

Law for Librarians

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Internet, CIPA & Sexual Harassment

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Policies Governing Internet Access

What is “obscene” speech?

Roth v. United States, 354 U.S. 476 (1957). The court held that “obscenity” is not protected speech and defined obscenity as speech that appeals to a prurient interest and is without redeeming social importance.

Memoirs v. Massachusetts, 383 U.S. 413 (1966). The court held that to be obscene, speech must depict specified sexual conduct in a patently offensive way, appeal to a prurient interest and be “utterly” without redeeming social value.

Miller v. California, 413 U.S. 15 (1973). The Court replaced “utterly without redeeming social value” with “lacking in serious literary, artistic, political, or scientific value.” The Court established a three-part test: (1) whether the average person, applying “contemporary community standards” would find the work, as a whole, appeals to the “prurient interest,” (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

What is “harmful to minors” speech?

Ginsberg v. New York, 390 U.S. 629 (1968). The Court upheld as constitutional a state statute providing that a broader category of “obscene” speech is unprotected for persons under 17. The test parallels the obscenity test but the considerations are in the context of offensiveness and serious value for minors.

American Booksellers Assn. v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990) and American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th

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Cir.), cert. denied, 494 U.S. 1056 (1990). Courts have held that a determination of whether material is “harmful to minors” must be made in the context of whether the material would be harmful to the oldest of minors. In other words, material cannot be deemed harmful to minors if it would be constitutionally protected for a seventeen-year old even if one might conclude that it was “harmful” for a five-year old.

Reno v. ACLU, 521 U.S. 844 (1997). The Court noted “that the strength of the Government’s interest in protecting minors is not equally strong throughout the [age] coverage of this broad statute.”

What is child pornography?

New York v. Ferber, 458 U.S. 747 (1982). The Court held that a third category of unprotected speech encompasses portrayals of actual children engaged in sexual activity, regardless of whether the speech in question would otherwise meet the criteria of Miller.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). The Court held that Ferber does not encompass “virtual” child pornography – whether generated by computer or using young-looking adults as actors.

Do library patrons have a constitutional right to unfiltered access to the Internet at the public library?

Children’s Internet Protection Act: CIPA provides that schools and libraries applying for certain funds for Internet access (e-rate discounts or LSTA grants) may not receive such funds unless they certify that they have in place a policy of Internet safety that includes the use of technology protection measures, *i.e.*, filtering or blocking software, that protects against access to certain visual depictions. Specifically, the school or library seeking funds must certify that it has filtering software in place that will block access for minors to visual depictions that are obscene, child pornography or harmful to minors and for adults to visual depictions that are obscene or child pornography. The technology protection measure must be placed on all computers, including those computers used by staff. An administrator may disable the software to enable access for “bona fide research or other lawful purposes.”

Neighborhood Children’s Internet Protection Act: NCIPA provides that libraries and schools receiving Universal Service Discounts must adopt and implement an Internet safety policy that addresses the following issues: (i) access by minors to inappropriate matter on the Internet and World Wide Web; (ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (iii) unauthorized access, including so-called “hacking,” and other unlawful activities by minors online; (iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (v) measures designed to restrict minors’ access to materials harmful to minors. Prior to adopting an Internet Safety Policy, the school or library must hold at least one public hearing or meeting to address the proposed policy. The determination of what material is “inappropriate” is left to the school board, local educational agency, library or “other authority” and no agency of the federal government may interfere in that determination. In other words, a school or library cannot be denied Universal Service Discounts as long as it holds at least one public hearing prior to adopting and implementing a policy that addresses the five criteria mentioned above. The determination of what policy to adopt is left solely to the discretion of the local body.

Reno v. ACLU, 521 U.S. 844 (1997). The Court held that the Communications Decency Act (“CDA”) was unconstitutional because it imposed a vague and overbroad indecency restriction on all Web speech available to minors, thus restricting access by adults to vast amounts of protected speech.

Ashcroft v. ACLU, 535 U.S. 564 (2002) (“*Ashcroft I*”); Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (“*Ashcroft II*”). CDA’s successor, the Child Online Protection Act, parallels the CDA but limits its application to commercial sites and “harmful to minors” speech. *Ashcroft II* held that COPA likely violates the First Amendment because less restrictive alternatives, like filtering, are available and remanded to lower courts.

