

THE FIRST AMENDMENT, CHILDREN, THE INTERNET, AND AMERICA'S PUBLIC LIBRARIES

by Fred Cate

to be impermissible when applied to books or public protests, have

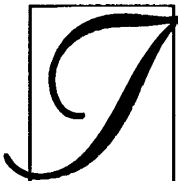
been permitted when applied to sound trucks, telephones, or broadcast television. The Court has assumed that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."²

Libraries and librarians are discovering that just as the invention of the printing press inspired censorship of books, the rapid proliferation of new technologies today is sparking new and vocal efforts to control access to information. Consider the videotape. Videos now account for between 20 and 30 percent of library circulation nationwide, according to the American Library Association. State legislatures, city councils, and community groups around the country have focused their attention recently on public libraries' video lending policies.

The fight over policies concerning videos will pale by comparison to the fight emerging over libraries providing Internet access for children. First deployed in 1969, the Internet today connects more than 60 million computers in the United States and millions more in 189 other countries. The most recent phenomenal growth has been largely due to the World Wide Web, the easy-to-use graphic interface that connects users to each other and to a dazzling array of on-line services and products with staggering speed and frequency. The Web is the fastest-growing medium in human history. Last year, only five years after its creation, the Web reached more than one-quarter of the U.S. population. By comparison, it took 38 years for radio to reach that many Americans, 13 for television, and 10 for cable.

The American Library Association reports that in 1997, 72 percent of public libraries were connected to the Internet, up from only 44 percent one year earlier. Ninety-eight percent of libraries serving populations of 100,000 or more—the libraries that serve the majority of the U.S. population—offer Internet access for their staffs; 65 percent offer such access to the patrons with a staff intermediary; and 75 percent offer Internet access directly to patrons.³

Those figures are certain to rise, especially with Washington's help. In the Telecommunications Act of 1996, Congress specified that "[e]lementary and secondary schools and classrooms . . . and libraries should have access to advanced telecommunication services," and directed the Federal Communications Commission to tax telecommunication service providers to subsidize the cost of that access.⁴ In May 1997 the Commission adopted a plan requir-



In 1996, the American Library Association reported 664 formal challenges to material in schools, school libraries, and public libraries. Although that figure reflects a decline for the second year in a row, it is significant and cause for concern, in part because it reflects a net 25 percent increase in challenges during the past five years. Moreover, each of those challenges involved a formal request or demand that something be removed from a curriculum or library, thereby seeking to restrict access by *other* students or patrons. Judith Krug, Director of the American Library Association's Office for Intellectual Freedom, estimates that for each challenge reported, four or five may go unreported.¹ And, for every formal challenge, there are likely to be many informal complaints.

Most importantly, however, the target of these challenges remained on works that describe lifestyles and experiences that differ from the Ward and June Cleaver mythical stereotype. Targeted books included those by Judy Blume, such as *Forever* and *Blubber*, *I Know Why the Caged Bird Sings* by Maya Angelou, and a variety of works by Toni Morrison, Roald Dahl, J.D. Salinger, and John Steinbeck, not to mention *Huckleberry Finn*. Even *The Complete Fairy Tales of Brothers Grimm*, *The Little Mermaid*, and the *American Heritage Dictionary* were all challenged in recent years.

The desire to control the availability of expression, not only for ourselves and our families, but for others, is nothing new. New methods of disseminating information have always brought with them new efforts to control the content of the information disseminated. The invention of a commercially viable printing press in the late 15th century brought with it the professional censor. It took Pope Alexander VI only until 1501 before he issued a bill forbidding printing without a license, and in 1559 the first *Index Expurgatorius*—list of forbidden books—was issued. By the time the mob overran the Bastille in 1789, over 800 authors, printers, and book dealers had been imprisoned there.

In the United States, the First Amendment has proved an extraordinary shield against censorship. Despite the breadth of protection it affords, however, the First Amendment is not absolute. For example, the Supreme Court has found that the protection afforded by the First Amendment depends upon the medium of communication involved. As a result, restrictions that the Court has found

ing telecommunications service providers to provide 20 to 90 percent discounts to schools and libraries for accessing information technology services, thereby subsidizing that access by \$2.25 billion every year.⁵

In their bid for a second term, President Clinton and Vice President Gore pledged to wire every American classroom and library by the year 2000. In the first State of the Union address of his second term, the President reiterated his plan "to connect every classroom and library to the Internet by the year 2000."⁶ Just days after the inauguration, the president sent to Congress a 1998 budget proposing \$500 million annually for "technology literacy" grants for four years—a \$2 billion grant program.

The expansion of library Internet access is an extraordinary opportunity for America's public libraries. But it also presents significant challenges, many of which center on libraries' legal and political responsibility for the material their patrons access via the Internet. That responsibility, and the role played by the First Amendment in shaping it, is of vital significance to librarians and library trustees today and for the 21st century.

