

**OP. NO. 04-073**

**LIBRARIES: STATE LIBRARY AND LIBRARY BOARD — STATE AND FEDERAL AID.**

**Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may require that such libraries adopt Internet safety policies preventing access to visual depictions of obscenity, child pornography, and other illegal materials; requirement should allow patrons to disable filters to conduct bona fide research or for other lawful purposes. Absent such spending authority, Library may not dictate measures to prevent on-line access to illegal materials.**

Mr. Peter E. Broadbent Jr.  
Chairman, The Library Board  
September 22, 2004

**Issues Presented**

You ask several questions regarding the relationship between the Library Board and local libraries with respect to their use of electronic filtering.

**Response**

It is my opinion that the Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may impose a requirement that such libraries adopt Internet safety policies that include the operation of technology protection measures that prevent access to visual depictions of obscenity, child pornography, and other illegal materials. Any such funding requirement should also allow patrons to disable filters for the purpose of conducting bona fide research or for other lawful purposes.

In the absence of such spending authority, the Library is without authority to dictate to local or regional libraries measures to prevent on-line access to illegal materials. The General Assembly, however, may impose upon such libraries constitutional requirements limiting computer Internet access to obscenity, child pornography and other illegal materials.

## Applicable Law and Discussion

You first ask whether the Library of Virginia may provide a local library with access to electronic information databases acquired with federal funds, without certification from the library that its Internet safety policy complies with § 9134(f)(1) of the Library Services and Technology Act.<sup>1</sup>

Section 9141 of the Library Services and Technology Act provides grants to states to "carry[] out ongoing library activities and projects."<sup>2</sup> In order to be approved to receive federal assistance under the Act, the Library of Virginia must submit to the Director of the Institute of Museum and Library Services a state plan<sup>3</sup> identifying Virginia's library needs and programs.<sup>4</sup> Section 42.1-1 designates the Library of Virginia as "the library agency of the Commonwealth." The Library is under the direction of the Library Board, a corporation whose members are appointed by the Governor.<sup>5</sup> Chapter 3 of Title 42.1, §§ 42.1-46 through 42.1-59, establishes the Library Board's spending and distribution authority. The Library has a corollary duty to supervise the manner in which state and federal monies are administered.<sup>6</sup> Thus, the Library may require, as a condition for funding access to on-line databases, that local and regional libraries adopt policies to protect patrons, particularly minors, from Internet obscenity, child pornography, and other illegal materials.<sup>7</sup> Such a requirement may include a mandate that recipients of such aid use filtering software or other technology protection measures to avert patron access to illegal materials.<sup>8</sup>

You next ask whether the Library Board may require all local public libraries to use mandatory electronic filtering similar to the filtering software approved by the Supreme Court of the United States.<sup>9</sup> Further, you inquire whether the Board may require a local public library that elects to receive state aid under § 42.1-52, to certify that it uses such mandatory electronic filtering.

While affirming the constitutionality of the Children's Internet Protection Act,<sup>10</sup> the United States Supreme Court rejected the notion that our public libraries constitute a "designated public forum."<sup>11</sup> The Court characterized Internet access at public libraries as a "'technological extension of the book stack.'"<sup>12</sup> The Supreme Court also rejected the district court's conclusion that a library's inability to review every website undercuts its traditional discretion to make content-based decisions about quality and suitability of materials, and made the following observations:

A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these judgments to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.<sup>[13]</sup>

In order to be sensitive to important First Amendment concerns that may arise when technology protection measures are employed in public libraries, if the Library Board imposes funding conditions on state-aid recipients, it must also ensure that any state or federal funding requirement mandating that technology protection measures be used in local or regional public libraries also require that such technologies be readily disabled by adult patrons seeking to engage in bona fide research or any other lawful purpose.<sup>14</sup>

While Virginia law vests the Library Board with discretion to distribute state and federal monies and to thereby promote establishment of quality, comprehensive library services throughout the Commonwealth, there is no general statutory authority, apart from the Board's spending powers, that authorizes the Library Board to impose upon local or regional libraries restrictions on patron access to Internet materials.<sup>15</sup> The General Assembly, however, does have authority over local and regional library boards, as they are creatures of statute, and may impose constitutional limitations on patron access to illegal materials online in local and regional libraries.<sup>16</sup>

In the absence of such legislation, or receipt of state or federal aid that supports technological innovation in libraries, local and regional libraries may adopt collection and library development policies that reflect local interests, community standards and sensibilities. Under its general mandate "[t]o give direction, assistance and counsel to all libraries in the Commonwealth"<sup>17</sup> the Library Board may recommend to the local and regional libraries any measures that the Board deems useful to improve the administration and maintenance of these libraries.

