

1 THE HONORABLE EDWARD F. SHEA

2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10  
11 SARAH BRADBURN, PEARL  
12 CHERRINGTON, CHARLES  
13 HEINLEN, and the SECOND  
AMENDMENT FOUNDATION,

14 Plaintiffs,

15  
16 v.

17  
18 NORTH CENTRAL REGIONAL  
19 LIBRARY DISTRICT,

20 Defendant

No. CV-06-327-EFS

**MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTIONS IN  
LIMINE**

21 Plaintiffs believe the following evidentiary matters should be resolved in  
22 advance of trial.  
23  
24  
25  
26

1                   **I. THE COURT SHOULD EXCLUDE TESTIMONY OF**  
2                   **BRANCH LIBRARIANS AND LIBRARY BOARD MEMBERS**  
3                   **NOT TIMELY DISCLOSED**

4                   NCRL’s witness list identifies as potential trial witnesses a number of  
5                   branch librarians and a member of NCRL’s Board of Directors who were not  
6                   previously disclosed. Throughout the discovery period, plaintiffs relied upon  
7                   NCRL’s express assurance that branch librarians and board members would NOT  
8                   be testifying, and for this reason did not take their depositions. It would violate  
9                   Rule 37(c) to allow NCRL to present testimony from witnesses who were kept  
10                  hidden until after the close of discovery.

11                  **A. Facts Relevant to Motion**

12                  **1. Branch Librarians and Board Members Were Not**  
13                  **Identified as Witnesses During the Discovery Period**

14                  Rule 26(a)(1)(A) directs that “a party must, without awaiting a discovery  
15                  request” identify “each individual likely to have discoverable information ... that  
16                  the disclosing party may use to support its claims or defenses...” (emphasis  
17                  added). The parties exchanged their initial disclosures in February 2007. NCRL’s  
18                  initial disclosures said this regarding branch librarians:  
19  
20  
21

22                               At this time, it is not known whether any of NCRL’s 31 branch  
23                               librarians will have information necessary for the defense of  
24                               this case. If, as discovery progresses, NCRL believes that it  
25                               will need to consult with any of these individuals, it will amend  
26                               this disclosure.

1 Declaration of Duncan Manville in Support of Plaintiffs' Motions In Limine  
2 [hereafter, Manville Decl.], Ex. A at 3. An identical statement was made regarding  
3 members of NCRL's Board of Directors. Id.  
4

5 On June 18, 2007, NCRL served responses to Plaintiffs' written discovery  
6 requests. Nothing in the text of those answers identified any branch librarians or  
7 board members as persons with knowledge or potential trial witnesses. Id., ¶ 3.  
8 Moreover, in its answer to Request for Production #10, NCRL said: "At this time,  
9 NCRL believes that it has complied with the Initial Disclosure Requirements set  
10 forth in the Federal Rules and that it has done its due diligence to produce  
11 documents responsive to Plaintiffs' First Interrogatories and Requests for  
12 Production. NCRL will continue to supplement its responses as discovery  
13 continues." Id., Ex B.  
14  
15

16 NCRL did indeed supplement its responses to its initial disclosures on  
17 several occasions, but only in the form of additional documents. Id., ¶ 4-6. For  
18 example, on February 12, 2008, NCRL sent a package of additional documents  
19 with a cover letter stating: "Enclosed please find supplemental production to our  
20 initial disclosures." Id., Ex. C. At no time did NCRL send any letter or other  
21 document to supplement the portion of the initial disclosures expressly stating that  
22 branch librarians and board members had not been identified as witnesses with  
23 relevant knowledge. Id., ¶ 6.  
24  
25  
26

1 Plaintiffs relied upon NCRL's assurances, and chose not to undertake  
2 depositions of any branch librarians or library board members. Instead, they  
3 deposed witnesses whom NCRL had identified in its initial disclosures: NCRL's  
4 Director Dean Marney, its Public Services Director Dan Howard, and its  
5 Information Services Manager Barbara Walters. Id., ¶ 7 & Ex. A.

7  
8 **2. NCRL Lists Branch Librarians and a Board Member as  
Witnesses**

9 In its witness list filed on March 24, 2008, NCRL identified for the first time  
10 several branch librarians and a board member as trial witnesses. According to  
11 NCRL, Connie Kuhlman, who has managed both the Grand Coulee and Moses  
12 Lake branches, "will discuss her personal experience with the internet filter,  
13 including instances where individuals have circumvented the filter to obtain illicit  
14 material. She will also discuss her concerns with unfiltered access." Defendant  
15 NCRL's Witness List and Exhibit List (Docket #72) at 4-5. Similar descriptions  
16 are given for Sharon Reddick of the Okanogan branch and Katy Sessions of the  
17 Wenatchee branch. Id. at 5.

