

The following document is from:

## ***Safe and Responsible Use of the Internet: A Guide for Educators***

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### ***Part III. Legal Issues - Internet Use in School***

#### ***1. District Liability Related to Access to Inappropriate Material or People***

##### **Avoiding Liability and Controversy**

Far too many school districts have installed filtering software thinking that such measures are necessary to protect the district against liability. Many filtering software companies use fear of litigation as a marketing tool. An example from the marketing literature for one such product reads:

Protect your school from legal liability

Letting students or staff surf anywhere on the internet may lead them to stray to inappropriate sites. This kind of activity can lead to lawsuits, harassment charges, and even criminal prosecution. Protect your students and your school by promoting intelligent Internet use<sup>1</sup>.

The *NRC Report* noted the degree to which avoidance of liability and controversy was the motivating factor for the use of filtering.

While filters are designed to reduce children's access to inappropriate material on the Internet, there are some interesting psychological and social phenomena related to their use. In most of the schools and libraries that the committee visited, teachers, librarians, and administrators told the committee that filters played a very small role in protecting students and library users from inappropriate material, large because most of these students and library users had unfiltered Internet access somewhere else (usually at home). ... nevertheless, the school or library filter served a useful political purpose in forestalling complaints from the community about "public facilities being used for shameful purposes." In virtually every school the committee visited, avoiding controversy and/or liability for exposing children to inappropriate sexually explicit material was the primary reason offered for the installation of filters<sup>2</sup>.

## **Statutory Immunity**

Although there are no cases directly on point it is probable that schools will enjoy statutory immunity for harm if a student accesses material placed by a third party on the Internet. This immunity was established through a section of the Computer Decency Act of 1996<sup>3</sup>. Other sections of the Computer Decency Act were ruled unconstitutional, however, this section remains in force and has been upheld in a number of court cases. §230(c)(1) provides:

- (1) TREATMENT OF PUBLISHER OR SPEAKER- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

As to whether an education institution offering Internet access to its students is an "interactive computer service", the question is directly addressed by §230(e)(2):

The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by *libraries or educational institutions*<sup>4</sup>.

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<sup>1</sup> From the SurfControl brochure for CyberPatrol. When the I received a copy of this brochure at the 2001 NECC Conference, I questioned the SurfControl staff about these assertions. The staff indicated that they were not aware of any district that had been found liable for misuse of the Internet. To include such statements in the brochure absent any evidence of potential liability raises concerns of false or misleading advertising.

<sup>2</sup> *Id.* at 12.1.2 (footnotes omitted).

<sup>3</sup> 47 U.S.C.A. §230(c)

<sup>4</sup> Emphasis added.

§230(d)(3) provides:

- (3) STATE LAW- Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

In sum, §230(c)(1) provides that an "interactive computer service" is not to be treated the same as a content provider; §230(e)(2) provides that an education institution offering Internet access is an interactive computer service; and §230(d)(3) provides that inconsistent state laws may not be used as a basis of liability.

The word "immunity" is not in the statute itself. But in *Zeran v. America Online, Inc.*,<sup>5</sup> the Fourth Circuit Court of Appeals expressly held that "[b]y its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service<sup>6</sup>."

In a more applicable case, *Kathleen R. v City of Livermore*<sup>7</sup>, a mother of a teenage boy sued the library because her son had accessed sexually explicit pictures through the library's Internet service. The City made two arguments based on §230. The first argument was that §230 provides federal immunity from liability to service providers for the speech of third-party content providers. The second argument was that in enacting §230, Congress preempted any state law which may be to the contrary. The action was dismissed. The dismissal was upheld on appeal<sup>8</sup>.

The appellate court found that under CDA, the library was an interactive service provider and was entitled to immunity under §230(c)(1). The court noted that although the purpose of CDA was to prevent minors from getting access to pornography, Congress made a deliberate policy choice not to subject those providing Internet access to tort liability.

