Legally Speaking -- "To Filter or Not to Filter: That is the Question:" A Brief Discussion of Internet Use Policies

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The library world has been the center of heated discussion recently over the issue of installing filtering software on Internet terminals. The Children's Internet Protection Act (CIPA) requires the use of filtering software for Internet terminals in public libraries. Since the American Library Association (ALA) was unsuccessful in its challenge to CIPA, libraries of all types are going to have to reevaluate their Internet use policies.

There are three parts to this article. Part one will discuss the background of the case and the District Court Opinion. Part two will talk about the U.S. Supreme Court plurality decision in United States et al. v. American Library Association. The third part will talk about Internet use policies and what the decision means to libraries, and will include some resources and Websites on library Internet use policies.

The District Court Decision

When the Children's Internet Protection Act (CIPA) was passed in December 2000, the statute included a provision requiring all libraries that receive federal funding to install filtering software on Internet terminals used by minors. This provision was included because of the use of public access Internet terminals to obtain pornographic Websites. Any library that did not comply with the provisions of this statute was precluded from receiving an E-rate telecommunication discount or any funding under the Library Service and Technology Act.

The American Library Association promptly challenged CIPA in Federal court. The District Court ruled in favor of ALA, stating: "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." The reasoning was based upon the argument that filtering software restricts access to constitutionally protected speech in two ways. First restriction involved the fact that filtering software can block access to sites that have nothing to do with pornography, making the restrictions overly broad.

The second part of the ruling by the District Court was based upon the reasoning that library public access Internet terminals constitute a public forum. Whenever the government imposes a restriction on a public forum based upon the content of the speech, the law is subject to strict scrutiny, and is permitted only if the law is narrowly tailored to further a compelling state interest. Additionally, the law must be the least restrictive alternative available. According to the District Court:

In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics. Where the state provides access to a "vast democratic forum," open to any member of the public to speak on subjects "as diverse as human thought," the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated. Application of strict scrutiny finds further support in the extent to which public libraries' provision of Internet access uniquely promotes First Amendment values in a manner analogous to traditional public fora [sic] such as streets, sidewalks, and parks, in which content-based restrictions are always subject to strict scrutiny. [Citations omitted.]

The District Court ruled that, although the government has a compelling interest in preventing the dissemination of obscenity, child pornography, or material harmful to minors, the use of software filters is not narrowly tailored to further that interest. According to the District Court, CIPA was unconstitutional because the law was overly broad and did not survive strict scrutiny.

After the decision by the District Court, the government appealed to the U.S. Supreme Court. In a plurality opinion, the Supreme Court ruled in favor of the government, finding that the filtering provisions of the Children's Internet Protection Act are constitutional.

There were five separate opinions in the case. Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, decided the opinion of the Court. Justice Kennedy and Justice Breyer each filed separate opinions concurring in the judgment. There were two dissenting opinions, one filed by Justice Stevens and one filed by Justices Souter and Ginsburg, also filed a dissenting opinion.
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Justice Stevens’ Dissent

One of the arguments that the ALA used was that Justice Stevens asserts the premise that “[a] federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate the First Amendment.” The argument is that the provision of Internet access within a public library... is for use by the public... as a “designated public forum” that “promotes First Amendment values in an analogous manner.”

Justice Stevens also discussed the discretion of libraries to make decisions on what to include and exclude from the collection. Unlike the plurality, he did not find it to be a reason for denying Internet terminals the status of a public forum. According to the opinion, “Given our Nation’s deep commitment to ‘safeguarding academic freedom’ and to the ‘robust exchange of ideas,’ a library’s exercise of judgment with respect to its collection is entitled to First Amendment protection.”