United States v. American Library Association, 539 U.S. 194 (2003). This case challenged the Children’s Internet Protection Act (“CIPA”) on behalf of public libraries. CIPA requires public and school libraries that accept federal funding for Internet access to install “technology protection measures” on every library computer terminal. The district court (by statute a panel of three judges) found that filters both underblocked and overblocked and that CIPA was invalid because it would require libraries to violate the First Amendment rights of their patrons. In reaching its conclusion the district court held that the provision of Internet access in a public library created a designated public forum – opened up a limitless portal for speech. The district court then concluded that CIPA was content-based and did not satisfy the standard of strict scrutiny because it was not narrowly tailored. The district court held specifically that the disabling provisions did not cure the law’s constitutional defects because the standard permitting disabling for “bona fide research or other lawful purposes” was too broad to be fairly applied and created a stigma when patrons had to ask the library staff to disable.

The Supreme Court reversed-- but without enough justices for a majority opinion:

- Chief Justice Rehnquist (joined by Justices O’Connor, Scalia and Thomas) rejected the idea that the public forum analysis applied, stating instead that public libraries have broad discretion to choose what they bring into their libraries and any problems with overblocking were cured by the disabling provisions. Reliance on the disabling provisions as a cure for any unconstitutionality was based on the Solicitor General’s position -- raised for the first time at the oral argument before the Supreme Court -- that librarians could unblock filters for adults without any explanation or need to ascertain that the request was bona fide. In other words, an adult only needs to request disabling.
- Justice Kennedy concurred, specifically basing his vote for reversal on the Solicitor General’s position that libraries will disable filters without significantly burdening the First Amendment rights of adult patrons. Justice Kennedy noted, however, if the rights of adults to view material on the Internet was burdened it could give rise to a claim in the future that CIPA was unconstitutional as applied.
- Justice Breyer also concurred, noting that his decision rested on the ease of disabling/unblocking.

Can a library be sued by a patron for alleged harm suffered as a result of viewing obscenity, material that is harmful to minors or child pornography?

47 U.S.C. § 230(c)(1) (Section 230 of the federal Communications Decency Act) immunizes “interactive service providers” against state law liability for third parties’ postings. Most state law claims based on unwanted exposure likely will be preempted by the federal law.

Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001). A woman sued a public library, claiming that her twelve-year old son was able to view and download pornography at a public library in Livermore, California. The plaintiff’s claims were summarily rejected, based in part on a provision in the federal Communications Decency Act, 47 U.S.C. § 230, that immunizes service providers against state law liability for third parties’ postings. The Court also rejected the plaintiff’s allegation that the library exhibits obscenity or material harmful to minors by allowing computer use: “[a]ny such implication would be contrary to the library policy attached to the complaint, which among other things, prohibits the use of computer resources for illegal purposes.” The Court also rejected the plaintiff’s conclusory allegation that the librarians help minors to access obscenity and material harmful to minors because “[s]uch lessons would not further the library’s stated mission, and would not be consistent with its policy that computers are to be used only for ‘educational, informational and recreational purposes.’”

Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997). The Court held that Section 230 immunizes America Online against state law claims alleging (1) “unreasonable delay” in failing to remove defamatory messages posted by unidentified third party, (2) refusing to post retractions, and (3) failing to screen for similar postings in future.

Doe v. America Online, Inc., 783 So.2d 1010 (Fla. 2001). A mother sued an individual, Richard Lee Russell, and the Internet Service Provider to recover for alleged emotional injuries suffered by her son after Russell lured the woman’s son and two other minors into sexual activity that he then advertised on AOL and arranged to sell through AOL. The complaint did not allege that Russell used AOL to transmit any images of the minor. The Court followed Zeran and held that AOL was immune from suit.

Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998). A White House employee instituted a defamation action against an online gossip columnist and AOL after the gossip columnist referred to reports that the plaintiff had been violent with his wife. The Court followed Zeran in holding that AOL was immune from suit.

Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Cal. Ct. App.), review granted, 87 P.3d 797 (2004) (pending). The defendant posted email from another person on a Usenet newsgroup alleging that the plaintiff engaged in criminal stalking. Plaintiff sued on a theory of distributor liability for defamation alleging that the defendant was not the “primary publisher” of the defamatory statement, but when disseminating the statement knew, or had reason to know, that it was false and defamatory. The California Appellate Court rejected the reasoning of Zeran, and held that Section 230 did not abrogate “distributor liability” for interactive computer service providers. In describing such providers, the Court explicitly listed libraries as distributors. The Court held that a service provider would not have to pre-screen, but would have to take reasonable steps to remedy a situation after receiving notice. In a footnote, the Court distinguished the Livermore decision and stated without explanation that under the circumstances in Livermore the library would not have had distributor liability. The appeal is pending.

Grace v. eBay Inc., 16 Cal. Rptr. 3d 192 (Cal. Ct. App.), review granted, 99 P.3d 2 (2004), appeal dismissed, 101 P.3d 509 (1004). The plaintiff brought a defamation suit after the defendant posted comments saying that Grace was dishonest and should be banned from eBay. The Court adopted the reasoning of Barrett, but held that Grace’s suit was barred by eBay’s user agreement. The Court explicitly declined to follow Zeran or Livermore. The appeal was later dismissed.

General Guidelines for Internet Use Policies

- Develop clear, specific, objective use policy for Internet terminals. The Internet Use Policy (IUP) should inform patrons about library procedures and consequences if those procedures are not followed. ALA resources for formulating such policies can be found on its Web site at <http://www.ala.org>.
- The IUP should be posted in a clear and conspicuous manner.
- The IUP should state that the library prohibits the use of library equipment to access material that is obscene, child pornography (or, in the case of minors, harmful to minors).
- The IUP should be applied consistently and objectively.
- The IUP should provide an appeal mechanism, even if informal.
- The IUP should alert parents to guidelines relating to minor patrons and should make clear that it is the parents, and not the library employees, who are responsible for monitoring their children's Internet activity.
- Where feasible, the library should provide tutorials on Internet use and the library might consider directing minors to sites developed for children.
- Where filters are used, the IUP must include procedures for disabling filters for adults when the adult asks for disabling; IUP procedures should include a procedure for unblocking sites for minors that are neither obscene, harmful to minors or child pornography.
- Optional steps include the use of privacy screens, recessed monitors, and segregation of terminals.

Policies Governing Harassment and Hostile Work Environment

General Legal Standard: In order to state a case for hostile work environment the plaintiff must show the following:

- (1) the plaintiff is a member of a protected group (e.g., sex, race or religion);
- (2) the plaintiff was subject to *pervasive or severe harassment* that unreasonably interfered with work performance because of his or her membership in a protected group;
- (3) both a reasonable person and the employee would view the behavior as harassment; and
- (4) the employer should be held responsible for the environment.

What is “pervasive or severe harassment”?

Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). The Court recognized that a plaintiff may establish a violation of Title VII of the Civil Rights Act of 1964 by proving that discrimination based on sex has created a hostile or abusive work environment. The Court emphasized that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). The Supreme Court reaffirmed its holding in Meritor that Title VII is violated if the employee is subjected to “discriminatorily hostile or abusive environment” even if the employee does not suffer economic injury or serious injury to her “psychological well-being.” The Court held that the inquiry must examine all the circumstances to determine whether the environment was both objectively and subjectively offensive, including: (1) frequency of the conduct; (2) severity of the conduct; (3) whether it is physically threatening or humiliating or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee’s work performance.

Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Supreme Court reiterated that “simple teasing,” offhand comments and isolated incidents would not amount to a hostile working environment and that Title VII is not meant to be a “general civility” code. The Court held that “we have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.”

Can the library be held liable for the acts of an employee?

Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). The Supreme Court held that employers are not automatically liable for sexual harassment at the workplace, but the lack of notice to an employer would not immediately excuse an employer from liability. Additionally, merely having a grievance procedure would not isolate an employer from agency liability, particularly if the procedure “did not address sexual harassment in particular” and if the procedure required the employee to report the alleged harassment to the supervisor accused of the harassment.

Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Supreme Court held that “an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim.” The Court allowed an employer to show as an affirmative defense to agency liability for a supervisor’s conduct, that the employer “had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer’s safeguards and otherwise to prevent harm that could have been avoided.” The Court also held that “[w]hile proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” Moreover, the Court noted that “while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.” The Court held, however, that no affirmative defense is available if the employee was actually demoted, discharged or received an undesirable reassignment.

Burlington Indust., Inc. v. Ellerth, 524 U.S. 742 (1998). This decision was issued on the same day as Faragher. The Court reiterated the Faragher rule for employer liability and remanded the case for further findings. The Court confirmed that an employer could be liable for a hostile working environment caused by supervisor threats with no tangible job consequences. If such an allegation is made, the employer may raise an affirmative defense.

Can the library be held liable for the acts of a patron?

Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998). Court of Appeals held that an employer can be held liable for sexual harassment caused by customers. The Court of Appeals held that a negligence standard applies to the determination of whether the employer is liable: did the employer fail to remedy a hostile working environment of which managers knew, or in the exercise of reasonable care should have known, existed in the workplace.

Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998). Court of Appeals held that a plaintiff alleging harassment by co-employees or customers must show either that the employer provided no reasonable avenue of complaint or knew of the harassment but failed to address it.

Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997). Court of Appeals held that the employer of a casino employee could be held liable for the actions of a casino patron “where the employer ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”

Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992). District Court held that an employer could be held liable for the sexual harassment of employees by non-employees, including customers.

Can a school be held liable under a theory of harassment for acts of a teacher or another student?

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). A parent brought suit pursuant to Title IX of the Education Amendments of 1972 against the school board alleging that her fifth grade daughter was sexually harassed by another student. The Supreme Court concluded that a private damages action can be brought against the school board in cases of student-on-student harassment where the recipient of the funding (the school board) acted with “deliberate indifference to known acts of harassment in its programs or activities.” The Court held that the school board would be liable only if the harassment was “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). A parent brought suit pursuant to Title IX against the school district alleging that her eighth grade daughter was sexually harassed by a teacher. The Supreme Court held that the school district would be liable for damages if an official at the school, who at a minimum has authority to institute corrective measures on the district’s behalf, has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.

Are there First Amendment considerations when a court is assessing liability for hostile environment claims?

Johnson v. County of Los Angeles Fire Dept., 865 F. Supp. 1430 (C.D. Cal. 1994). The Los Angeles Fire Department promulgated a written policy that prohibited sexually harassing conduct as well as certain materials such as *Playboy* magazine. The plaintiff filed a declaratory judgment action seeking a finding that the prohibition against *Playboy* violated his First Amendment rights. The court applied a balancing test and concluded that the policy violated the First Amendment rights of the firefighters to the extent that it prohibited the private possession, reading and consensual sharing of the magazine at the workplace.

O'Rourke v. City of Providence, 235 F.3d 713, 735 (1st Cir. 2001). Court of Appeals rejected district court's holding that firefighter's reading of pornography in public spaces of a fire station is protected by the First Amendment and that the burden to avoid the pornography is on the plaintiff. The court distinguished Johnson holding that the firefighter plaintiff in this case was "surrounded by pornographic magazines, sexually explicit movies, and nude pictures displayed, with no way to avoid them." The court concluded that the presence of pornography could be considered as evidence (along with the other incidents alleged by the plaintiff) in determining whether a hostile work environment existed.

Stanley v. The Lawson Co., 1997 WL 835480 (N.D. Ohio). The plaintiff was discharged from her job at a grocery store for refusing to stock and sell adult magazines. She contended that the action of selling the magazines would violate her "Christian principles" and created a hostile work environment. In support of her hostile work environment claim, the plaintiff also alleged that on three occasions male customers made "lewd" and sexually suggestive comments to her about the magazines and that the company should have put opaque covers on the magazines to avoid a hostile work environment. The district court rejected her claim.

Baty v. Willamette Indus., Inc., 985 F. Supp. 987 (D. Kansas 1997). The district court held that the First Amendment does not preclude a finding of hostile work environment and that evidence of comments and graffiti could be considered as part of the claim.

Can the display of materials on the Internet be sufficient to create a hostile work environment?

