

Before The
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

1401 Constitution Ave. N.W.
Washington, D.C. 20230

In Re:)
)
Request for Comment on the) Docket No. 020514121-2121-01
Effectiveness of Internet Protection) RIN 0660-XX14
Measures and Safety Policies)
)
Section 1703, Children's Internet)
Protection Act)

COMMENTS OF THE AMERICAN CENTER FOR LAW AND JUSTICE

THE AMERICAN CENTER FOR LAW AND JUSTICE

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These Comments of the American Center for Law and Justice (“ACLJ”) are submitted in response to the National Telecommunications and Information Administration’s request for information made pursuant to § 1703 of the Children’s Internet Protection Act (CIPA). The Comments address the following issues of fact, law, and policy:

- 1. Are current blocking and filtering methods effectively protecting children or limiting their access to prohibited Internet activity?**

- 2. Can filtering technology accommodate all age groups?**

- 3. Do the imperfections in the filtering methods pose legal problems in implementing them in educational institutions?**

ISSUE #1

Are current blocking and filtering methods effectively protecting children or limiting their access to prohibited Internet activity?

Brief Answer

Yes. The current blocking and filtering methods are effective in protecting children from prohibited internet activity and content as indicated by a number of *independent* lab tests performed over the past five (5) years by entities not interested in either promoting or deterring the use of filtering devices. Another factor strongly indicating the effectiveness of filtering devices is the steady growth of their usage in multiple markets such as businesses, schools, libraries, and households.

Discussion

The emergence of internet filtering software during the past few years has sparked a debate among various advocacy groups regarding the effectiveness and propriety of the use of such software. As a result, a vast amount of information has been produced both supporting and criticizing internet filtering devices. In light of this background, the ACLJ recommends that, rather than looking at single advocacy studies conducted by such groups as the ACLU, a better approach is to look at independent lab tests conducted over the past several years by entities that are not interested in either promoting or discouraging filtering software use and that do not conduct research with any specific advocacy goal in mind (except benefitting the consumer).

Such independent studies can be found in major computer technology publications such as PC Magazine, PC World, MacWorld, Network Computing, etc. The results from the tests conducted by the leading technology publications have been compiled into a comprehensive report entitled "The Facts on Filters," authored by David Burt. The report contains a comprehensive review of 26 independent lab tests conducted during the period from 1995 through 2001. It is attached hereto as Exhibit A. The report shows that the majority of the tests find filters effective (19 out of 26), with only 3 studies finding filtering "ineffective." The other tests found "mixed results" and notably, were conducted during the early stages or development of filtering software (i.e. during 1995-97). Finally, the three tests with "negative" results, though recent, were conducted by an entity inexperienced in software testing and whose methodology was severely criticized by technology experts. Therefore, given the independent study results described above and the fact that filtering software is constantly evolving and improving, it is fair to conclude that filtering is an effective method of protecting minors from pornographic material harmful to them.

A remaining issue bears consideration. An argument is often made that filtering devices are imperfect because they are "limited by the software designers' ability to keep up with the latest 'dirty' places." *See, e.g.*, Eugene Volokh, Speech and Spillover, Slate Online Magazine, *available at* <<http://slate.msn.com/default.aspx?id=2371>>. Dozens of websites, the argument goes, are being added daily, so one never knows what will get posted tomorrow. This would only be true if the

filtering devices relied solely on a pre-determined list of objectionable sites. In fact, however, most filtering programs use multiple approaches, such as a combination of keyword- and pattern-matching algorithms, *plus* a list of pre-screened sites to be blocked. *See, e.g.*, Mike Godwin, Law Professor Errs in Slate Article, *available at* <<http://ftp-swiss.ai.mit.edu/~hal/volokh-slate-critique-by-godwin-abelson.html>> (discussing the success of Surfwatch during the current website boom).

ISSUE #2

Can filtering technology accommodate all age groups?

Brief Answer

Yes. The latest advances in filtering technology allow for accommodation of all different age groups within the kindergarten--twelfth grade range. We are aware of at least one such software program. For example, the FamilyClick Filter provides six age-appropriate access levels: unfiltered access (adults), teen access (ages 15-17), pre-teen access (ages 12-14), kids access (ages 8-11), children's playroom access (ages 7 and under). The filtering becomes more stringent in lower age categories, blocking sites that are inappropriate or unintended for that age groups. For instance, Family Click blocks such sites as personals and chat rooms (unless specifically approved by provider) for children 17 and under. The detailed descriptions of the various age access levels can be found at <<http://familyclick.com>> and are attached hereto as Exhibit B.