Justice Stevens was not impressed by the plurality argument that some computers could be left unblocked. “A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate that Amendment. I think it equally clear that

the First Amendment protects libraries from being denied funds for refusing to comply with an identical rule.” In addition, Justice Stevens did not agree with the contention of the Chief Justice that the First Amendment was not harmed simply because libraries lost funding, saying “This Court should not permit federal funds to be used to enforce this kind of broad restriction of First Amendment rights, particularly when such a restriction is unnecessary to accomplish Congress’ stated goal. The abridgment of speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.”
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is not a word about barring requesting adults from any materials in a library's collection. Or about limiting an adult's access based on evaluation of his purposes in seeking materials. If such a practice had survived into the latter half of the 20th century, one would surely find a statement about it from the ALA, which had become the nemesis of anything sounding like censorship of library holdings, as shown by the history just sampled. The silence bespeaks an American public library that gives any adult patron any material at hand, and a history without support for the plurality's reading of the First Amendment as tolerating a public library's censorship of its collection against adult enquiry. [T]here is no prepublication scrutiny rationale to save library Internet blocking from treatment as censorship, and no support for it in the historical development of library practice. To these two reasons to treat blocking differently from a decision declining to buy a book, a third must be added. Quite simply, we can smell a rat when a library blocks material already in its control, just as we do when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand. Content-based blocking and removal tell us something that mere absence from the shelves does not. There is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material. On that ground, the Act's blocking requirement in its current breadth calls for unconstitutional action. ... and is itself unconstitutional.18

Justice Breyer's Opinion

The opinion by Justice Breyer, as with the opinion of Chief Justice Rehnquist, finds that strict scrutiny does not apply, however, Justice Breyer would apply the principles of "heightened scrutiny" to this situation. According to Justice Breyer's decision:

I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care. The Act directly restricts the public's receipt of information. And it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the Internet as addressed by public libraries. For that reason, we should not examine the statute's constitutionality as if it raised no special First Amendment concern— as if, like tax or economic regulation, the First Amendment demanded only a "rational basis" for imposing a restriction.

Nor should we accept the Government's suggestion that a presumption in favor of the state's constitutionality applies. [Citations omitted]20

In deciding the case, Justice Breyer questions: "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm in that, in relation to that objective, is out of proportion."21

Justice Breyer found that the restrictions were legitimate, and that they were in fact of the same nature as the type of ordinary collection development that libraries routinely engage in. Although Justice Breyer found that the restrictions of the filtering software were overbroad and did indeed restrict protected speech, he noted that:

At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to "overblocked" Web sites: the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter..." The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere. Perhaps local library rules or practices could further restrict the ability of patrons to obtain "overblocked" Internet material.22 But we are not now considering any such local practices. We have concluded only a facial challenge to the Act itself.

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives. I therefore agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment. [Citations omitted]23

Justice Kennedy's Opinion

The concurring opinion by Justice Kennedy also relied upon the ability of the librarians to remove the filter when necessary. According to Justice Kennedy:

If, on the request of a patron, a library administers an "overblanked" Internet to a (or to an "overblanked" Internet user, a librarian will unblock filtered material or disable the Internet user's filter with... continued on page 89
out significant delay, there is little to this case. The Government represents this is indeed the fact. If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user’s election to vote constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case. There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. For these reasons, I concur in the judgment of the Court.22

Reviewing Internet Use Policies

So what does the plurality opinion by the Supreme Court mean to libraries? All public and school libraries and special libraries serving those who are under the age of eighteen should re-evaluate their Internet use policies in light of this decision.

Because the three plurality opinions all discussed the right of patrons to request that the filtering software be disabled, this provision in the statute becomes key to the revision of Internet use policies. Both the E-rate program and the LSTA grant guidelines allow the software to be disabled. According to the statute, the E-rate program allows disabling “during use by an adult,” while the LSTA grant guidelines allow disabling upon request “by any person.”33

The CIPA does not require filtering for adults, which means that public libraries don’t have to filter in the adult sections or with adult users. This provision allows adult users to access materials without restrictions so that their First Amendment rights are protected. That may be the basis of another case, but for right now that is what the law states. An individual library could decide to filter everything; however, it appears from the dissenting opinions of both Justice Souter and Justice Stevens and the plurality opinion of Justice Kennedy that this type of universal filtering might be subject to greater scrutiny than a mere blocking of computers operated by children.

