Public Libraries and the Internet

The Supreme Court Upholds Funding Conditions Mandating Internet Filters

— by Deborah Caldwell-Stone —

Throughout the last decade, the proliferation of sexually explicit material on the Internet, as well as the ease with which it can be accessed in a public library, has sparked considerable public controversy and debate. Urged on by "family values" advocates, Congress attempted to address the controversy by adopting laws designed to eliminate or control the availability of online pornography on the Internet as a whole.[1] As quickly as Congress adopted these laws, the courts struck them down as unconstitutional restrictions on speech.[2]

It appears Congress has finally discovered a winning formula for regulating problematic Internet content in the library; namely, requiring public libraries to impose content-based restrictions on Internet use as a condition for receiving federal funding. This strategy passed constitutional muster this past summer when the Supreme Court upheld the Children's Internet Protection Act (CIPA), Congress's third attempt to police Internet indecency.[3] However, an assurance by the Solicitor General that adult users could ask libraries to disable Internet filters, without having to explain their request, curbs the decision's impact on free speech.

Background

Congress passed CIPA in December, 2000 in response to complaints that public funds were underwriting library users' access to sexually explicit materials on the Internet.[4] CIPA requires that, in order to receive federal Internet subsidies, public libraries install "technological protection measures," or filters, on all Internet-capable computers to prevent minors from accessing images that are obscene, child pornography, or "harmful to minors."[5] The law applies to any library receiving benefits from the Universal Service support program ("E-rate")[6] or grants disbursed under the Library Services and Technology Act (LSTA).[7]

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CIPA's approach to Internet regulation—placing conditions on the receipt of federal benefits—represents Congress's attempt to avoid the constitutional infirmities found in its previous efforts to regulate the Internet. Unlike those efforts, CIPA does not directly proscribe protected speech or impose criminal sanctions on Internet content providers.[8] Instead, it seeks to induce libraries receiving federal funds to enforce Congress's desire for a *de facto* ban on pornographic Internet content for all users by requiring libraries to install Internet filters.

CIPA's proponents argue that attaching conditions to federal funding that institutions are free to accept or reject is nothing more than a constitutional exercise of Congress's spending powers, fully justified by the government's interest in protecting minors from possibly harmful materials available online. CIPA's critics, however, charge that the law leaves little choice for libraries and schools needing funding, since the funding measures targeted by CIPA are all programs meant to address the economic disparity between wealthier communities and communities otherwise unable to afford Internet access for their libraries. Critics also fault the law's requirement that libraries use software known to block large amounts of constitutionally protected information on the Internet, while still allowing significant quantities of sexually explicit materials to reach the user.[9]

Librarians, in particular, object to CIPA's imposition of filtering software on the library user. Long committed to promoting First Amendment values, librarians view mandatory Internet filtering as an unconstitutional prior restraint on protected speech,[10] and they immediately identified CIPA as a threat to libraries' ability to provide free access to information on the Internet.

The American Library Association (ALA) and the American Civil Liberties Union (ACLU), together with a group of public libraries, library users, and Internet publishers, filed lawsuits challenging CIPA's constitutionality.[11] The suits alleged that the conditions CIPA placed on the receipt of federal funding were facially unconstitutional because CIPA compelled libraries to violate the First Amendment rights of

library users and surrender their own First Amendment rights, or forfeit funding.[12] The case proceeded under CIPA's provisions for expedited review.[13]

After a two-week trial on the merits, a three-judge panel in the Eastern District of Pennsylvania unanimously found CIPA to be facially invalid.[14] Central to the panel's decision was its conclusion that public libraries create a public forum when they provide Internet access to users.[15] That conclusion required the panel to apply strict scrutiny to CIPA's mandate requiring the use of filtering software on public library terminals.[16]

The panel determined, first, that the government possessed a compelling interest in preventing the distribution of child pornography, illegal speech found to be obscene, or, in the case of minors,materials found to be obscene as to minors.[17] However, it ruled that the mandated use of commercial filtering software on public library Internet terminals was not narrowly tailored with respect to the government's interest in stopping dissemination of illegal speech or speech proscribed for minors.[18] "[A]ny filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors will necessarily overblock substantial amounts of speech that does not fall within these categories."[19] The government could not justify restrictions on constitutionally protected speech on the ground that such restrictions were necessary to suppress the distribution of illegal speech.[20] Moreover, a provision permitting librarians to disable filters did not cure the law's constitutional infirmities because requiring patrons to identify themselves in order to access sensitive or disfavored content imposed an unconstitutional burden on the user's right to access information.[21] The panel concluded by enjoining the federal government from withholding funds from any public library for failing to comply with CIPA.[22]

The Supreme Court Plurality Decision

The government immediately sought Supreme Court review of the panel's judgment. One year after the district court panel filed its judgment, the Supreme Court reversed that decision by a 6-3 vote.[23] Justice Rehnquist, writing the plurality opinion on behalf of Justices O'Connor, Scalia, and Thomas, concluded that CIPA did not induce libraries to violate their patrons' First Amendment rights when it required public libraries to install filters as a condition of receiving federal assistance to provide Internet access.[24]

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In rejecting the plaintiffs' constitutional claims, the plurality refused to adopt the librarians' view that public libraries create a public forum when they provide Internet access.[25] Instead, the plurality found that, in developing collections, librarians traditionally exercise a content-based judgment in deciding what materials are provided to patrons, and collecting only materials of "requisite and appropriate quality," in pursuit of the public library's mission to "facilitate learning and cultural enrichment."[26] The plurality, comparing a public library's decision to provide Internet access to a public television station's exercise of journalistic discretion[27] and the NEA's mandate to make esthetic, content-based judgments in awarding grants based on excellence,[28] determined that public forum analysis and the heightened judicial scrutiny that accompanies forum analysis were incompatible with the discretion public libraries necessarily exercised in developing collections.[29] "In deciding not to collect pornographic material from the Internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision."[30]