18  
19  
20  
21 NCRL also listed Deborah Moore, a member of NCRL's board since  
22 January 2007, as a trial witness to testify "regarding the current Internet Filtering  
23 Policy." Id. at 5-6. Ms. Moore had never been identified as a potential witness in  
24 any previous oral or written discovery. It is unclear from the description what  
25  
26

1 testimony she would offer that differs from that of NCRL’s witnesses Marney,  
2 Howard, and Walters.

3  
4 **B. Legal Argument**

5 Federal Rule of Civil Procedure 37(c)(1) states: “If a party fails to ...  
6 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use  
7 that ... witness to supply evidence ... at a trial, unless the failure was substantially  
8 justified or is harmless.”  
9

10 The four witnesses in question (Kuhlman, Reddick, Sessions, and Moore)  
11 were not identified in initial disclosures under Rule 26(a), and indeed the Rule  
12 26(a) disclosure specifically said that branch librarians would NOT be called as  
13 witnesses unless there was a supplemental disclosure. No supplemental disclosure  
14 was made under Rule 26(e). As a result, Rule 37(c)(1) bars these witnesses unless  
15 NCRL can show substantial justification or harmlessness. Neither of the  
16 exceptions is found here.  
17

18  
19 NCRL’s failure is not substantially justified, given that the proposed  
20 witnesses are all employees of or board members of NCRL. Defense counsel has  
21 had direct access to these witnesses at all relevant times. This is not a situation  
22 where counsel unexpectedly learned of a previously unknown witness with  
23 unexpectedly relevant information. To the contrary, nothing prevented timely  
24 disclosure of these witnesses. Nor is the lack of disclosure harmless. The  
25  
26

1 discovery cut-off was January 18, 2008. Plaintiffs relied on NCRL's  
2 representations during discovery, and did not seek to take depositions of any  
3 branch librarians or board members. It is now too late under the Court's  
4 scheduling order for Plaintiffs to depose the witnesses who were first identified on  
5 March 24. Even if that deadline were to be extended, it would be prejudicial to  
6 Plaintiffs' trial preparation for Plaintiffs to have to depose four new witnesses (and  
7 perhaps undertake other discovery related to those witnesses and their testimony)  
8 in addition to completing the other tasks that must be accomplished before trial.  
9

10  
11 For the foregoing reasons, NCRL should not be permitted to call Connie  
12 Kuhlman, Sharon Reddick, Katy Sessions or Deborah Moore to testify at the trial  
13 of this case.  
14

15 **II. THE COURT SHOULD EXCLUDE HEARSAY**  
16 **TESTIMONY DESCRIBING THE ALLEGED EXPERIENCES**  
17 **OF BRANCH LIBRARIANS**

18 NCRL's summary judgment briefing and witness list strongly suggest that it  
19 may seek to introduce hearsay statements from branch librarians through  
20 administration witnesses like Dan Howard. Such statements fall within no hearsay  
21 exception and should be excluded.  
22

23 **A. Facts Relevant to Motion**

24 The Declaration of Dan Howard (Docket #34) submitted by NCRL in  
25 support of its motion for summary judgment contained several lengthy paragraphs  
26

1 describing as fact information that was relayed to Mr. Howard by others. Some of  
2 this testimony took the form of simple hearsay where Mr. Howard repeated  
3 statements made to him as proof of the matter asserted:  
4

5 Lucile Ames, NCRL's Okanogan branch librarian, reports  
6 having seen inappropriate pornographic materials both on the  
computers and at the printers.

7 Howard Decl., ¶ 11. Other similar statements were hearsay-within-hearsay:  
8

9 Sharron [sic] Reddick, NCRL's Omak Branch Librarian, recalls  
10 specific incidents where patrons where [sic] able to obtain  
11 explicit, pornographic images prior to NCRL's decision to  
12 block Google images. Ms. Reddick advised Mr. Howard she  
13 and her staff felt victimized and even a bit scared when they  
were subjected to the material. She reported that she and her  
staff found the confrontation with the patrons stressful and  
upsetting.