Although the decision involved public libraries, it applies equally to school library media centers and special libraries serving children. Of course, school libraries are also subject to additional regulations from the U.S. Department of Education and state educational bodies. Yet the principles laid down in the plurality opinion should be considered by all entities that serve minors under the age of eighteen.

One of the most important provisions that libraries should make in their Internet use poli-

Endnotes
3. Since the legal definition of a “minor” is a person under the legal age of eighteen, this provision applies to young adults, even though most of the discussion uses the term “children.”
5. 47 U.S.C. §§254(b)(6)(B)(i) and (C)(i).
7. 201 F. Supp. 2d at 453.
8. 201 F. Supp. 2d 401 at 408.
9. “According to the plaintiffs, these content-based restrictions are subject to strict scrutiny under public forum doctrine, see Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837, 521 U.S. 670, 115 S. Ct. 2510 (1995), [***93] and are therefore permissible only if they are narrowly tailored to further a compelling state interest and no less restrictive alternatives would further that interest, see Reno v. ACLU, 521 U.S. 884, 887, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997).” 201 F. Supp. 2d at 407.
10. 201 F. Supp. 2d at 409.
15. Id.
17. Id.
18. Posting of Keith Michael Fields, Executive Director, American Library Association, to raus@access@ala.org. [ALACOUNC-10053] responding to the CIPA decision (July 16, 2003).
22. This argument is used in Justice Stevens’ dissenting opinion at 8.
23. 201 F. Supp. 2d 401 at 457.
24. 201 F. Supp. 2d at 466.
25. Dissent of Justice Stevens.
26. Id.
27. Id.
28. Souter.
29. Souter.
30. 1-6.
31. Justice Breyer is relying on In re Federal-State Joint Board on Universal Service: Children’s Internet Protection Act, 16 FCC Rcd. 8182, 8183, ¶ 2, 8204, ¶ 53 (2001). This report leaves determinations regarding the appropriateness of compliant Internet safety policies and their disabling to local communities.
33. Kennedy.
When Copyright And Trademark Collide


In 1948, with the war still fresh in his memory, Dwight Eisenhower wrote Crusade in Europe published by Doubleday which registered copyright and then sold exclusive T.V. rights to Twentieth Century Fox. Fox then hired Time Inc. to do the T.V. series with Time assigning its copyright to Fox. The 26 episode series was aired in 1949.

Which is curious. I thought there were only three T.V.s in existence then.

Doubleday renewed its copyright on the book in 1975, but Fox didn't, dumping the T.V. series into the public domain. However, Fox reacquired T.V. rights in the book in 1988 including the exclusive right to distribute the series on video. And Fox turned it into video.

This re-acquisition of rights is not discussed in the case. So you have to pretty much wipe it from your thoughts and focus on the public domain.

With the 50th anniversary of VE Day coming up, Dastar Corp (petitioner — see caption above) saw the Crusade series sitting there quietly in the public domain. It bought the Fox video series on the open market, copied and then heavily edited it down to about half the original length.

Betraying the diminished attention span of today's WW II buffs.

Some new sequencing and narration was done, and the result put out as the video set World War II Campaigns in Europe as a Dastar product. And Dastar ruthlessly undercut Fox's price. It was after all only half the length.

Knowing they were trumped on the copyright issue due to the public domain thing, Fox's high-priced lawyers had to come up with another cause of action. And so they did.

Fox sued saying that Dastar was pulling a "reverse passing off" — § 43(a) of the Lanham Act — by not giving proper credit to the Crusade T.V. series. You pass or palm off when you misrepresent your goods as those of someone else. See, e.g., O & W Thum Co. v. Dickinson, 245 F. 609, 621 (CA6 1917). A reverse passing off is — you got it — the reverse. You claim someone else's goods are yours. See, e.g., Williams v. Curtis-Wright Corp., 691 F.2d 168, 172 (CA3 1982).

The Ninth Circuit did not care for what it termed the "bodily appropriation" of the Fox work and affirmed a District Court award of two times Dastar's profits. And then the case went to the Supreme.