ISSUE #3

Do the imperfections in the filtering methods pose legal problems in implementing them in educational institutions?

Brief Answer

No. Internet access in public schools does not present a "public forum" where the speakers have the right to make their material available to recipients (and where the listener can claim the right to receive information). Instead, schools provide Internet access to children to further their educational mission and to facilitate the learning process. In doing so, schools can make policy determinations and decide that the strong interest and benefit of preventing minors' access to harmful material outweighs the detriment of potentially making inaccessible some useful material due to possible overblocking. Further, even if certain useful content does get overblocked (e.g. sex-education and similar material), such material can be made accessible to students via other, non-Internet-based means such as textbooks and classroom discussions. Thus, it is entirely appropriate for public schools to provide only the limited internet content the schools deem to be sufficiently safe for their students.

Discussion

1. Public schools have a compelling interest in protecting their students from harmful pornographic material.

Public schools have a strong interest to protect their students from objectionable material. As the Supreme court has stated, “it is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling . . .” *New York v. Ferber*, 458 U.S. 747, 756-58 (1982). A number of other Supreme Court decisions likewise hold that the government has a compelling interest in protecting the physical and psychological well-being of minors. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 745 (1996). In addition, the Supreme Court held in *Sable Communications v. FCC*, 492 U.S. 115, 126 (1988) that “[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards.” The state possesses this compelling interest when acting in *loco parentis* for children. As the Supreme court reiterated in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986):

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico*, 457 U.S. 853, 871-872 (1982) (plurality opinion); *id.*, at 879-881 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918-920 (REHNQUIST, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting in *loco parentis*, to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech.

Id. at 684 (emphasis added). Accordingly, the *Bethel* Court held that

petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.

Id. at 685.

It is more than obvious that children do not have the right to receive pornographic information in public schools and cannot make choices concerning pornography any more than they have the right to buy alcohol and cigarettes: “during the formative years of childhood and adolescence, minors often lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). Therefore, to protect the welfare of children and to remove the possibility of any civil liability, public schools should take reasonable steps to ensure that children do not access indecent or pornographic material through the use of the Internet.

2. Public schools can protect their students from pornography by using filtering software without infringing on anyone’s First Amendment rights.

Public schools can further their strong interest in protecting minors without infringing on anyone’s First Amendment rights. A case almost directly on point is *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). In *Urofsky*, a constitutional challenge was brought against a Virginia law restricting state employees from accessing sexually explicit materials on computers owned or leased by the state. The district court ruled the law unconstitutional, and the Federal Court of Appeals for the Fourth Circuit overturned that decision holding such restrictions to be constitutional. The Fourth Circuit ruled:

We reject the conclusion of the district court that Va. Code Ann. §§ 2.1-804 to -806, restricting state employees from accessing sexually explicit material on computers that are owned or leased by the Commonwealth unless given permission to do so, infringes upon first amendment rights of state employees. The Act regulates the speech of individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus the Act does not touch upon a matter of public concern. Consequently, the speech may be restricted consistent with the First Amendment.

Urofsky, 216 F.3d at 416. Just as the state may limit its employees’ access to sexually explicit material, the schools can similarly restrict their students’ access to the same material. Another case illustrative of this point is *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, cert. denied, 118 S. Ct. 2637 (1998). In *Cohen*, the court was asked to determine the constitutionality of the Military Honor and Decency Act which prohibits the sale of sexually explicit material at military exchanges. *Id.* at 275. In upholding the Act, the court held military exchanges to be a nonpublic forum. *Id.* at 280.