14 Id., ¶ 9. Plaintiffs objected to this use of hearsay on summary judgment, Plaintiffs'  
15 Opposition to Summary Judgment, Docket #53 at 14. n.3, and that issue remains to  
16 be decided by the Court.  
17

18 Meanwhile, NCRL's witness list strongly suggests that NCRL intends to  
19 have Mr. Howard introduce similar hearsay statements from witnesses who were  
20 not disclosed and will not be present in court in any event:  
21

22 With respect to the individual branches, Mr. Howard's  
23 responsibilities include, among other things, management of  
24 personnel. This includes supervision of all NCRL branch  
25 librarians. ... Mr. Howard will discuss his concerns with  
unfiltered access and the impact on branch staff.  
26

1 NCRL's Amended Witness and Trial Exhibit List (Docket # 73) at 3-4. NCRL  
2 may also seek to have such evidence introduced through Mr. Marney:

3  
4 As Director, Mr. Marney serves as the liaison between the  
5 Board and library staff. ... Mr. Marney will also discuss the  
6 other purposes the Internet filters serve ... to include ...  
7 protection of staff and patrons from inadvertent exposure to  
8 illegal, pornographic, or other disruptive and inappropriate  
9 material.

10 Id. at 2-3.

## 11 **B. Legal Argument**

12 To the extent NCRL wishes to introduce evidence that patrons often view  
13 pornography on its library terminals, and that this occurs with such frequency or  
14 severity as to justify measures alleged to violate the First Amendment, there must  
15 be admissible evidence of an actual problem. In a free speech case, "the  
16 government must present more than anecdote and supposition" to support its claim  
17 that an actual problem exists requiring the suppression of speech. United States v.  
18 Playboy Entm't Group, Inc., 529 U.S. 803, 822-23 (2000).

19 Out-of-court statements "offered in evidence to prove the truth of the matter  
20 asserted" are hearsay, FRE 801(c), and are inadmissible under FRE 802 unless they  
21 fall within one of the exceptions enumerated in FRE 803 and 804. Statements  
22 from testifying witnesses such as Mr. Howard or Mr. Marney that branch librarians  
23 told them that pornography was being viewed are offered for precisely this  
24 purpose. No exception applies. The Court should therefore rule in limine that  
25  
26



1 witnesses may not testify to statements by other persons about the existence of a  
2 pornography problem.

3 NCRL may argue that these out-of-court statements of branch librarians are  
4 not offered for the truth of the matter, but instead to show Mr. Howard's state of  
5 mind, or NCRL's understanding of the situation, without regard to the truth. If  
6 NCRL were to make this argument, it would fail. Anecdotes about the viewing of  
7 pornography on NCRL computers would only matter if they were true. If  
8 Mr. Howard and other NCRL policy-makers implemented their filtering policy  
9 based on a false impression that library users were viewing pornography, it would  
10 be no defense.  
11  
12

13  
14 **III. THE COURT SHOULD EXCLUDE HEARSAY FROM**  
15 **NEWSPAPER ARTICLES ABOUT EVENTS ALLEGEDLY**  
16 **OCCURRING IN OTHER LIBRARIES**

17 NCRL seeks to introduce as evidence at trial several newspaper articles  
18 describing events that allegedly occurred at other libraries. The newspaper articles  
19 will be offered for the truth of the matter asserted, and should be excluded as  
20 hearsay.

21 **A. Facts Relevant to Motion**

22 In its motion for summary judgment, NCRL described events that allegedly  
23 occurred in the Minneapolis and Houston public libraries, relying on three  
24 newspaper articles as the sole source of evidence. Docket #28 (motion), #30-5  
25  
26

1 (Exhibits F and G to Declaration of Thomas Adams). Plaintiffs objected to these  
2 articles as inadmissible hearsay. Docket #53 at 15, 17. In support of its reply brief  
3 (Docket #61), NCRL submitted a new declaration from Dean Marney to which  
4 were attached the three articles previously submitted, plus thirteen additional  
5 newspaper articles describing other events that had allegedly occurred in libraries  
6 around the country. Docket #64 (Marney Declaration), Docket #64-2 (Exhibits).  
7  
8 The only authentication of the articles was the following passage from  
9

10 Mr. Marney's declaration:

11 NCRL has adduced evidence that allowing unfiltered access  
12 would create a risk to patrons or staff and create and [sic]  
13 unacceptable risk or hostile atmosphere, not only due to  
14 incidents in our library district, but based on my personal  
15 knowledge of other districts' and communities' concerns with  
16 the dangers presented by unfiltered access. (Attached as Ex. A  
17 are true and correct copies of numerous newspaper articles that  
18 I have collected discussing this topic).

19 Docket #64, ¶ 8. There is no further description of any personal experience  
20 Mr. Marney had at any other library system, so it appears that the only source of  
21 his knowledge is the articles that were attached. The Court has not yet ruled on the  
22 summary judgment motion.

