Public Library Internet Filters:

An Attack On Access To Freedom of Information

by Phyllis W. Cheng, Esq.*

> *These libraries have improved the general conversation of Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges.*
>
> Benjamin Franklin

Ever since Benjamin Franklin founded the nation's first subscription library system, public libraries have been a forum for upholding access to freedom of speech embodied under the First Amendment of the U.S. Constitution1 as well as article I, section 2, subdivision (a), of the California Constitution.[2] With the advent of the World Wide Web, library patrons are accessing the Internet through our public library system. Recently, public libraries have been under pressure to install filters or otherwise supervise Internet access for minors. This demand has resulted in the enactment of a controversial federal law requiring Internet filters for minors in public libraries receiving federal funds, as well as a California bill currently debated in the 2001-2002 legislative session. The purpose of this article is to assess the impact of these initiatives on access to the freedom of speech embodied in the federal and state constitutions.

Background

Existing California law provides for the establishment and funding of public libraries.[3] The Legislature has declared that the public library system's "diffusion [of information and knowledge] is a matter of general concern inasmuch as it is the duty of the state to provide encouragement to the voluntary lifelong learning of the people of this state."[4] The Legislature has further declared that "the public library is a supplement to the formal system of free public education, and a source of information and inspiration to persons of all ages, cultural backgrounds, and economic statuses, and a resource for continuing education and reeducation beyond the years of formal education . . . ."[5]

Education Code section 18030.5 provides that every public library receiving state funds and which provide public access to the Internet must adopt a policy regarding access by minors to the Internet by January 1, 2000.[6] However, the purpose of this statute is to limit electronic collection of Internet users' personal information in order to protect their privacy.[7] Similarly, Education Code section 51870.5 provides that a school district must adopt a policy for pupils' Internet access to harmful matters. However, this provision sunsets on December 31, 2002.[8]

Case Law

A California Court of Appeal decision recently held that a parent may not force a public library to censor Internet access for minors, citing federal preemption of state law claims under 47 U.S.C. § 230 ("section 230").[9] Section 230(c)(1) states that: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker or any information provided by another information content provider."

In 1997, the U.S. Supreme Court held unconstitutional two statutory provisions of the Federal Communications Decency Act[10] intended to protect minors from "indecent" and "patently offensive" communications on the Internet, because they abridge the fundamental right to receive information.[11] Likewise, in 1998, even as it suggested filtering as one possible alternative to an outright ban of Internet materials, one court noted that "filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks."[12] In Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, the court struck down a public library's Internet filtering system, holding that "[a]lthough [the library] is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access."[13]

Federal CHIPA Statute

In 2000, Congress enacted the Children's Internet Protection Act ("CHIPA").[14] Effective April 20, 2001, CHIPA requires public libraries receiving federal funds to install filtering software to block minors' access to obscene material on the Internet.

As of March 20, 2001, the constitutionality of CHIPA has been challenged in two federal suits on the grounds that the law violates the First Amendment's freedom of speech guarantee and the Fifth Amendment's Due Process Clause. In the first suit, American Library Assoc., Inc. v. United States ("ALA"),[15] the California Library Association is one of the 11 named plaintiffs, and People for the American Way Foundation is one of plaintiffs' counsel of record. In the second suit, Multnomah County Public Library v. United States ("Multnomah")[16], the Santa Cruz Public Library Joint Powers Authority is one of the 23 named plaintiffs, and the American Civil Liberties Union of New York is one of plaintiffs' counsel of record. On March 26, 2001, pursuant to 28 U.S.C. § 2284, the District Court convened a panel of three district court judges to hear and

determine the facial constitutional challenges to CHIPA in both lawsuits. The suits are expected to be on a fast track for review before this panel, and will certainly be appealed to the Third Circuit Court of Appeals and the U.S. Supreme Court.

California's AB 151

In the 2001-2002 legislative session, Assemblymember Sarah Reyes introduced AB 151. This bill would parallel CHIPA at the State level by requiring public libraries to install filtering software to limit Internet access to obscene matter, including obscene live conduct, on computers available to minors. Imposing a state-mandated local program, the bill would appropriate an unspecified sum from the General Fund to the State Librarian for allocation to public libraries to purchase and install such filtering devices.

– This bill is supported by the Campaign for California Families, the Capitol Resource Institute, the Committee on Moral Concerns, Enough is Enough, Klaas Kids Foundation, and the National Center for Missing and Exploited Children. It is opposed by the American Civil Liberties Union, the California Library Association, Berkeley Public Library, and Alameda County Board of Supervisors.