The Second Circuit held that the purpose of the military exchange was to "provide authorized patrons with articles and services necessary for their health, comfort, and convenience and to provide a supplemental source of funding for military morale, welfare, and recreation programs." *Id.* at 280 (internal citations and quotation marks omitted). "[T]he government has simply chosen to purchase certain magazines, newspapers, and videos from third parties, and has offered this merchandise for resale to its personnel at military exchanges. . . . It does not offer to resell the merchandise of every producer, or every 'speaker,' who seeks access to those shelves." *Id.*

Public schools are similarly designed to "provide authorized patrons" with material necessary for educational purposes. To further this goal, schools choose certain materials for purchase and offer this material to authorized patrons. Schools do not open themselves to every "speaker who seeks access." Thus, a school's Internet access, as with a military exchange, is either a nonpublic forum, or a forum of such a restricted nature as to allow aesthetic decisions to be made about what sites will be "acquired" and made available to the students. Supreme Court jurisprudence compels the same conclusion. As the Supreme Court noted in *Board of Educ. v Pico*, 457 U.S. 853, 870 (1982):

an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." *Id.* at 53. In other words, in respondents' view, such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

It is therefore constitutional for public schools to regulate minors' access to the Internet by filtering out pornographic materials through the use of filtering software. Moreover, as the Supreme Court held in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), the "Government can, without violating the Constitution, . . . encourage certain activities it believes to be in the public interest." A public school is not an open forum by government designation for all speech, but it is instead a government agency which can exercise editorial discretion. A similar situation occurred in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), where the Supreme Court emphasized that editorial discretion may be exercised by a government agency procuring art:

as we held in *Rust*, congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 588 (citations and internal quotation marks omitted). Common sense dictates that public schools, like the NEA, cannot purchase all of the art or books that are available, and consequently, must exercise aesthetic judgments. Therefore, the idea that public schools are compelled to buy Internet pornography simply because they buy access to the Internet is not consonant with U.S. Supreme Court jurisprudence.

3. There are no effective alternatives to filtering in preventing minors from accessing material harmful to them.

Opponents of Internet filtering software, such as the American Library Association (ALA) and the American Civil Liberties Union (ACLU), have proposed several alternatives which they argue would be less restrictive and just as effective. The following are the five alternatives proposed: (1) Acceptable Use Policies - provide carefully worded instructions for parents, teachers, students and libraries on use of the Internet; (2) Time Limits - Establish content neutral time limits on use of the Internet, request that Internet access in schools be limited to school-related work; (3) "Driver's Ed" for Internet Users - condition Internet access for minors on completion of an Internet seminar similar to a driver's education course; (4) Recommended Reading - publicize and provide link to websites recommended for children and teens; (5) Privacy Screens - install screens to protect users' privacy when viewing sensitive information and avoid unwanted viewing of websites by passers-by. ACLU White Paper, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries*, available at <<http://www.aclu.org/issues/cyber/box.html#battling>>.

First, the initial four suffer from the flaw of assuming that one can avoid offensive material simply by being educated about the Internet. One can hardly imagine a search on the Internet which will not yield at least a few pornographic sites. Many sites are designed to look innocent at first glance so that they can avoid being blocked by Internet filtering software.

Second, establishing time limits would in no way limit children's *access* to pornography. It would only limit the *amount* of pornography that they could access. Third, these alternatives suffer from another faulty premise that, if educated, children will not access pornographic sites. In no other aspect of our society does the law trust minors to do what is in the best interest.¹ Children are banned from accessing pornography in every other venue. Public schools should not be the only place where children are allowed to access such material because we trust them to do what is in their best interest. Lastly, privacy screens will only foster minors' access of pornography by allowing them to do it in private without the fear or embarrassment of being caught. They will in no way decrease the minors' access of pornography. Therefore, none of the alternatives cited by the ALA and ACLU provide any reasonable proof that if placed in use they will be at all effective in curbing the issue of minors' being able to access pornography in school.

Conclusion

Public schools have a compelling interest to protect the physical and psychological well-being of children. This interest is compromised when Internet access is left unchecked and minors are exposed (unwillingly or willingly) to the hardcore pornography available throughout the Internet.

¹Minors are banned from a myriad of activities: purchasing alcohol, cigarettes, or pornography; entering a strip joint, bar, or adult bookstore. These laws all illustrate the principle that minors may properly, and should be, protected from make decisions which are not in their best interest.

Public schools not only may implement reasonable regulations to prohibit the access of pornography, but potential liability would arise if such measures are not undertaken. The use of Internet filtering devices is a reasonable regulation, determined effective by most independent studies, which accomplish the goal of greatly restricting or eliminating access to pornography, and which fosters the public schools' educational purposes.