THE INTERNET

The Internet began in 1969 as an experimental project of the U.S. Defense Department's Advanced Research Project Agency. Originally called ARPANET, the network linked computers and computer networks owned by the military, defense contractors, and universities conducting defense-related research. The Internet evolved from ARPANET as more universities and, later, organizations with no ties to defense research were connected.

The Internet today is constituted of literally millions of computers and computer networks. Content, therefore, comes not from identified content providers, as is the case with television and newspapers, but from all of the computers that also are receivers and processors of information. As a result, the Internet is truly interactive: every person who is connected is both a supplier and receiver of information. And, unlike telephones, which are also interactive, most Internet data can be accessed by anyone who is online, even multiple users at the same time. Creation and control of Internet content, therefore, are in the hands of millions of disparate businesses, educational institutions, government agencies, and individuals.

Internet services may be divided generally into three broad categories. Electronic mail (e-mail) allows one user to communicate with another or with a service provider. E-mail also permits users to subscribe to "lists," where they automatically receive all e-mail messages posted by other subscribers. Like its postal counterpart—"snail mail" as Internet aficionados refer to it—e-mail also is used to deliver a growing volume of unsolicited junk mail offering everything from Girl Scout cookies to legal services. Internet users generate approximately 100 million e-mail messages every day and more than half of all U.S. employ-

ers use e-mail to communicate with their employees. In fact, computers deliver more mail each day than the U.S. Postal Service. Other point-to-point Internet services are evolving rapidly, including digital audio telephone conversations, which utilize Internet technologies to carry traditional telephone traffic.

The second general category of Internet services is electronic bulletin boards—"newsgroups" in Internet parlance—where users can post messages for all other bulletin board subscribers to read, and can read and respond to the messages, images, and video and sound clips posted by all other users. Newsgroups are organized into "hierarchies," each of which begins with a short abbreviation providing some general idea of the nature of the groups included with each hierarchy. For example, "rec.sport.skating.ice.figure" is a newsgroup in the "recreation" hierarchy and includes messages dealing with figure skating. Similarly, "rec.sport.skating.inline" is in the same hierarchy, but deals with inline skating. The major newsgroup hierarchies include:

alt	"alternative" and often controversial topics
bionet	biological research
bit	popular e-mail lists from BitNet
clari	a series of newsgroups from commercial news servers
comp	computers and related subjects
k12	newsgroups devoted to K-12 educational curriculum, language exchanges with native speakers, and classroom-to-classroom projects designed by teachers
law	legal issues
misc	material that does not fit elsewhere
rec	"recreation" information, including hobbies, games, sports, and arts
sci	"sciences" other than biology
soc	"social" groups and topics
talk	politics and related topics

Newsgroups are carried in many locations throughout the Internet, typically on the larger "servers" operated by universities and commercial service providers. Not all servers carry all newsgroups. This is particularly true for controversial subjects within the "alt" hierarchy. An Internet user can connect most easily to those newsgroups carried on the server which she uses to access the Internet. For example, a person who accesses the Internet through America Online will have easiest access to the newsgroups that America Online carries on its server. But it is also possible to connect to newsgroups carried on other servers. There are more than 30,000 newsgroups to which

users post approximately 100 million messages every day. New types of these services are developing rapidly, such as "chat rooms," where diverse Internet users communicate with each other in real time, much like textual equivalents of conference calls.

The third group of Internet offerings includes a wide range of online services and products, such as electronic merchandise catalogs, online airline reservations systems, and electronic access to laws and library catalogs and thousands of other searchable databases. While these Internet services are provided by a wide variety of institutions and individuals, this is the area of fastest commercial online growth. These services are provided today primarily through the World Wide Web.

The World Wide Web is a graphic interface that makes all of these services easier to use. The Web allows a user to click with her mouse on a highlighted term and have a computer then automatically take her to the site or text or service linked to that term. Cumbersome text-based commands are replaced with a single "click," and processes previously requiring a series of instructions that had to be learned and memorized are now fully automated. Moreover, powerful new Internet browsers, such as Netscape Communicator and Microsoft Internet Explorer, recognize and correctly act upon the variety of data and services available through the Internet: text is displayed as text; images are configured and displayed as images; recorded sounds are played as music or speech; e-mail is sent as e-mail; and files requested for downloading and storage are directed to the user's hard drive. Finally, the growth of the Internet and easy-to-use interfaces has led to the proliferation of effective search engines that allow users to identify and access information or sites on a given subject or associated with a specified institution or individual.