23 NCRL's witness list indicates that it intends to introduce ten of these  
24 newspaper articles as trial exhibits. NCRL's Amended Witness and Trial Exhibit  
25 List (Docket # 73) at 9-10 (exhibit numbered 706-15).  
26

1 **B. Legal Argument**

2 A statement found in a newspaper article meets the definition of hearsay  
3 from FRE 801(c): “a statement, other than one made by the declarant while  
4 testifying at the trial or hearing, offered in evidence to prove the truth of the matter  
5 asserted.” NCRL intends to use these articles to prove that certain forms of  
6 unfiltered Internet access led to the events described in these articles, and that those  
7 events caused other library districts and other communities to develop “concerns  
8 with the dangers presented by unfiltered access.” The articles may also contain  
9 hearsay within hearsay, which is further prohibited under FRE 805.  
10

11  
12 “Newspaper articles have been held inadmissible hearsay as to their  
13 content.” Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991). See  
14 also Tyson v. Willauer, 290 F. Supp. 2d 278, 287 n. 5 (D. Conn. 2003) (two  
15 newspaper articles attached to motion for summary judgment are excluded as  
16 hearsay); United States v. Harris, 271 F.3d 690, 696 (7th Cir.2001) (“daily  
17 newspapers are not reliable evidentiary sources”); Articulate Systems, Inc. v.  
18 Apple Computer, Inc, 53 F. Supp. 2d 62, 75 (D. Mass. 1999) (article from trade  
19 publication was inadmissible hearsay); Fitzgerald v. Town of Kingston, 13 F.  
20 Supp. 2d 119 (D. Mass. 1998) (newspaper article “is inadmissible hearsay”).  
21  
22

23  
24 NCRL seeks to introduce the hearsay statements in these articles as proof of  
25 what happened in other cities, but the reliability of these statements cannot be  
26

1 tested in court. The finder of fact cannot assess the credibility of a printed article,  
2 nor can it be cross-examined to reveal potential inaccuracies, omissions, or biases.  
3 Plaintiffs recognize that the experiences of other libraries may be probative  
4 evidence for the Court. This is why they designated as witnesses several librarians  
5 and library administrators from other jurisdictions who will testify at trial about  
6 their libraries' successful experience with Internet access that is unfiltered, or with  
7 filtering that is immediately disabled upon the request of an adult patron. These  
8 witnesses include Kenton Oliver from Canton, Ohio; Sally Beasley from Madras,  
9 Oregon; and June Pinnell-Stephens from Fairbanks, Alaska. But unlike NCRL,  
10 plaintiffs will present their proof through admissible evidence in the form of live  
11 testimony of percipient witnesses and not through untestable hearsay from  
12 newspaper articles gathered from the Internet.  
13  
14  
15

16         The Court should order in limine that hearsay from these newspaper articles  
17 cannot be admitted at trial.  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 DATED this 31<sup>st</sup> day of March, 2008.

2 AMERICAN CIVIL LIBERTIES UNION  
3 OF WASHINGTON FOUNDATION

4  
5 By: /s/ Aaron H. Caplan  
6 Aaron H. Caplan, WSBA #22525  
7 American Civil Liberties Union of  
8 Washington Foundation  
9 705 Second Avenue, Third Floor  
10 Seattle, WA 98103  
11 Tel. (206) 624-2184  
12 Fax (206) 624-2190  
13 [caplan@aclu-wa.org](mailto:caplan@aclu-wa.org)

14 Duncan Manville, WSBA #30304  
15 1629 2<sup>nd</sup> Avenue W.  
16 Seattle, WA 98119  
17 Tel. (206) 288-9330  
18 Fax (206) 624-2190  
19 [duncan.manville@yahoo.com](mailto:duncan.manville@yahoo.com)

20 Catherine Crump, pro hac vice  
21 American Civil Liberties Union Foundation  
22 125 Broad Street, 18<sup>th</sup> Floor  
23 New York, NY 10004  
24 Tel. (212) 519-7806  
25 [ccrump@aclu.org](mailto:ccrump@aclu.org)

26 Counsel for Plaintiffs

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the persons listed below:

Thomas D. Adams  
Celeste Mountain Monroe  
KARR TUTTLE CAMPBELL  
1201 Third Avenue, Suite 2900  
Seattle, WA 98101

Attorneys for Defendant

DATED this 31<sup>st</sup> day of March, 2008.

AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON FOUNDATION

By: /s/ Aaron H. Caplan  
Aaron H. Caplan, WSBA #22525  
American Civil Liberties Union of  
Washington Foundation  
705 Second Avenue, Third Floor  
Seattle, WA 98103  
Tel. (206) 624-2184  
Fax (206) 624-2190  
[caplan@aclu-wa.org](mailto:caplan@aclu-wa.org)

MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTIONS IN LIMINE

AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON FOUNDATION  
705 Second Avenue, Suite 300  
Seattle, Washington 98104-1799  
(206) 624-2184