Our Old Friend the Lanham Act

The Lanham Act was written to make "actionable the deceptive and misleading use of marks." § 43(a), 15 U.S.C. § 1125(a) allows a federal suit to stop anyone from making a false designation of origin, or any false description or representation" vis-à-vis goods or services.

The Supreme Court immediately cited the Second Circuit that § 43(a) "does not have boundless application as a remedy for unfair trade practices." Alfred Dunhill, Ltd v. Interstate Cigar Co., 499 F.2d 232, 237 (1974). "Because of its (???) inherently limited wording (???) and § 43(a) can never be a federal "codification of the overall law of unfair competition," 4 J. McCarthy Trademarks and Unfair Competition § 27:7, p. 27-14 (4th ed. 2002).

(???) added by author to express his bafflement over what seems like pretty good-darn broad wording. The confusion here perhaps lies in the Lanham language that the act was intended "to protect persons engaged in commerce against unfair competition." Which sounds hugely broad. But the act plainly says it's about the improper use of trademarks. Which must be the inherently limited wording.

But sticking to our issue of false designation or origin, the word 'origin' does not just mean geographical locale, but also source or manufacture. Federal-Mogul-Bower Bearings, Inc. v. Ascof, 313 F.2d 405, 408 (1963). So that makes Lanham broad enough to encompass reverse passing off.

Which strikes me as what that inherently limited wording says with "false description or representation:"

But then, incredibly, the Court goes on to say that the Trademark Law Revision Act of 1988 makes it clear that it covers origin of production as well as geography. See, e.g., Alpo Petfoods, Inc. v. Ralston Purina Co., 286 U.S. App. D.C. 192, 913 F.2d 958,963-964, n. 6 (CA9 1990) (Thomas, J.).

So why did we need the above stuff? Do those S.C. clerks not have enough to keep them busy? Or are they the law review pedants you always suspected them to be? And why am I making you read this?

Anyhow

Let's cut to the gravamen as they say. Using Lanham language, Fox argued that Dastar made "false designation of origin ... which is likely to cause confusion as to the origin of his or her goods."

The Court didn't — dare I say — but that, holding instead that Dastar reprogrammed Crusade it would indeed be a no-no. By repackage, it means acquire the Fox video, strip the Fox cellophane off, and put Dastar cellophane on.

Instead, Dastar took a work out of the public domain, fined some (trivial) alterations and came up with its own series of videotapes. If "origin" means manufacturer, then Dastar was the origin. But can "origin" mean the creator of the underlying work that was brutally edited?

Origin: "that from which anything primarily proceeds; source." Webster's New International Dictionary 1720-1721 (2d ed. 1949).

Don't they have a more up-to-date dictionary? in the S. Ct. library? Or did they want the dictionary that Dwight Eisenhower would have used?

Anyhow, they conclude on that slim basis that origin means "producer of the tangible product sold in the marketplace" which is to say the physical Campaigns video made by Dastar.

Section 43(a) strikes at trademark infringements that impair a manufacturer's goodwill or trade on his reputation. The loyal consumer who is buying your icky brown cola that has been falsely labeled Coca-Cola believes that Coke produced your brew and hence was the origin. But he does not necessarily believe that Coke was the first to

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www.pen.k12.va.us/go/VDOE/Technology/AUP/home.shtml

Conclusion
The plurality opinion from the United States Supreme Court brings up as many issues as it resolves. A large part of the decision revolved around the ability of adult users to request that the filtering software be disabled. This decision, however, means that libraries should review and revise their Internet use policies as soon as possible.

When looking at an Internet use policy, the most important part of the policy involves the procedure that a patron should follow when he or she wishes to have the filtering software disabled. In addition, libraries should look at their policies concerning the use of computers in the adult room by children if they opt to provide unfiltered access to adult computers.

Every decision has its nuances, but a plurality decision is even trickier to interpret than most. As a result, I recommend that you consult with your library, city, or school board attorney before finalizing your final Internet use policy.