THE FIRST AMENDMENT

The First Amendment to the U.S. Constitution extends extraordinary protection to expression. The Supreme Court has interpreted "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."7 to prevent the government from restricting expression prior to its utterance or publication or merely because the government disagrees with the sentiment expressed. It also forbids the government from making impermissible distinctions based on content, compelling speech, or granting access to the expressive capacity of another without demonstrating that the government's action is narrowly tailored to serve a compelling governmental interest. These First Amendment principles restrict not merely Congress, but all federal and state governmental agencies. This is especially important since most legal restraints on sexually explicit expression occur at the state level. These First Amendment principles may also apply to expression that the Court has determined does not independently warrant protection (such as false or defamatory expression), conduct that involves no speech (such as burning a flag or picket-

ing), and activities ancillary to expression (such as funding and distributing expression).

This last point is particularly important for libraries, which distribute expression that they do not originate or control. Under the Supreme Court's interpretation of the First Amendment, a distributor of publications is not liable for their content unless it either knows or had reason to know that the content was harmful. "[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry.⁸ In *Smith v. California*, the Court struck down an ordinance that imposed liability on booksellers for possessing obscene books without requiring that the bookseller know of the books' content. The Court reasoned that "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."⁹ Moreover, the Court stressed, imposing liability on booksellers without a knowledge requirement would necessarily restrict the amount and variety of material available to the public:

For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him[,] the public's access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.¹⁰

REGULATING SEXUALLY EXPLICIT MATERIAL

■ *Sexually Explicit Material on the Internet*

Despite the extraordinary breadth of the First Amendment, it does not protect all expression equally. Sexually explicit material—depending upon its content, technological context, and audience—is particularly subject to regulation. Moreover, despite the extraordinary variety of information available on the Internet, lawmakers, regulators, academics, and journalists have tended to focus on the sexually explicit expression found there. Even though sexually explicit material is estimated to make up only one-third of 1 percent of Internet traffic—a substantially lower percentage of sexually explicit expression than is found in many newsstands, video stores, or premium cable television channels—such expression is a lightning rod for debate.

This reflects both the extreme, often violent, nature of some of that expression, and the fact that the technologies required to access this material are often more familiar to children than to adults. As a result of both the lower First Amendment protection applicable to some forms of sexually explicit expression, and the political sensitivity surrounding such expression, this is where virtually all efforts to regulate Internet expression are focused; this is where the limits of free expression are being tested today.

Sexual content is available on the Internet primarily from two types of services: newsgroups and web sites. More than 100 newsgroups provide access to a wide range of sexually explicit stories, images, and messages. Most of these newsgroups are part of the "alt" hierarchy; "alt.sex" and "alt.sex.stories" are the largest sexually explicit newsgroups and two of the five largest of all newsgroups. The other Internet-based source of sexually explicit material includes a wide variety of World Wide Web sites. The majority of sexually explicit sites, however, are either commercial—the online equivalent of "adult" theaters and bookstores—or provided as a public service concerned with safe sex, medical research, literature, or political consciousness-raising.

■ Obscenity

The Supreme Court has found that the amendment's protection does not extend at all to the distribution or public exhibition of sexually explicit expression that is "obscene." In 1957 in *Roth v. United States*, the Court held that "obscenity is not within the area of constitutionally protected speech or press,"¹¹ but the Court declined to provide a specific definition for "obscenity." *Roth* set off more than a decade of judicial confusion and indecision about the definition of obscenity, leading the late Justice Stewart to write in 1964 that an intelligent definition might be impossible, but "I know it when I see it."¹² On 31 occasions, the Court reviewed purportedly obscene material and rendered a judgment as to its permissibility. Justice Brennan complained that the examination of this material was "hardly a source of edification to the members of this Court. . . [and] has cast us in the role of an unreviewable board of censorship for the 50 states."¹³

In 1973 the Court finally adopted a specific, albeit still subjective, definition of obscenity. In *Miller v. California*, a 5-4 majority held that works are obscene, and therefore outside the protection of the First Amendment, only if (1) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual or excretory conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴ The "prurient interest" requirement, the Court later ruled, is satisfied only by expression that does more than "provoke only normal, healthy sexual desires."¹⁵ In *Miller* and subsequent cases, the

Court stressed that the first two prongs of the test could be judged under subjective local or state community standards.¹⁶ Redeeming literary, artistic, political, or scientific value, on the other hand, is not a subject for local standards and must therefore be judged under a national "reasonable person" standard.¹⁷

Contemporaneously with the *Roth-Miller* line of cases, which dealt with distributing and displaying publicly obscene material, the Court also decided *Stanley v. Georgia*,¹⁸ which involved the possession of obscenity. In *Stanley* the Court held, without dissent, that the Constitution protected the possession of sexually explicit material, even if it was legally obscene. While the "[s]tates retain broad power to regulate obscenity," Justice Marshall wrote for the Court, "that power simply does not extend to mere possession by the individual in the privacy of his own home."¹⁹ The Court concluded: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."²⁰