Minneapolis, Minnesota: Twelve librarians sued the Minneapolis Public Library alleging that they were subjected to a hostile work environment “as a result of” an Internet Use Policy that permitted unrestricted access to the Internet by patrons. In May 2001, the Minneapolis EEOC office issued a letter indicating that the librarians had “probable cause” for their claim that they were subjected to a hostile work environment. However, the Civil Rights Division of the Department of Justice declined to pursue the suit on behalf of the librarians. The complaint alleged the claim of hostile work environment was based on seeing images on the Internet accessed by patrons as well as targeted sexual behavior. The case was settled in August, 2003 for \$435,000 dollars (apparently within the limits of the library’s insurance policy). The library also agreed to implement a centralized location for Internet printing, review Internet filtering and enforce its current Internet Use Policy.

Hoffman v. Lincoln Life and Annuity Distributors, Inc., 174 F. Supp. 2d 367 (D. Md. 2001). The following incidents did not create a hostile work environment: (1) one incident in which the plaintiff opened an envelope for her supervisor marked “personal and confidential” and found pornographic pictures; and (2) during screening of supervisor’s email identified a total of 12 emails over a period of 17 months that included 16 text-only sexual jokes and one cartoon with dragons “apparently” mating. The district court held that “[b]ecause Hoffman’s work responsibilities did not require her to handle jokes and other non-work-related materials, she could easily have elected not to read these e-mails after she had ascertained that they were jokes.” Additionally, the court held that “as a matter of law,” the emails and mailing could not constitute “severe and pervasive harassment” where there was no contention or evidence that the mail was “targeted” at her.

Lutz v. Purdue University, 133 F. Supp. 2d 1101 (N.D. Ill. 2001). A professor claimed that he was subjected to a hostile work environment when he logged onto his computer and found two icons that, once opened, were “offensive.” He viewed each for a few seconds. The court held that “[p]ictures of a sexual nature do not rise to the level of sexual harassment.” The district court held also that the incident did not constitute “severe and pervasive” harassment where “it is uncontradicted by Lutz that he viewed the pictures for only a matter of seconds and that the pictures remained on his computer for a matter of days.”

Petrosino v. Bell Atlantic, 385 F.3d 210 (2d Cir. 2004). The Court of Appeals held that the plaintiff’s appeal of a summary judgment verdict against her should be reversed because she had alleged repeated exposure to sexually offensive comments, pictures and graffiti that created a genuine dispute of fact for the jury as to whether it constituted “severe and pervasive” harassment.

Brennan v. Metropolitan Opera Ass'n, Inc., 192 F.3d 310 (2d Cir. 1999). The Court of Appeals held that a jury could not possibly find that the employer had created a hostile working environment on the basis of one incident of sexual banter and the display of sexually provocative pictures of nude and partially clothed men that a male co-worker had put up in an office shared by several assistant stage directors at a theatre.

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). The district court held that the plaintiff had demonstrated "severe and pervasive" harassment amounting to a hostile work environment with evidence of comments and pictures displayed at the workplace.

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990). The Court of Appeals reversed a summary judgment finding for the employer and remanded for further findings on whether the following constituted "severe and pervasive" harassment: name calling, displayed pornography, displayed sexual objects on desks, recurrent disappearances of plaintiffs' case files and work products, anonymous phone calls, and destruction of their property.

General Guidelines for Sexual Harassment Policies

- The library should adopt a harassment policy – with the advice of counsel – that makes clear that the library does not condone, encourage, or tolerate the harassment of employees by other employees or by patrons through the use of any means, whether or not those means include images from the Internet.
- The library should publicize that policy – post it prominently in the library so that every employee and patron is aware of its existence.
- The library should establish confidential procedures for addressing complaints of a hostile work environment by an employee.
- The library should make complaint procedures easily accessible and well known to employees; make sure every current employee receives a copy of that policy and all new employees receive the policy when they start.
- If a complaint comes in, the library should immediately direct that complaint to an employment counselor or legal counsel for investigation – regardless of whether or not it appears to be meritorious. The investigation and complaint procedure can be conducted privately and confidentially to spare the accused embarrassment if the complaint is frivolous. The library should let the person or committee designated to conduct the investigation determine if the complaint has merit.