



January 9, 2008

Members of the San Jose City Council
200 East Santa Clara Street
San Jose, California 95113

Re: City Internet Access Policy

Dear Members of the San Jose City Council:

I write to express the concern of the ACLU of Northern California regarding the City Internet Access Policy proposed by Councilmember Constant (hereafter Constant Proposal). As I understand it, the Constant Proposal would require blocking software on all San Jose library computers. Adults would have no unqualified right to ask for and obtain unfiltered internet access; young people would have to obtain parental consent when they seek access to material that is blocked, even though the material is not actually "harmful to minors" or otherwise unlawful.

All blocking software systems inevitably block materials that adults have a First Amendment right to access through the internet. They also frequently erroneously block materials that minors have a First Amendment right to access. Accordingly, a policy that denies adults unfiltered access to the internet would violate that adult's First Amendment rights and would be subject to legal challenge. Similar concerns are raised if minors are denied access to protected material.

Because City of San Jose Libraries do not receive federal funds, they are under no obligation to use blocking software, and such software is not currently in use in the City's libraries. However, privacy screens are available at all libraries and staff have the authority to require that a patron use the screen. (Internet Access and Use Policy, Rule 7).

The existing internet procedures appear to be working well. According to the *San Jose Mercury News*, a review of library records by San Jose City Library Director, Jane Light, reveals that internet use at the libraries is very high and complaints about pornography are extremely low. There were over 700,000 internet sessions at the downtown King Library last year and only ten complaints. There were a total of three complaints last year from all eighteen of the branch libraries combined. In contemplating a change in internet policy, the City of San Jose should carefully examine whether any changes to the Internet Access and Use Policy are necessary. If any modifications are drafted, the City must take extreme care not to violate the constitutional rights of adults and young people in the community or risk being subject to legal challenge.

1) The Constant Proposal For Determining What Material Should Be Blocked is Unconstitutionally Vague and Overbroad

Outside a few narrowly defined categories, "the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) (hereafter "*Free Speech Coalition*"). Unlike the narrow categories of obscenity or child pornography, sexually explicit speech, for example, is entitled to full constitutional protection as to adults. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811(2000) (hereafter "*Playboy Entertainment*"); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (hereafter "*Sable*").

The Constant Proposal does not limit itself to material falling into one of these narrow categories. *Compare United States v. American Library Association*, 539 U.S. 194 (2003) (upholding Children's Internet Protection Act ("CIPA") because adults may obtain unfiltered access). Instead, the Constant Proposal states that "all materials deemed objectionable" may be filtered and provides that "users who encounter objectionable materials may submit a request to the Library for those sites to be filtered."

"Objectionable" is an undefined and indefinable term that covers a great deal of constitutionally protected material. Moreover, as used in the Constant Proposal, it is more than simply subjective; it gives every library patron a veto over the material available to others, based on that patron's subjective sensibilities and prejudices. Material may be blocked because of its political or artistic content, not to mention the wide array of controversial topics ranging from abortion to gun control that may be objectionable to one or members of the library community. The rights of all to constitutionally protected information may not be curtailed on the basis that it is "objectionable."

2) Internet Blocking Software Inevitably Blocks Constitutionally Protected Material

The Constant Proposal suggests that the San Jose Libraries could implement a "basic filter" for adult patrons that would block only material that constitutes child pornography or that is obscene. This is simply not the case. Blocking software, even when intended to block access only to material that is obscene or that constitutes child pornography, nevertheless blocks vast amounts of protected speech. In part, that is because a software program is simply incapable of making the fine legal distinctions made in the courtroom as to whether material falls into one of these categories. Over-blocking also results from more systemic flaws in the way either machines or humans make decisions as to whether material should be blocked. This is a problem that has not gone away over the years. A June 2005 Consumer Reports article on filtering software had this to say:

As we found in our tests in 2001, the best blockers today tended to block many sites they should not.

Informative sites are snubbed, too. The best porn blockers were heavy-handed against sites about health issues, sex education, civil rights, and politics. For example, seven products blocked KeepAndBearArms.com, a site advocating gun owners' rights. Most unwarranted blocking occurred with sites featuring sex education or gender-related issues. Some drug-education sites were blocked. For example, four products blocked the National Institute on Drug Abuse, part of the federal government's National Institutes of Health.

Research can be a headache. These programs may impede older children doing research for school reports. Seven block the entire results page of a Google or Yahoo search if some links have objectionable words in them. AOL, KidsNet, Norton Internet Security, and Safe Eyes allow searches to be completed by displaying the entire results page or blocking only offending words.

The full article is available at <http://www.consumerreports.org/cro/electronics-computers/resource-center/internet-filtering-software-605/overview/index.htm>.

The problems inherent in all filtering software systems are further compounded when such systems are used to block material that is "harmful to minors." By definition, material falling into this category is material that *adults* have a First Amendment right to see and read. *Reno v. ACLU*, 521 U.S. 844 (1997).