While the *Miller* test failed to end the controversy over the definition of obscenity, it has emphasized the narrowness of the so-called "obscenity" exception to the First Amendment. When both the audience and the participants, if any, are consenting adults, the First Amendment protects all expression other than that meeting the *Miller* definition of obscenity. And the determination of whether specific expression fits within that definition requires that the state specifically define the conduct or expression to be prohibited; that the expression offend the standards of the local or, at most, state community; and that the literary, artistic, political, or scientific value be judged according to a national, reasonable person standard. Expression not meeting the *Miller* definition, judged according to these procedural and substantive safeguards, is not obscene and is protected by the First Amendment. Words and phrases such as "pornography" or "lewd, lascivious, and filthy" or "XXX," which may be used to describe sexually explicit expression, have no legal significance. Expression which meets the *Miller* definition for obscenity may be prohibited only insofar as the regulation applies to distribution or public display. Under *Stanley*, the mere possession of obscenity is fully protected by the First Amendment.

■ Material that is Harmful to Minors

When the audience or participants are not limited to consenting adults, courts have interpreted the First Amendment to permit greater regulation, or even prohibition, of sexually explicit expression. This is particularly true when children are involved. For example, the Supreme Court has found that states may not only criminalize the depiction of children in sexually explicit films and photographs, they may prohibit the distribution, and even the mere possession, of those films and photographs in an ef-

fort to eliminate the market for child pornography.²¹

The government may also constitutionally require suppliers of sexually explicit expression to restrict children's access to that expression. Sometimes referred to as "variable obscenity," this concept permits states to require sellers of non-obscene, "adult" books, magazines, and videos to stock those items in a section of the store inaccessible to children, or to display them with opaque wrappers, or to require proof of age from people entering "adult" book and video stores.²² Indiana, for example, typical of many states, designates some material or performances as "harmful to minors" if:

- (1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
- (2) Considered as a whole, it appeals to the prurient interest in sex of minors;
- (3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
- (4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.²³

State law broadly prohibits making such material or performances available to minors.²⁴

Laws such as this recognize that material that is not obscene for adults, may nonetheless be harmful for children. The constitutional limit on those restrictions, according to the Supreme Court, is that they must not limit what adults may read to "only what is fit for children."²⁵ "Regardless of the strength of the government's interest" in protecting children, the Court has written, "the level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for a sandbox."²⁶ The Court's most recent cases indicate that no incursion into the First Amendment rights of adults is permissible in order to protect children if it is not necessary and effective as a means of controlling minors' access.²⁷

■ *Indecency*

With most media it is possible to restrict access by children to sexually explicit expression without also foreclosing access by adults. The broadcasting medium, however, presents two special problems. First, as the Supreme Court noted in 1978, "broadcasting is uniquely accessible to children, even those too young to read."²⁸ Second, broadcasting has traditionally involved children and adults in the same audience, and broadcasters—unlike booksellers—are virtually powerless to distinguish between them.

As a result of these technological differences, the FCC, Congress, and the courts have created a definition for a new category of sexually explicit expression—"indecentcy." According to that definition, broadcast programs

are indecent if they contain "language or material that depicts or describes in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities or organs."²⁹ Because there is no effective way to determine the age of members of the audience watching broadcast television programs—the situation is technologically different for cable television—and because the images and sounds included in television broadcasts are accessible even to children too young to read, Congress and the FCC have "channeled" the airing of indecent material to nighttime when, they have assumed, fewer viewers are unsupervised children.

Outside of the context of over-the-air broadcasting, which the Court has found warrants less First Amendment protection because of other technological features,³⁰ the Supreme Court evaluates the constitutionality of regulations on indecency under "strict scrutiny"—the Court's highest standard of constitutional review. Under strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."³¹ In *Sable Communications of California, Inc. v. Federal Communications Commission*,³² the Court struck down the portions of a federal law prohibiting the transmission of indecent expression for commercial purposes—so-called "dial-a-porn."³³ "Sexual expression which is indecent but not obscene is protected by the First Amendment. . . ."³⁴ The Court found that for the government to regulate indecent expression it must do so not only in furtherance of a "compelling" state interest, but also "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."³⁵ This is the highest form of scrutiny applied by the Court to any regulation of expression. The fact that the expression was sexually explicit and, in the case before the Court, commercial, was irrelevant.

LIBRARIES, LIABILITY, AND CHILDREN'S INTERNET ACCESS

"Obscene" material presents few issues for libraries, because librarians themselves are unlikely to be downloading material meeting the stringent test for obscenity any more than they are likely to bring obscene movies into their libraries. The failure of librarians to prevent patrons—adults or children—from accessing such material would almost certainly not violate obscenity laws, especially if those professionals were unaware of the content that patrons were accessing. Finally, law enforcement officials have traditionally prosecuted the people and organizations who create and distribute obscene material, rather than the users who access it. This seems likely to remain the case with Internet-based obscenity.

