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Legal Update

Censoring Internet Access at Public Libraries: First Amendment Restrictions*

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1. A recent United States District Court decision concerning the use of filtering software in public libraries may curb the software's use in public facilities.[1] In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, Judge Brinkema granted summary judgment on the plaintiffs and intervenors' claim that the use of filtering software to block protected speech on certain World Wide Web ("Web") sites violated their First Amendment rights.[2] The District Court concluded that the library's policy, which utilized the filtering software, abridged the plaintiff's free expression[3] and that the use of filtering software to block Web sites gave the operator's of the sites standing to sue.[4] More importantly, the Judge determined that the use of filtering software in a public library fails the "less restrictive means" element of a strict scrutiny analysis[5] and amounts to a prior restraint of the plaintiffs' freedom of expression.[6]

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[1] *See* David Carney, *Filtering Software Debate Continues*, TECH L.J. (last modified Apr. 1, 1999) <http://www.techlawjournal.com/censor/19981221.htm>.

[2] *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998).

[3] *See id.* at 567.

[4] *See id.* at 560.

[5] *See id.* at 567.

[6] *See id.* at 570.

2. In October 1997, the Board of Trustees of the Loudoun County Library adopted a policy for addressing Internet sexual harassment.[7] The policy stated that the public libraries would provide Internet access through site-blocking software programmed to block child pornography, obscene material, and "material deemed harmful to juveniles."[8] The library filtered patrons' Internet access through commercial software, although patrons could request the staff to unblock sites that the software unnecessarily blocked.[9] When patrons submitted written requests to unblock a site, a librarian would view the blocked site to determine whether the site should remain blocked.[10] The policy did not provide a time limit for granting access nor notification procedures.[11]

3. The plaintiffs sued the library board under 42 U.S.C. § 1983, alleging that the policy unconstitutionally "discriminated against protected speech on the basis of content."[12] The defendant Board of Trustees of the Loudoun County Public Library responded that the intervenors[13] lacked standing; that the policy did not raise First Amendment issues; that the policy achieves two compelling governmental interests in the least restrictive manner; and that the library has statutory immunity.[14] The defendant asserted that the software only blocked three intervenor Web sites when the library board tested the software, but Judge Brinkema noted the "dynamic nature of the Internet" and stated that its variable character could lead to different

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[7] *See id.* at 556.

[8] *Id.* The library instituted additional measures, including a prohibition against the use of email and "chatrooms," the installation of all computers within the library staffs' sight, and the provision of police assistance if a patron refused to stop viewing a pornographic site. *See id.* Richard Raysman & Peter Brown, *The Disputes Over the Use of Net Filters*, N.Y. L.J., Jan. 12, 1999, at 3, provides a brief description of the filtering methods used by filtering software and outlines the inherent problems found in various programs.

[9] *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998). The actual software used was X-Stop, by Log-On Data Corporation. *See id.* The software's method for blocking Web sites and its definition of obscenity is kept "secret by the developers." *Id.* Citing a trial deposition, the court noted that "it is undisputed that [the software] has blocked at least some sites that do not contain any material that is prohibited by the Policy." *Id.*

[10] *See id.*

[11] *See id.* at 556-57.

[12] *See id.* at 557.

[13] The intervenors are three Web sites, the Safer Sex Page, Banned Books Online, and the Books for Gay and Lesbian Teens/Youth page; two non-profit corporations that maintain Web sites, the American Association of University Women and the Renaissance Transgender Association; a for-profit corporation that maintains a Web site, The Ethical Spectacle; a news columnist who publishes his articles on Web sites; and an artist who publishes his work on a Web site. *See id.*

[14] *See id.* at 557.

results when different users attempted to visit the sites.[15] In response to the defendant's contention that the intervenors lacked standing because the library no longer blocked their sites, the intervenors argued that the library could block the sites again and that because the library voluntarily unblocked the sites did not render the case moot.[16] Judge Brinkema agreed and held that the intervenors could reasonably fear that their sites would later be blocked because Web site content frequently changes and moves.[17]