## Conclusion

Accordingly, it is my opinion that the Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may impose a requirement that such libraries adopt Internet safety policies that include the operation of technology protection measures that prevent access to visual depictions of obscenity, child pornography, and other illegal materials. Any such funding requirement should also allow patrons to disable filters for the purpose of conducting bona fide research or for other lawful purposes.

In the absence of such spending authority, the Library is without authority to dictate to local or regional libraries measures to prevent on-line access to illegal materials. The General Assembly, however, may impose upon such libraries constitutional requirements limiting computer Internet access to obscenity, child pornography and other illegal materials.

<sup>1</sup>20 U.S.C.A. § 9134(f)(1)(A)-(B) (West 2003 & Supp. 2004) (prohibiting use of federal funds by public library to purchase computers, unless library has and enforces "policy of Internet safety for minors" that includes "technology protection measure" that protects against computer Internet access to visual depictions of obscenity, child pornography, and other material that is harmful to minors); see also 47 U.S.C.A. § 254(h)(6)(B)(i), (C)(i) (West 2001) (providing that libraries having Internet access may not receive services at discount rates, unless they submit certification that they are enforcing technology protection measures with respect to minors and adults).

<sup>2</sup>20 U.S.C.A. § 9123(b)(1) (West 2003).

<sup>3</sup>*Id.* § 9134 (West 2003 & Supp. 2004).

<sup>4</sup>See *id.* § 9122 (West Supp. 2004); see also §§ 9121, 9123, 9131, 9134, 9162 (West 2003 & Supp. 2004); §§ 9132, 9133, 9151 9161, 9163 (West 2003); § 9141 (West Supp. 2004).

<sup>5</sup>Va. Code Ann. § 42.1-2 (LexisNexis Repl. Vol. 2002).

<sup>6</sup>See § 42.1-1(8) (LexisNexis Repl. Vol. 2002) (vesting State Library with power and duty "[t]o administer and distribute state and federal library funds in accordance with law and its own regulations to the city, county, town and regional libraries of the Commonwealth").

<sup>7</sup>Section 42.1-36.1(A) requires every library board, or the governing body of a locality that has not established a library board, that receives state funds to file, on a biennial basis, "an acceptable use policy" governing Internet access. The policy must contain provisions designed to prevent library employees and patrons from using public library computers to obtain illegal material from the Internet. See § 42.1-36.1(A) (LexisNexis Repl. Vol. 2002). Additionally, the policy must seek to (1) "prevent access by library patrons under the age of eighteen to material which is harmful to juveniles," and (2) "establish appropriate measures to be taken against persons who violate the policy." *Id.*

<sup>8</sup>See § 42.1-36.1(B).

<sup>9</sup>Congress enacted the Children's Internet Protection Act "to address the problems associated with the availability of Internet pornography in public libraries." *United States v. Am. Library Ass'n*, 539 U.S. 194, 198 (2003). "Under the Act, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that it harmful to them." *Id.* at 199. The Court found that the use of Internet filtering software by public libraries does not violate library patrons' First Amendment rights, that the Children's Internet Protection Act imposes no unconstitutional condition on public libraries, and that the Act is a valid exercise of Congress' spending power. *Id.* at 214.

<sup>10</sup>See Neighborhood Children's Internet Protection Act, Pub. L. No. 106-554, 2000 U.S.C.C.A.N. (114 Stat.) 2763, 2763A-350 to -352.

<sup>11</sup>*Am. Library Ass'n*, 539 U.S. at 205 ("Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum.").

<sup>12</sup>*Id.* at 207 (citation omitted).

<sup>13</sup>*Id.* at 208.

<sup>14</sup>*Id.* at 209.

<sup>15</sup>Comparing public libraries to public broadcasting and public arts funding (*id.* at 204-05), the Court recognized that library access policies, including those decisions effecting Internet access, are inherently content-based, stating that "[p]ublic library staffs necessarily consider content in making collection decisions and

enjoy broad discretion in making them." *Id.* at 205; *see also* § 42.1-32.1 (providing that none of networking policies of public libraries "shall be construed to interfere with the autonomy of the governing boards of ... public ... libraries.")

<sup>16</sup>"As creatures of statute, [local and regional library boards] function within the ambit of powers conferred by the General Assembly." *Marsh v. Gainesville-Haymarket Sanitary Dist.*, 214 Va. 83, 85, 197 S.E.2d 329, 331 (1973) (powers of sanitary districts).

<sup>17</sup>Section 42.1-1(6) (LexisNexis Repl. Vol. 2002).

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