"Material that is harmful to minors" and "indecentcy" present more relevant issues. Given the broad language of variable obscenity statutes in many states, it is possible that resources which a librarian would find educa-

tionally valuable might also fit within the state law's definition of material that is harmful to minors. The legal risk to libraries, however, is quite low, for two reasons.

First, most state variable obscenity laws define material that is harmful to minors to include only that which "considered as a whole" "appeals to the prurient interest in sex of minors" and "lacks serious literary, artistic, political, or scientific value for minors."³⁶ Moreover, these laws usually require that the harmful material be provided "knowingly or intentionally."³⁷ The failure to control students' access to sexually explicit expression is unlikely to satisfy that requirement. And most state variable obscenity laws provide a specific exemption for librarians and teachers, particularly at public institutions, who act with a legitimate educational purpose. Indiana, for example, provides two relevant defenses:

(1) That the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes; [or]

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment.

³⁸

As a result, librarians enjoy virtual immunity from laws protecting minors from harmful expression.

Second, the one federal effort to regulate children's access to indecent expression on the Internet—the Communications Decency Act³⁹—was struck down in 1997 by the Supreme Court.⁴⁰ The Act would have criminalized the knowing use of an "interactive computer system" to transmit or display to a minor "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs"⁴¹ The Act would have applied not only to the originator of the offending communication, but also to anyone who knowingly permits a telecommunications facility under his or her control to be used for such an activity, irrespective of whether "the user of such service placed the call or initiated the communication."⁴²

In a 7-2 decision, the Court struck down the Communications Decency Act as overbroad and vague. The Court's analysis is significant because it indicates the breadth of protection the Court interprets the First Amendment to provide to even Internet expression. The Court first distinguished the Internet from broadcast television and radio, which are subject to lower First Amendment scrutiny. The Court then considered whether any other characteristics of the Internet warranted lower First Amendment scrutiny. Having concluded that there was "no

basis for qualifying the level of First Amendment scrutiny" that should be applied to the Internet, the Court then proceeded to apply its traditional First Amendment jurisprudence to find that the Act did not meet the high level of First Amendment scrutiny required of a direct, content-based regulation of constitutionally protected expression. In particular, the Court found that it was either impossible or potentially very costly for Internet content providers to ascertain and comply with the requirements of the CDA. Rather than impose a constitutionally minimal interference with adult access in order to protect children, the Court found that the Act was "vague," "ineffective," and certain to impose "significant burdens," particularly on noncommercial service providers. "The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so." Justice Stevens concluded for the Court:

*We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision. In Sable, we remarked that the speech restriction at issue there amounted to "burning the house to roast the pig." The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.*⁴³

The First Amendment, therefore, offers sweeping protection for libraries and librarians whose patrons, irrespective of their age, use the Internet to access sexually explicit expression. Given the high level of protection afforded non-sexually explicit expression, this conclusion correctly suggests that libraries enjoy near absolute protection against liability resulting from the content of the expression to which they provide access.

CONTROLLING CHILDREN'S ACCESS

Legal liability is not the only—or even the primary—concern of most librarians and library trustees. Instead, they risk public criticism and financial reprisals for providing minors with access to "objectionable" material. It would therefore seem worthwhile to go beyond the question of *liability* for online sexually explicit expression, to consider briefly some of the practical issues concerning the risk that children will encounter harmful content on the Internet.

■ *Filters and Other Technologies*

The Internet facilitates the use of technologies to regulate access to specified content. There are many products—including Cyber Snoop, CyberPatrol, CYBERSitter, Internet Filter, NetNanny, Net-Rated, Net Snitch, SafeSearch, SmartFilter, SurfWatch, WebTrack, and X-Stop, among others—for controlling access by minors.

These software filters are evolving quite rapidly, but they generally offer three types of services: site blocking, content blocking, and session recording. Site blocking is the most basic and widespread feature of software filters. Once installed, the software refers to an online list of sites and blocks access to those sites, unless a password is entered. The lists are developed by panels of reviewers, which often include parents and teachers, and include Web sites and newsgroups which are known to feature sexually explicit information. More recent versions of these site blocking packages permit a very high degree of customization, based on user, time of day, and type of information to be blocked. CyberPatrol, one of the most popular filtering packages, for example, enables parents to selectively block access to any or all of 12 categories of Internet content that go far beyond sexually explicit expression:

- Violence/Profanity
- Partial Nudity
- Nudity
- Sexual Acts (graphic or text)
- Gross Depictions (graphic or text)
- Racism/Ethnic Impropriety
- Satanic/Cult
- Drugs/Drug Culture
- Militant/Extremist
- Gambling
- Questionable/Illegal
- Alcohol, Beer & Wine

The list of sites blocked by each category are updated regularly. SurfWatch, for example, offers a new list to subscribers every day; the user's computer is updated automatically when she activates her Internet browser. That list reportedly included more than 40,000 sites as of August 1997. These site blocking programs work with direct Internet service providers and with commercial online services, such as CompuServe and America Online. In fact, all of the major online services now offer access to some form of site blocking software to their members. The software can also be purchased for approximately \$19.95, with subscriptions to list updates costing approximately \$60 per year.

