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 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 telecommunications 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. The 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.

Chief Justice Rehnquist's Opinion
Chief Justice Rehnquist's opinion (joined by Justices O'Connor, Scalia, and Thomas) relied in large part on the nature of collection development, since the selection of materials is necessarily a content-based decision. The analysis included analogies to the decisions of public television stations and the National Endowment for the Arts in selecting items based on "artistic merit." According to the opinion, "the principles...apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."

The Chief Justice also stated that public access Internet terminals are not a public forum subject to strict scrutiny, and that the filtering provisions in CIPA are not overly broad. According to the opinion, "a public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers, but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. As Congress recognized, "the Internet is simply another method for making information available in a school or library." [Citations omitted.]

One interesting part of the decision is that...
"the justices ultimately ruled that the law was constitutional only if adult library users were able to readily request and receive unfiltered access to the Internet." This was a large part of the decision, and was based on provisions in CIPA that allows libraries to disable the filtering software "to enable access for bona fide research or other lawful purposes." According to Chief Justice Rehnquist:

"Any such concern is dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter… [T]he Solicitor General stated at oral argument that a "library may … eliminate the filtering with respect to specific sites … at the request of a patron… [and] can, in response to a request from a patron, unblock the filtering mechanism altogether… " [Citations omitted]"^20

The argument that libraries can disable the filtering software was ultimately used in all of the concurring opinions, making it an important part of the decision. This provision will become very important as librarians begin to draft and revise their Internet use policies.

The second part of the Chief Justice’s opinion involved a discussion of statutory analysis and the powers of Congress. According to the opinion, "The E-rate and LSSTA programs were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Congress may certainly insist that these "public funds be spent for the purposes for which they were authorized." Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition… ."^21

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."^22

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."^23

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."^24 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."^25

Justice Souter’s Dissent

Justice Souter (joined by Justice Ginsburg) uses a different type of analysis in dissenting. According to the dissent, although patrons may request that the filtering software be disabled, the nature of the filtering software still constitutes governmental censorship. Speaking to the collection development argument used by the plurality, Justice Souter states that:

"Public libraries are indeed selective in what they acquire to place in their stacks, as they must be. There is only so much money and so much shelf space. continued on page 88
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space, and the necessity to choose some material and reject the rest justifies the effort to be selective with an eye to demand, quality, and the object of maintaining the library as a place of civilized enquiry by widely different sorts of people. Selectivity is thus necessary and complex, and these two characteristics explain why review of a library's selection decisions must be limited: the decisions are made all the time, and only in extreme cases could one expect particular choices to reveal impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic. Review for rational basis is probably the most that any court could conduct, owing to the myriad particular selections that might be attacked by someone, and the difficulty of untangling the play of factors behind a particular decision.

At every significant point, however, the Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed. Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space. In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired. Thus, deciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees. The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable "purpose," or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults. [Citations omitted]37

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 is addressed in 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 statute's constitutionality applies. [Citations omitted]38

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 that, in relation to that objective, is out of proportion."39

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.40 But we are not now considering any such local practices. We are here considering 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. Therefore, I agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment. [Citations omitted]41

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 an adult user, a librarian will unblock filtered material or disable the Internet software filter with...
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 view 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.”23

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 that 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 polici-
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 TV 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 TV’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 re-acquired T.V. rights 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 WWII 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 (CA 6 1917). A reverse passing off is — you got it — the reverse. You claim someone else’s goods are yours. See, e.g., Williams v. Curtiss-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 make a claim for “false designation of origin, or any false description or representation” vis-à-vis goods or services.


(???) added by author to express his bafflement over what seems like pretty gross-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. Acof, 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 955,963-964, 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 a “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 — buy that, holding instead that had Dastar repackaged *Crusade* it would indeed be a no-no. By repackaging, 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, finessed 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 producer’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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