3) The Proposed Internet Policy Lacks Constitutional Safeguard Providing Adults with Unqualified Ability to Obtain Unfiltered Access

In *United States v. American Library Association*, 539 U.S. 194, the Supreme Court upheld the constitutionality of the CIPA statute *only* because it read the statute as requiring libraries to honor requests from adults for unfiltered access to the internet. Justice Kennedy and Justice Breyer, whose votes were necessary to obtaining a majority upholding the statute, made this clear. See *id.* at 214-15 (Kennedy, J., concurring in the judgment); *id.* at 219-220 (Breyer, J. concurring in the judgment). Significantly, neither Justice Kennedy nor Justice Breyer limited his view on the matter to providing only a qualified ability to obtain unfiltered access. See *also id.* at 209 (plurality opinion interpreting statute as not requiring adult patrons to provide a reason for asking to have filtering software turned off).

This view is consistent with earlier decisions in which the Supreme Court has held that adult access to internet content may not be limited to materials that are only fit for children. See, e.g., *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004) ("A statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'" (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997))); see *also*, *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (televised content); *Sable Communications v. FCC*, 492 U.S. 115, 128 (1989) (telephone communications); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) (mailed advertisements); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (books). The California Courts have also struck down provisions as overbroad which are aimed at protecting young people from material that is "harmful to minors," but in operation deny adults and young people access to "items which they have an unfettered constitutional right to enjoy." *American Booksellers Assoc., Inc. v. Superior Court*, 129 Cal. App. 3d 197, 206 (1982) (striking down city ordinance as overbroad that prohibited sale of sexually explicit material to minors).

Denying adults and young people access to constitutionally protected information is precisely what would happen if the City implements the Constant Proposal. It sets up impermissible hurdles for adults in requesting that a site be temporarily or permanently unblocked and gives improper discretionary authority to individuals who are not trained in the nuances of the law.

Under the Constant Proposal, in order to obtain temporary access to a blocked website, an adult must make a request to a library employee, who will then refer this request to an IT specialist on duty. Not only may this process be slow and inefficient, but even after the IT specialist is notified, the site is not unblocked. The Constant Proposal gives discretion to the IT specialist to "determine that the site is appropriate for viewing (i.e. falls outside the appropriate filtering categories)."

For an adult to permanently unblock a site, he or she must submit a written request to the library, which will then be forwarded to the software blocking company. This process may also be extremely slow and gives discretion to the software filtering company to determine whether the site should remain blocked. The software filtering company's decision may be appealed to a team of library employees, but it is the company that has the "final" decision as to whether an individual will be able to obtain access to material, some of which may be constitutionally protected. The City of San Jose would be more than ill-advised to rely on the determinations of IT specialists and the software company about whether the constitutional rights of citizens are being infringed and legal challenges would be supported.

4) The Constant Proposal Will Interfere with the Ability of Young People to Access Essential Information

The Constant Proposal will also have an extremely detrimental effect on the ability of young people in the community to access essential information. The blocking software and the procedures in the Constant Proposal will institute serious barriers between young people and important information about issues such as personal health, sexual or physical abuse, and LGBT issues.

The Constant Proposal requires young people to obtain the consent of a parent or legal guardian in order to have a site unblocked and allows parents or legal guardians, when in possession of the minor's library card, to obtain information about a young person's internet usage. This means that young people searching for information on a range of sensitive issues may no longer view the library as a safe place in which information can be obtained in confidence. LGBT teenagers whose sexual orientation is not known to their parents cannot turn to the internet for fear that their parents will discover this information. Similarly, young people may avoid accessing what may well be life-saving information on any number of important issues ranging from contraception to help with a substance abuse problem, rather than risk the wrath of their parents. The library has traditionally been a place where young and old alike can seek information knowing that they can do so privately and anonymously. The Constant Proposal works a fundamental and unjustified change in the role of the library as a safe haven for those in need of information.

Blocking software will also make it more difficult for young people to use the library to access important information for schoolwork and for their families. According to Consumer Reports, filters often block more sites than they should, including sites necessary for older students to complete research assignments. In many families, parents need the help of their teenage children in accessing information on the internet, for a variety of reasons. As more and more information about issues such as healthcare and public benefits moves online, blocking software may make it harder for young people to access necessary information for their families, particularly for families that cannot afford internet access at home. Blocking software simply exacerbates the problems of the Digital Divide.

5) The Constant Proposal Has No Place in the City of San Jose's Libraries

The *San Jose Mercury News* Editorial of October 24, 2007, stated it well:

A decade ago, the San Jose City Council wisely rejected a proposal to install filters on computers at city libraries to prevent viewing pornography over the Internet. Filtering was a bad idea then, and still is. Responding to a minor nuisance at the downtown library by dampening the rights of inquiry and speech of all patrons at every city library is an unacceptable trade-off.

The City Council should reject the Constant Proposal and continue to ensure that San Jose City Libraries are a place where the community can expand its intellectual and cultural horizons. As Justice Kennedy noted in *Free Speech Coalition*, 535 U.S. at 253, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is beginning of thought."

Sincerely,

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