The second and emerging type of filter software blocks specific content, rather than sites. These programs are very useful for controlling access to e-mail messages, which are not screened by site blocking software. Content blocking packages can also be used to restrict the information transmitted from the user's computer, thereby allowing a parent to prevent a child from conducting Internet searches for sexually explicit words or phrases or from giving away her name or address. ChatGuard, a companion

program to CyberPatrol, for example, allows parents to enter words or character strings on a ChatGuard list. Then, when the child types these words or character strings, the listed words, characters or phrases are replaced by the equivalent number of "xxxxx."

The third type of software designed to control minor's access to specific expression imposes no technological barrier to such information, but rather saves a list of Internet sites visited, and the time of day and duration of each visit. The list is stored in an encrypted, password-protected file on the user's computer, so that a parent or librarian can later "audit" the material minor users have accessed on the Internet. Cyber Snoop and Net Snitch are two widely available examples of this type of program.

In addition to site blocking, content blocking, and session recording software, most commercial online service providers offer additional specialized parental control options to their members. These providers give their subscribers the option of blocking access to the Internet, and allow parents to tailor the services to which their children have access. America Online offers an online area designed specifically for children. The "Kids Only" parental control feature allows parents to establish an America Online account for their children that accesses only the Kids Only channel on America Online.

Despite the existence of software filters and online controls, technologies are not a panacea for controlling children's access to sexually explicit expression. They all require affirmative steps to acquire and activate. Most are available at a cost and require some form of on-going subscription. The site blocking programs all rely on ratings conducted by third parties, who may have dramatically different tastes and values than adult users. While software can effectively screen for suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images if they are not accompanied by suggestive text and do not originate from a listed site. Moreover, the sheer volume of data on the Internet means that there will always be some delay before a site is rated or before a site's rating is updated to keep up with rapidly changing material. And it is impossible to verify the speed and quality of rating services, because the lists are necessarily kept secret to prevent them from being used as a guide to "banned" material on the Internet.

Perhaps most importantly, all of these programs have the effect of screening out information that may be appropriate and desirable for children, especially older children, to access. This is inevitably the case because of the difficulty of accounting for the context in which suspect words are used. For example, SurfWatch originally screened for the word "couples," thereby excluding many inoffensive sites, include the White House Web server. SurfWatch also reportedly blocks access to articles and news stories about AIDS, HIV, and homosexuality. NetNanny blocks access to the U.S. Central Intelligence Agency and the National

Organization of Women. CyberPatrol, depending upon the categories chosen by users, will block sites which frequently use the words "gay," "bisexual," "homosexual," "lesbian," "male," "men," "boy," "activities," or "rights." This not only has the effect of denying children access to important segments of the Internet; it also skews the political and intellectual variety of material to which they have access.

Despite these limitations, filtering software has been widely employed not only by online service providers, but also by companies wishing to control their employees' access to non-work-related sites (businesses now account for 30 percent of SurfWatch sales), and by libraries. This last use is particularly controversial, because the American Library Association last year adopted a resolution opposing the use of "filtering software by libraries to block access to constitutionally protected speech" as a violation of the Library Bill of Rights.⁴⁴ This resolution is consistent with the ALA's longstanding opposition to any restrictions on the materials than any patron may use. This is clear not only from Article V of the ALA's Bill of Rights—"A person's right to use a library should not be denied or abridged because of origin, age, background, or views"⁴⁵—but also in the ALA's resolutions on Free Access to Libraries for Minors, Access for Children and Young People to Videotapes and Other Nonprint Formats, and Access to Electronic Information, Services, and Networks. All of these documents provide that "the rights of users who are minors shall in no way be abridged"⁴⁶ and that "policies which set minimum age limits for access to videotapes and/or audiovisual materials and equipment, with or without parental permission, abridge library use for minors."⁴⁷

This absolutist position is controversial and, in light of state law concerning material that is harmful to minors and community values, arguably difficult to justify. But it does highlight the vexing issue posed by technological efforts to control access to online content, because those efforts by definition interfere with a minor's quest for knowledge, and inevitably block access to valuable material.

