Matt Cologna

From: Doug Harpool
Sent: Tuesday, February 26, 2013 12:25 PM
To: Matt Cologna
Subject: FW: Hunter v. Salem - Settlement Discussion Pursuant to FRE 408

-----Original Message-----
From: Doug Harpool
Sent: Friday, February 08, 2013 3:39 PM
To: 'Anthony Rothert'
Subject: RE: Hunter v. Salem - Settlement Discussion Pursuant to FRE 408

When will I get your clients answers to interrogatories and be able to take her deposition? Why have you not responded to our requests for that discovery from your client? Both would be important in my evaluation of the legal argument you pose in your email. I can mediate April 30 but I need your clients discovery as soon as possible so I can advise my client on settlement and be prepared for mediation.

The facts you assert in your email are not supported by the record. Perhaps your clients deposition and discovery answers will provide support for your claims. I won't know till I have them. Once I have the discovery if I believe settlement is appropriate I will make that recommendation to my client.

I think the exact procedures followed by my client were specifically and approvingly discussed in the American Library Association Case. Therefore I don't see much merit to your "as applied" challenge. However I withhold my final evaluation until we have your clients discovery which we have been waiting on for several months and is now very much overdue.

-----Original Message-----
From: Anthony Rothert [mailto:Anthony@aclu-em.org]
Sent: Friday, February 08, 2013 3:00 PM
To: Doug Harpool
Subject: RE: Hunter v. Salem - Settlement Discussion Pursuant to FRE 408

In our last email exchange (December 19), you noted you would be "glad to consider" why we contend your clients' in/actions violated the constitution and therefore why a consent judgment is the best course of action for all parties. This email outlines our position.

The Supreme Court case involving Internet filters in libraries, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), was a facial challenge to a federal law requiring certain libraries to include filters. The Supreme Court's decision assumed a viewpoint-neutral filtering program could be utilized and, in fact, viewpoint-neutral filters are employed in most libraries. Furthermore, while fractured, the ALA decision was wholly dependent on the concurrences of both Kennedy and Breyer which held that "if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case." 539 U.S. at 215 (Kennedy, concurrence).

Our lawsuit is an as-applied challenge to your clients' use of a filter configured to block minority religious views in a viewpoint discriminatory manner. While you emphasize in your last email that the they just had the "minimum content filtering recommendations" of Morenet -which you imply provides sort of 'safe harbor' from lawsuit- this is mistaken.

The burden is on the library to ensure that the filtering system is content neutral. Your clients kept their practice in place even after both the head librarian and the board were advised that their system, as configured, engaged in viewpoint discrimination (i.e., after our client informed them of this; something that was confirmed when your client, Ms.Wofford, contacted Ms. Barbara Reading of the State Library). This remained true even though your clients had the ability to change the configuration and knew they had the ability. The result was that our client's attempts to access positive information about minority religions was blocked while positive information about mainstream religious and negative information about minority religions was not blocked. This is the epitome of viewpoint discrimination. The requirement that those, like our client, who wish to view positive information about minority religions repeatedly request that sites be unblocked (when a simple and permanent unblocking of the "occult" category would have sufficed without -as your client readily admitted- allowing access to those websites proscribed by CIPA) worked an additional harm by impose stigma on minority-religious viewpoints. Furthermore, the evidence in this case is that the library would only unblock sites that our client advised should be unblocked for a very short period, re-imposing the viewpoint discriminatory block after a few minutes (e.g., 600 seconds), for no purpose other than to continue engaging in viewpoint discrimination. Finally, there is the shameful daily log of our client's actions, statements, and research at the Salem Public Library after she sought to do research on the other side of your clients' filters. Ms. Wofford's maintenance of that log and subsequent provision of that log to the police is breathtakingly violative of her duties as a librarian. Our library expert's opinion on this is damning.