Policy Implications for Enactment of AB 151

AB 151 presents serious constitutional implications for access to the freedom of speech in California's public library system. First, unintended consequences may result from the enactment of the bill. Consumer reports show that Internet filtering devices block as many unobjectionable as objectionable sites.[17] Terms such as "adult" and "Bambi" can trigger blocking devices.[18] Because of hate-promoting terms, hate-crime prevention Web sites such as the Simon Wiesenthal Center may also be blocked.[19] Some Internet filtering systems have blocked a government physics Web site with an address that began with "XXX," a Web site for Super Bowl XXX, the Web sites of Congressman Dick Army and Beaver College in Pennsylvania, sections of Edward Gibbon's Decline and Fall of the Roman Empire, and passages of Saint Augustine's Confessions.[20]

Second, consistent with Education Code section 18010, public libraries should not be put in the position of having to police the freedom of information to patrons of any age. To do so may create a chilling effect on the diffusion of information and knowledge in California's public library scheme, which encompasses179 library jurisdictions and 7,800 Internet work stations.[21]

Third, as a public policy matter, parents should have the sole right to determine the scope of their individual children's Internet access. There is and should be no substitute for parental supervision.

Fourth, AB 151's requirement for all libraries to filter obscene material from minors' Internet access may be interpreted as "a law which restrains or abridges liberty of speech" prohibited under California Constitution, article 1, section 2, subdivision (a). If enacted, the new law would certainly invite litigation.

Fifth, in a related matter, California's Court of Appeal decision in Kathleen R. has held that parents cannot force public libraries to use Internet filters for minors, because the matter is preempted under federal law. Hence, AB 151 may also face a preemption challenge.

Sixth, AB 151 is modeled upon its federal counterpart, CHIPA, which is being challenged as facially unconstitutional under the First Amendment in the ALA and Multnomah lawsuits (in which the California Library Association and the Santa Cruz Public Library Joint Powers Authority are named plaintiffs). Whatever the three-judge U.S. District Court panel decides, the two suits will likely be reviewed by the Third Circuit Court of Appeals and the U.S. Supreme Court. By extension, it is equally likely that this parallel California bill, if enacted, would face a similar challenge.

Conclusion

Though well intended, the recent slew of federal and state legislation requiring public libraries to install Internet filters for minors represents an assault on constitutional principles related to the freedom of speech. The failure to install filtering devices or their ineffectiveness in blocking objectionable material may subject local libraries to liabilities brought by either civil libertarians or library patrons. Even if such suits were unsuccessful, they still incur the time and expense incident to any litigation. Hopefully, these pressures will not chill public access to the freedom of information so essential to our public libraries.

Endnotes

1 "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I, cl. 2.
2 "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, §2, subd. (a).
3 Cal. Ed. Code, § 18010 et seq.
4 Cal. Ed. Code, § 18010.
5 Id., emphasis added.
6 Ed. Code, § 18030.5.
7 Sen. Rules Com., analysis of Sen. Bill No. 1386 (1998-99 Reg. Sess.) as amended Aug. 13, 1998, pp. 1-2.
8 Cal. Ed. Code, § 51870.5, subd. (b).
9 Kathleen R. v. City of Livermore __ Cal.App.4th__ [2001 Cal. App. LEXIS 158; 2001 Daily Journal DAR 2383] (Mar. 6, 2000).
10 47 U.S.C. § 223(a) and 47 U.S.C. § 223(d).
11 Reno v. ACLU (1997) 521 U.S. 844, 849, 874 ("Reno I").
12 Reno v. ACLU (E.D.Pa. 1999) 31 F.Supp.2d 473, 497 ("Reno II").
13 Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library 24 F. Supp. 2d 552, 570 (E.D.Va. 1998).
14 Pub.L. 106-554 (to be codified as 47 U.S.C. § 254(h) and 20 U.S.C. § 9134).
15 American Library Assoc., Inc. v. United States (E.D.Pa., Case No. 01-CV-1303) ("ALA").
16 Multnomah County Public Library v. United States (E.D. Pa., Case No. 01-CV-1322) ("Multnomah").
17 See Consumer Reports Online, Digital Chaperones for Kids, http://www.consumerreports.org/Special/ConsumerInterest/Reports/0103fil0.html.
18 Ibid.
19 Ibid.
20 ALA complaint, ¶ 38.
21 Assemb. Com. on Local Gov., analysis of Assemb. Bill No. 151 (2001-2002 Reg. Sess.) as amended Mar. 23, 2001, p. 1

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