■ *Provider Behavior*

Most Internet service providers take steps on their own to "channel" indecent material away from children to facilitate parental control—motivated by common sense and professional judgment, rather than legal compulsion. For example, virtually all "adult" Internet sites contain bold warning screens through which users pass before accessing sexually explicit material. Some sites require confirmation that the user is age 18 or 21 or older, and that she understands that sexually explicit expression is available on the site. Most newsgroup titles (e.g., "alt.sex.stories") clearly indicate the subject matter of the messages posted there. And most e-mail and newsgroup messages contain "headers"—the electronic equivalent to the "Re:" line in paper memos—that tell the reader what to expect. Those headers

are displayed before any sexually explicit expression is accessed.

Some providers limit access to sexually explicit expression only to users with a password, which is supplied only upon proof, not just affirmation, of age. An increasing number of "adult" sites subscribe to age-verification services, such as "Adult Check," "Adult Pass," and "Validate." For a modest one-time or annual fee, these services verify a user's age and then issue her with a password which can be used when accessing sexually explicit sites to "prove" that the user is not a minor. This is reminiscent of the techniques used by providers of so-called "dial-a-porn" services. In that context, the Supreme Court has held the use of technologically unsophisticated mechanisms, such as requiring use of a credit card, to be legally sufficient to distinguish between adult and minor customers.⁴⁸ As the Internet becomes more commercial, and the primary source of sexually explicit information shifts from non-commercial to commercial providers, the number of Internet sites requiring passwords, subscriptions, and/or payment to access cybersex is growing.

These traits of the Internet medium and the behavior of most information providers led the Supreme Court to conclude that "Though such material is widely available, users seldom encounter such content accidentally."⁴⁹

■ *Benefits of Access*

Finally, controls on minors' access to the Internet, while undoubtedly appropriate in certain contexts, ignore minors' legitimate interest not only in non-sexually explicit expression that is inadvertently, but inevitably, also affected, but also in material that is sexually explicit itself. For example, restricting minors' access to the "alt.sex" newsgroups would necessarily block access to "alt.sex.safe" and "alt.sex.abstinence." The information in these newsgroups, while sexually explicit, might nonetheless be of value to junior and senior high school students. As one U.S. District Court has noted: "one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20 . . . [G]raphic material . . . post[ed] on the Internet could help save lives . . ."⁵⁰ Denying teenagers meaningful access to information about sexual activities and safe sex practices will not make those statistics go away. The absence of information will only exacerbate the problem.

Minors may have a legitimate interest in sexually explicit expression, even if based solely on curiosity and the role that such information plays in their own development and maturing—what the Supreme Court has characterized as the student's right "to inquire, to study and to evaluate, to gain new maturity and understanding."⁵¹ In 1982, in *Board of Education v. Pico*,⁵² the Court considered the power of a public school board to remove specified material from a school library—the situation perhaps most closely analogous to restricting access to material on the

Internet. The case involved a challenge by students to a school board order removing certain books from junior and senior high school libraries. The board had characterized the targeted books, which included works by Kurt Vonnegut Jr., Richard Wright, Alice Childress, and Eldridge Cleaver, among other authors, as "anti-American, anti-Christian, anti-[Semitic], and just plain filthy."⁵³ The students alleged that the board's action violated their First Amendment rights. While noting the existence of limits on students' First Amendment rights, the Court nevertheless distinguished restrictions on expression in the classroom, where attendance and curriculum are compulsory, and as part of school-sponsored activities, which might be perceived as being endorsed by the school, from independent exploration by students in the school library. Justice Brennan's language in the plurality opinion seems well suited to the Internet as well:

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." Keyishian v. Board of Regents observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom.⁵⁴

Libraries are certainly not required to provide minors' with access to sexually explicit or other expression. However, the Supreme Court's recognition of students' First Amendment rights is significant because of the logic that undergirds that recognition. Lawmakers and librarians should resist limiting the material which minor patrons are permitted but not required to access because the information accessed may be valuable in itself, because such access is necessary to individual thought and expression, because disparate information is often challenging and thought-provoking, because the process of sorting through such information is excellent training for broader participation in society, and because imposing limits undermines the toleration and respect—for other people, other ideas, and for the Constitution—that we claim to value.

This does not necessarily lead to the conclusion that there should be no limits on the information available to children, even in libraries. Certainly, depending upon age, level of development, setting, and nature of material, some expression may indeed be inappropriate. What the Court's logic argues for however, is hesitation before using technological or other means for restricting children's access to Internet content, and sensitivity if it is ultimately thought necessary to do so.

ABOUT THE AUTHOR

Fred H. Cate is Professor of Law, Louis F. Niezer Faculty Fellow, and Director of the Information Law and Commerce Institute at the Indiana University School of Law-Bloomington; and Senior Counsel for Information Law, Ice Miller Donadio & Ryan, Indianapolis, Indiana.