4. The District Court, however, did find that one intervenor did not have proper standing.[18] John Ockerbloom maintained the Internet business, Banned Books Online, and asserted standing because the defendant blocked a link from his Web site to another site, though the defendant did not block his Web site.[19] Ockerbloom argued that his "mission" was to allow access to censored books. Judge Brinkema observed that the question of whether free speech protection extends to Internet links was an issue of first impression, but that in "more traditional contexts," "individuals are frequently found to have standing to challenge restrictions on speech in which they have a sufficient interest even where that speech is not their own."[20] On the Internet, however, Judge Brinkema reasoned that the basic rules of standing would be eliminated because a party could assert standing for any "Internet-related First Amendment" harm by linking to a site.[21] The court, therefore, held that Ockerbloom, unlike the other intervenors, did not have sufficient standing to bring this action.[22]

5. The Communications Decency Act of 1996 ("CDA") provides immunity from civil liability to "provider[s] of interactive computer service[s]" if the provider makes a good faith attempt to prohibit users' access to Web sites that the providers believe are offensive.[23] Prior to the final *Loudoun* decision, the defendant moved to dismiss, claiming that the library board's use of filtering software was "absolutely

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[15] *See id.* at 558.

[16] *See id.* at 558-59.

[17] *See id.* at 559.

[18] *See id.* at 560.

[19] *See id.* at 559-60.

[20] *Id.* at 560.

[21] *Id.*

[22] *See id.*

[23] 47 U.S.C. § 230(c)(2)(A) (1998) ("No provider or user of an interactive computer service shall be liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.").

immune from suit."[24] Judge Brinkema, in deciding the motion, cited *Zeran v. America Online, Inc.*, which held that § 230 was written to minimize governmental intrusion on the Internet and encourage self regulation by service providers.[25] Judge Brinkema denied the defendant's motion to dismiss because, while § 230 does provide immunity from tort damages, the provision fails to "immunize [the] defendant from an action for declaratory and injunctive relief."[26]

6. In *Board of Education v. Pico*, a plurality of the Supreme Court held that school libraries could not deny access to materials merely because officials disliked them, but they could restrict materials for educational reasons.[27] The defendant in *Loudoun*, argued that its decision to use filtering software did not implicate the First Amendment or *Pico* because the Loudoun County Library decided not to acquire materials, instead of deciding to remove protected materials.[28] Both concurring and dissenting opinions in the *Pico* decision, however, stated that their decision was limited to school libraries and held that public libraries, intended for adult patronage, could not limit access to their materials.[29] Judge Brinkema, responding to the defendant's motion to dismiss, concluded that "to the extent that Pico applies to this case, we conclude that it stands for the proposition that the First Amendment applies to, and limits, the discretion of a public library to place content-based restrictions on access to constitutionally protected materials within its collection."[30] By providing Internet access, the Loudoun County Library made all Web sites immediately available to its patrons, and the library's subsequent restriction of that access was analogous to it "laboriously redact[ing]" parts of an encyclopedia "deemed unfit for library patrons."[31] Because the defendant imposed content-based restrictions on Internet access, the court concluded that the restrictions must be based on compelling state interests and implemented with the narrowest possible means.[32]

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[24] Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 789 (E.D. Va. 1998).

[25] *See id.* at 789-90 (citing Zeran v. America Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)).

[26] *See id.* at 790.

[27] *See* 457 U.S. 853, 872 (1982).

[28] *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d at 561.

[29] *See, e.g., Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting).

[30] *Mainstream Loudoun*, 2 F. Supp. 2d at 794.

[31] *Id.* at 793-94.

[32] *See id.* at 795.