Our client seeks only nominal damages of $1.00 for the violation of her First Amendment rights in the past and binding assurance that you clients will not return to their viewpoint discriminatory practices in the future. It is important that you realize that she brought this matter to the attention of the director and to the Board and received only negative responses, including a call to the police. It is quite reasonable under these circumstances for her to be unwilling to simply accept your clients' word that they will not return to their old ways. Furthermore, even your last email informed us that your clients, while capable of making filtering decisions independent of your internet content filtering (ICF) provider, have always deferred to Morenet's decisions. Should Morenet decided to over-filter again, we want to ensure that your clients comply with their constitutional obligations.

We are confident that the evidence shows intentional viewpoint discrimination that does not further a compelling government interest. This case is capable of being resolved. Our client only requests $1.00 in damages, so there is no room for downward negotiation. The language of your clients' promise in the consent judgment is negotiable. Our attorneys' fees and costs are also negotiable. But we have made reasonable offers without receiving a serious counter-offer, so the ball is in your clients' court.

Separately, your office has not responded to our requests for available dates for mediation. As a result, we lost the possible mediation dates that were available with Mr. Sher. Currently, Mr. Sher is holding April 30, 2013, for us. Please let me know as soon as possible if that date works for you.

In the meantime, I would like your thoughts about whether mediation is appropriate in this case. Frankly, this case should be resolved without mediation. If your clients are not willing to purpose a meaningful counter-offer, or if our insistence on a consent judgment will create an insurmountable impasse, then mediation would be futile. If so, then perhaps the best course is to ask the court to vacate the ADR referral. Let me know your thoughts on that as well.

Tony Rothert

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-----Original Message-----
From: Doug Harpool [mailto:dharpool@blmhpc.com]
Sent: Wednesday, December 19, 2012 10:20 AM
To: Anthony Rothert
Subject: RE: Hunter v. Salem - Settlement Discussion Pursuant to FRE 408

We are not inclined to settle through entry of any court order. The Library policy always complied with the guidelines set forth in the Supreme Court's most recent opinion on the subject. We are therefore puzzled why you think any damages should be paid. Filtering was unblocked upon request. An offer to unblock sites on a permanent basis was rejected by your client.

Any change to filtering standards was related to changes by the software provider. Salem consistently used the minimum content filtering recommendations of the statewide group when presented with a choice. The current standards were put in place before this lawsuit was filed.

It is possible that learning more about your clients claims could cause us to reevaluate our position. Perhaps the previous statements from her don't fully detail all of her complaints. We will only know when she complies with discovery. Her discovery responses are currently

seriously overdue. You obtained an extension without our objection but the deadline in that extension was several weeks ago. We also have repeatedly requested dates for your clients deposition which we were advised needed to be rescheduled to accommodate her medical care. We will need to take your experts deposition as soon as your clients deposition can be concluded.

I will do my best to persuade my client to forgo any claim for attorney fees or malicious prosecution or abuse of process if you will dismiss this case that should never have been filed. Salem is and always was acting in accordance with the best legal guidance available to them upon the advice of the state system.

Of course if you have case law that indicates unblocking sites on request that have been allegedly "over-filtered" by filtering software does not comply with the constitution please provide me with the authority and I will be glad to consider it and reevaluate our position on settlement.

-----Original Message-----
From: Anthony Rothert [mailto:Anthony@aclu-em.org]
Sent: Tuesday, December 18, 2012 7:06 PM
To: Doug Harpool
Cc: Grant Doty
Subject: Hunter v. Salem - Settlement Discussion Pursuant to FRE 408

Thank you for the response today on an agreeable mediator. I will contact Mr. Sher's office in the morning to determine when he is available. I anticipate that he will not be available before our deadline to complete mediation-- January 4, 2013, so an extension will likely be necessary. I will let you know his first available dates.

In the meantime, I wanted to follow up on our settlement offer of November 16. On the same date, you wrote that you would review and discuss with your clients, but we have heard nothing after November 16 about the possibility of reaching an agreement. Please advise if your clients have a response to our offer. If they have already implemented the policies we are asking for, then it seems that the remaining issue is nominal damages for the period they employed a viewpoint discriminatory block on minority religious views. If settlement is close, then it would be good to avoid taking a spot on Mr. Sher's calendar.

Tony Rothert