Professor Cate is the author of *The Internet and the First Amendment: Schools and Sexually Explicit Expression* (Phi Delta Kappa 1998).

REFERENCES

1. American Library Association, *Banned Books Week, Sept. 20-27, Celebrates the Right to Read* (Sep. 1997).
2. Red Lion Broadcasting Company v. Federal Communications Commission, 395 U.S. 367, 386 (1969).
3. American Library Association, *How Many Libraries Are on the Internet?* (Feb. 1998).
4. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 101(a), 254(b)(6), 254(e), 110 Stat. 56, 72-73 (to be codified at 47 U.S.C. §§ 254(b)(6), 254(e)).
5. First Report and Order (FCC 97-158), CC Docket No. 96-45, 1997 FCC LEXIS 2332 (May 7, 1997) (FCC report and order).
6. *President Clinton's Message to Congress on the State of the Union*, *NEW YORK TIMES*, Feb. 5, 1997, at A20.
7. U.S. CONST. amend. I.
8. *Smith v. California*, 361 U.S. 147, 152-53 (1959).
9. *Id.* at 153.
10. *Id.* at 153-154.
11. 354 U.S. 476, 485 (1957).
12. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
13. *Paris Adult Theater v. Slayton*, 413 U.S. 49, 92-93 (1973) (Brennan, J., dissenting).
14. 413 U.S. 15, 24 (1973).
15. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).
16. 413 U.S. 15, 20; *Jenkins v. Georgia*, 418 U.S. 153 (1974).
17. *Pope v. Illinois*, 481 U.S. 497 (1987).
18. 394 U.S. 557 (1969).
19. *Id.* at 568.
20. *Id.* at 565.
21. *New York v. Ferber*, 458 U.S. 747 (1982).

22. *Ginsberg v. New York*, 390 U.S. 629 (1968); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *Upper Midwest Booksellers Association v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985).
23. Burns Indiana Code Annotated § 35-49-2-2 (1995).
24. A person who knowingly or intentionally:
- (1) Disseminates matter to minors that is harmful to minors;
 - (2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;
 - (3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet (500') of the nearest property line of a school or church;
 - (4) Engages in or conducts a performance before minors that is harmful to minors;
 - (5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian; . . . commits a Class D felony.
25. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).
26. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983).
27. *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, ___ U.S. ___, 116 S. Ct. 2374 (1996); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989).
28. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 749 (1978).
29. New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, FCC No. 87-153, 62 Rad. Reg. 2d (P&F) 1218 (1987) (public notice).
30. The Supreme Court has justified applying a lower standard of First Amendment scrutiny to regulations affecting radio and television broadcasting, based on a variety of rationales, the most prominent of which is the scarcity of the electromagnetic spectrum that broadcasting requires. In *Red Lion Broadcasting Company v. Federal Communications Commission*, the unanimous Court reasoned: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. 367, 388 (1969).
31. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).
32. 492 U.S. 115 (1989).
33. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-297, 102 Stat. 424 (amending 47 U.S.C. § 223(b) to prohibit obscene and indecent telephone calls).
34. 492 U.S. at 126.
35. *Id.* at 128 (citations omitted) (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980)).
36. Burns Indiana Code Annotated § 35-49-2-2 (1996).
37. *Id.* § 35-49-3-3.
38. *Id.* § 35-49-3-4.
39. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501 *et seq.*
40. *Reno v. American Civil Liberties Union*, ___ U.S. ___, 1997 U.S. LEXIS 4037 (1997).
41. Telecommunications Act of 1996, § 502(e).
42. *Id.* § 502(d).
43. ___ U.S. at ___, 1997 U.S. LEXIS 4037, *67 (citation omitted).
44. *Resolution on the Use of Filtering Software in Libraries*, adopted by the American Library Association Council, July 2, 1997.
45. *Library Bill of Rights*, adopted by the American Library Association Council, June 18, 1948, amended Feb. 2, 1961 and Jan. 23, 1980.
46. *Free Access to Libraries for Minors*, adopted by the American Library Association Council, June 30, 1972, amended July 1, 1981 and July 3, 1991.
47. *Access for Children and Young People to Videotapes and Other Nonprint Formats*, adopted by the American Library Association Council, June 28, 1989.
48. *Carlin Communications, Inc. v. Federal Communications Commission*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 928 (1988).
49. ___ U.S. at ___, 1997 U.S. LEXIS 4037 at *20.

50. American Civil Liberties Union v. Reno, 929 F. Supp. 824, 853 (E.D. Pa. 1996) (Sloviter, C.J., concurring), *aff'd*, ___ U.S. ___, 1997 U.S. LEXIS 4037 (1997).

51. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

52. 457 U.S. 853 (1982).

53. *Id.* at 857.

54. *Id.* at 868-69 (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Keyishian*, 385 U.S. at 603) (citations and footnote omitted).