7. At trial, the defendant claimed that the library is a non-public forum and, as such, asks the court to review its earlier application of the strict scrutiny standard of review.[33] The defendant argued that the library, as a "non-public forum," is subject to intermediate scrutiny First Amendment review,[34] but admitted that all content based speech restrictions in "limited-public forums" are evaluated according to a strict scrutiny standard.[35] Accordingly, Judge Brinkema focused the court's review on whether the Loudoun County Library is "a limited public forum or a non-public forum," citing the hierarchy of public locations delineated by the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[36] Applying the Third Circuit's test in *Kreimer v. Bureau of Police*,[37] Judge Brinkema concluded that because the defendant created the libraries (i) "as public fora" to provide access to diverse views and expressions (ii) for the "public at large," (iii) the use of Internet filtering software was "incompatible" with intended "nature of the forum."[38] The library, therefore, was a limited public forum and the Board of Trustees must "permit the public to exercise the rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum."[39]

8. The District Court also rejected the defendant's argument that blocking Internet access is a time, place, and manner restriction like that at issue in *City of Renton v. Playtime Theatres, Inc.*,[40] where the Court held that certain regulations curtailing protected speech may be justified by the need to address secondary effects caused by the speech but unrelated to its content.[41] Specifically, the defendant argued that it designed its Internet access policy to prevent a "sexually hostile environment" from developing in the libraries and to comply with "obscenity, child pornography, and harm to juvenile laws."[42] Judge Brinkema rejected this argument and held that these concerns are not secondary effects because they focus on the

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[33] *See Mainstream Loudoun*, 24 F. Supp. 2d at 561.

[34] *Id.* (citing Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992)).

[35] *Id.* at 562.

[36] *See id.* (discussing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983)).

[37] 958 F.2d 1242, 1259 (3d Cir. 1992).

[38] *See Mainstream Loudoun*, 24 F. Supp. 2d at 563.

[39] *Id.* (quoting from Kreimer v. Bureau of Police, 958 F.2d 1242, 1262 (3d Cir. 1992)).

[40] 475 U.S. 41 (1986).

[41] *See Mainstream Loudoun*, 24 F. Supp. 2d at 563-64 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[42] *Id.* at 564.

"audience's reaction" and address the content directly.[43] Furthermore, the court referred to the Fourth Circuit's decision in *United States v. Johnson*,[44] which required content neutrality for time, place, and manner restrictions, a requirement the defendant admittedly did not meet.[45]

9. Having rejected the defendant's arguments that the court should use an intermediate scrutiny standard of review, the District Court continued to analyze the constitutionality of the defendant's policy. The defendant claimed that even under a strict scrutiny analysis, its policy did not abridge the plaintiff and intervenors' First Amendment rights because the library had used the least restrictive means for achieving compelling governmental goals, the key test for a content based restriction of speech.[46] The goals that the defendant asserted were (i) "minimizing access to illegal pornography" and (ii) avoiding the "creation of a sexually hostile environment."[47] In response, the plaintiff and intervenors argued that less restrictive means existed for meeting the defendant's goals and that the policy instituted amounted to an unconstitutional prior restraint.[48] Judge Brinkema identified the *Perry* test's three factors: (i) Are the state's interest compelling; (ii) is the restriction required for achieving the state's goals; and (iii) is the restriction narrowly drawn?[49]

10. For purposes of summary judgment, the District Court accepted that both policy goals were compelling governmental interests, thereby satisfying the first factor.[50]The court next addressed the second and third factors. The defendant bore the burden of proving that its asserted harms were real and that its policy would address those harms.[51] The defendant offered minimal evidence of "isolated" instances where unrestrained Internet use allowed patrons to view pornography, causing the court to conclude that the defendant's policy was not required to further its overall goals.[52] In addressing the third factor, the court found that less

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[43] *Id.*

[44] 159 F.3d 892 (4th Cir. 1998).

[45] *See Mainstream Loudoun*, 24 F. Supp. 2d at 564.

[46] *See id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[47] *See id.* (quoting from the defendant's brief).

[48] *See id.*

[49] *See id.* at 564-65.

[50] *See id.* at 565.

[51] *See id.* (citing Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)).