## Impact of CIPA

On its face, there is no language in CIPA that would establish liability of a school district. The liability issue was raised during the FCC proceedings in the development of CIPA regulations. Here is the pertinent section of the FCC Order discussing this issue:

34. A large majority of commenters express concern that there is no technology protection measure currently available that can successfully block all visual depictions covered by CIPA. Such commenters seek language in the certification or elsewhere "designed to protect those who certify from liability for, or charges of, having made a false statement in the certification" because available technology may not successfully filter or block all such depictions. Commenters are also

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<sup>5</sup> 129 F.3d 327 (4th Cir. 1997)

<sup>6</sup> *Id.* at 330.

<sup>7</sup> Cal. Ct. App., 1st App. Dist., A086349, 3/6/01)

<sup>8</sup> URL: <http://www.techlawjournal.com/courts/kathleenr/Default.htm>

concerned that technology protection measures may also filter or block visual depictions that are not prohibited under CIPA.

35. We presume Congress did not intend to penalize recipients that act in good faith and in a reasonable manner to implement available technology protection measures. Moreover, this proceeding is not the forum to determine whether such measures are fully effective<sup>9</sup>.

Based on the language of the law and the comments of the FCC, it appears unlikely that CIPA has raised a potential basis for liability.

## **Informed Consent**

Unfortunately, CIPA could have raised expectations in the minds of parents that a school district's use of filtering would totally protect their child. The plain facts are that *no* approach will ever be successful in totally preventing children using the Internet from accidentally or intentionally accessing inappropriate material or coming into contact with a dangerous individual. Such risks are inherent with the use of the technology. The risks must be addressed through effective education and supervision and balanced against the benefits of using the Internet for educational purposes.

Districts should not amplify the potential risk of liability (or controversy) by promising that the District Safe and Responsible Use Plan will prevent such access or contact. Honest disclosure of the potential risks and the strategies that have been adopted to address the risks is the most appropriate approach to address these concerns.

- Always make it clear to parents and to the community that the district is engaging in a good faith effort to address the concerns, but that given the nature of the Internet, no strategy can ever be assumed to be totally effective.
- Include a disclaimer of liability in the policy and the agreement that parent/guardians sign granting permission for their children to use the Internet.

The following statement is example statements that can address the concerns:

### "Information for Parents about Student Use of the Internet

The Internet is a global information and communication network that provides a tremendous opportunity to bring previously unimaginable education and information opportunities to our students. Through the Internet, students can access up-to-date, highly relevant information that will enhance their learning. Students also have the opportunity to communicate with other people from throughout the world. Use of the Internet for

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<sup>9</sup> Federal Communications Commission, *In the Matter of Federal-State Joint Board on Universal Service Children's Internet Protection Act. Report and Order*. April 5, 2001.

URL: [http://www.fcc.gov/Bureaus/Common\\_Carrier/Orders/2001/fcc01120.doc](http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2001/fcc01120.doc).

enriching educational activities will assist in preparing students for success in life and work in the 21st Century.

The Internet is, however, a public space. As is true with all public spaces, there is a potential that students may come into contact with potentially harmful or inappropriate material or people. Therefore use of the Internet by young people necessarily raises concerns about safety and security. Young people may also use the Internet to engage in actions that are ethical, legal and responsible. Schools that provide Internet access to students have an obligation to help students learn to use the Internet in a safe and responsible manner.

The following Safe and Responsible Internet Use Plan addresses the strategies the District will utilize to create an environment that will support the safe and responsible use of the Internet by students. The District's Internet Safe and Responsible Use Policy and Regulations contain the specific guidelines necessary to implement this Plan. The Student Internet Use Policy addresses student responsibilities related to this Plan. Through this Plan the district seeks to:

- Establish an appropriate environment that will support the safe and responsible use of the Internet by students in school
- Impart to students the knowledge, skills, and motivation to use the Internet in a safe and responsible manner regardless of where or how they have access to the Internet.

#### Limitation of Liability

Due to the nature of the Internet, there can be no absolute guarantee that the implementation of the safe and responsible use measures contained in this Plan, including the Technology Protection Measure, will fully protected against access to material or people that may be considered inappropriate or potentially harmful. The district will not be responsible for any damage students may suffer if they accidentally or intentionally are exposed to such materials or people. Use of the system by students will be limited to those students whose parents have signed a disclaimer of claims for damages against the district."