[52] *See id.* at 556. The defendant produced only one incident where the Internet was used to view pornography in another Virginia library. *See id.* at 565. Defendant's expert testified about three

restrictive means were available.[53] The court addressed three inquiries in evaluating this third prong.[54] Relying in part on *Sable Communications of Calif., Inc. v. FCC*,[55] Judge Brinkema found that the defendant did not adequately demonstrate that other suggested less-restrictive alternatives would not be as effective as the chosen policy because the defendant had failed to test the alternatives "over time."[56] Judge Brinkema also stated that the government's interest in protecting children from harmful influences cannot justify an over inclusive regulation that abridges the rights of adults.[57] Since the blocking software admittedly blocks certain sites from both children and adults, the policy is necessarily overinclusive and not the least restrictive means available.[58] The District Court did not discuss whether the actual filtering software was the least restrictive software, having found that the defendant's overall policy was overinclusive.[59]

11. The District Court next considered the plaintiffs' claim that the defendant's policy amounted to a prior restraint of speech because "it provides neither sufficient standards to limit the discretion of the decision-maker nor

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news articles from across the United States that reported on library patrons viewing pornography. *See id.* at 565-66. Judge Brinkema found that

> [n]o reasonable trier of fact could conclude that three isolated incidents nationally, one very minor incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country establish that the Policy is necessary to prevent sexual harassment or access to obscenity or child pornography.

Id. at 566.

[53] *See id.* at 566-67.

[54] The court addressed whether (i) "less restrictive means are available," (ii) "the policy is overinclusive," and (iii) the program used to filter the Internet access was "the least restrictive filtering software." *Id.* at 566-68.

[55] 492 U.S. 115 (1989).

[56] *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d at 567. The court observed that the library could use "privacy screens," "filters that can be turned off for adult use," "changing the location of the Internet terminals," and "enforcing criminal laws when violations occur." *Id.* at 566.

[57] *See id.* at 567. Judge Brinkema cited Reno v. ACLU, 521 U.S. 844, 900 (1997), which discussed how the Communications Decency Act effectively limited the Internet sites that both adults and children could access because Internet access providers could not prevent children from viewing materials without also restricting adults. *See Mainstream Loudoun*, 24 F. Supp. 2d. at 567.

[58] *See id.*

[59] *See id.* at 568.

adequate procedural safeguards."[60] Judge Brinkema dismissed the defendant's response that the doctrine of prior restraint applies only when the government restrains all speech within a specific area, stating that the defendant's argument was not based on legal precedent.[61] The court found that the policy did not define "child pornography, obscenity, or material deemed harmful to juveniles" and noted that the wholesale entrustment of blocking decisions to Log-On Data was proof that the policy lacked adequate standards.[62] Without adequate standards, the court held that the defendant had not met the first prong of prior restraint.[63] Furthermore, the court held that the defendant failed to meet the second prong, finding that the policy did not provide for administrative review or "expeditious judicial review after the administrative decision is made."[64] Judge Brinkema, *sua sponte*, briefly noted that despite the policy's severability clause, the entire policy was unconstitutional as a prior restraint and found for the plaintiffs and intervenors.[65]

12. In concluding, Judge Brinkema noted that the defendant did not have to provide Internet access to its patrons, but having chosen to do so, it must comply with constitutional safeguards for speech.[66] The defendant's Internet policy amounted to a "broad right to censor the expressive activity of the receipt and communication of information through the Internet."[67] While some consider Judge Brinkema's decision as final, others believe it simply establishes certain standards that libraries should consider in the future when providing Internet access to patrons.[68] Currently, the defendant has not appealed the decision, but awaits a final order awarding legal fees.[69]

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[60] *Id.*

[61] *See id.* at 569. Judge Brinkema cited Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), which stated that "it does not matter . . . that the board's decision might not have the effect of total suppression of the musical [Hair] in the community. Denying use of the municipal facility under the circumstances present here constituted the prior restraint." *Mainstream Loudoun*, 24 F. Supp. 2d. at 569 (quoting *Southeastern Promotions*, 420 U.S. at 556).

[62] *See id.*

[63] *See id.*

[64] *See id.* at 569-70.

[65] *See id.* at 570.

[66] *See id.*

[67] *Id.*

[68] *See* Carney, *supra* note 1.

[69] *See* David Carney, *Appeal Still Possible in Loudoun Case*, TECH L.J. (last modified Apr. 1, 1999) <http://www.techlawjournal.com/censor/19990210c.htm> (reporting that the ACLU and People for the American Way demanded fees totaling $488,610.10). The amount of fees that the defendant

must pay will affect the defendant's decisions to appeal the district court's decision. *See id.*