Further, the plurality dismissed the dissenting justices' objection that government-mandated Internet filtering blocked adult users' access to substantial amounts of non-obscene, constitutionally protected speech. Pointing to the provisions within CIPA that permitted librarians to unblock or disable the filter for an adult user at the user's request, the plurality found no constitutional difficulties with CIPA's filtering mandate.[31] Similarly, the plurality refused to consider the plaintiffs' alternative claim—that CIPA imposed an unconstitutional condition on the receipt of federal funds. Reiterating the Court's earlier holding in *Rust v. Sullivan*, the plurality emphasized "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program,"[32] and "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."[33]

Breyer's Proposal for Intermediate Scrutiny

While concurring in the plurality's judgment, Justice Breyer repudiated the

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plurality's decision to analyze CIPA "as if it raised no special First Amendment concerns."[34] CIPA, he observed, "directly restricts the public's receipt of information" through limitations imposed by Congress upon "two critically important sources of information"—public libraries and the Internet.[35] But, according to Breyer, it does so by requiring "selection" or "editing" of information, a function libraries properly engage in through necessity (due to scarce resources), or by design (due to deliberate collection development policies).[36] Because libraries are entitled to exercise such discretion, Breyer would not apply strict scrutiny to CIPA's "selection" requirements.[37] Instead, Breyer argued for a form of "heightened scrutiny," to be applied whenever a government-imposed speech restriction involved "complex competing constitutional interests," or where government-imposed speech restrictions were potentially justified by "unusually strong governmental interests."[38] Such "heightened scrutiny" required an analysis of whether CIPA's restrictions were disproportionate in light of the justification for the law.[39]

According to Breyer, CIPA met the constitutional demands imposed by heightened scrutiny. The legislation sought to restrict minors' access to obscenity, child pornography, and materials harmful to minors, a government objective he found "legitimate" and compelling.[40] At the same time, CIPA also contained an exception that allowed librarians to unblock a particular Web site or disable the filter when asked to do so by an adult user, which limited CIPA's harms to protected speech activities.[41] Given the user's ability to request disabling of a library's filter—a burden Breyer saw as "comparatively small"—the speech-related restrictions imposed by CIPA were not disproportionate to its stated purpose of protecting children.[42]

Kennedy: Ability to Unblock Filters is Key

Justice Kennedy's concurring opinion provided the sixth vote upholding CIPA. Dispensing with any analysis of the plaintiffs' arguments concerning public fora or unconstitutional conditions, Kennedy was brief, curt, and to the point. "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case."[43]

Kennedy relied upon the representations made by Solicitor General Theodore Olsen, who assured the nine justices that CIPA permitted libraries to disable the filtering in its entirety, or unblock specific sites at the request of a patron, without requiring the patron to explain why unfiltered Internet access was being requested.[44] Further noting that the findings of fact below failed to demonstrate any significant burden on adult library users' ability to access the Internet, Kennedy concluded CIPA was constitutional on its face.[45] He issued a warning, however, alerting the government and libraries alike that implementing CIPA's unblocking provisions was key to preserving the law's constitutionality:

> If some libraries do not have the capacity to unblock specific websites or to disable the filter or 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.[46]

The Agencies Weigh In

On July 24, 2003, the Federal Communications Commission (FCC) issued its order outlining its rules for implementing and enforcing CIPA in the wake of the Supreme Court's decision upholding the law.[47] The order reinstates the FCC's original Order implementing CIPA for public libraries.[48] Acknowledging that public libraries require time to procure and install filtering software, the FCC granted public libraries receiving E-rate discounts for Internet access or internal connections a one-year time period to come into compliance with CIPA.[49] Thus, public libraries receiving E-rate discounts for Funding Year 2003 (July 1, 2003 through July 1, 2004) are required to certify that they are either already compliant with CIPA, or "undertaking efforts" to comply with CIPA by Funding Year 2004 (July 1, 2004 through July 1, 2005).[50] In the context of CIPA, "undertaking efforts" means "undertaking such actions including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements [of CIPA]."[51] In the view of the FCC, libraries taking action to comply with CIPA's filtering requirement during the present funding year will likely "prepare a budget for the purchase of software and related costs, design, procure, and/or order software appropriate to their systems, install the software and implement a procedure for unblocking the filter upon request by an adult."[52]

The FCC's decision to highlight the library's need to prepare procedures to unblock the library's Internet filter for adult users clearly reflects the FCC's interpretation of the Supreme Court's plurality decision. In setting out the reasoning of the Court, the agency emphasized that "the Supreme Court found that CIPA does not induce libraries to violate the Constitution because public libraries' Internet filtering software can be disabled at the request of any adult user."[53]

The Institute for Museum and Library Services (IMLS) has issued its own guidance for those libraries not subject to FCC guidelines; that is, those libraries not receiving E-rate discounts but which are receiving funding for Internet access and computer hardware through grants made under the Library Science and Technology Act.[54] Like the FCC, IMLS is giving libraries one year to comply with CIPA's filtering mandate, requiring libraries not currently in compliance with CIPA's filtering requirements to certify, during the current funding year (Program Year 2004), that they are "undertaking efforts" to comply with the law by the next funding year (Program Year 2005).[55] Libraries are expected to be in full compliance with the law by the next funding year.[56] IMLS further tracked the FCC's order by quoting the FCC's paraphrasing of the

Supreme Court decision in its guidance to grant recipients.[57]

Bottom-Line Guidance

Despite the Supreme Court's 6-3 vote to uphold CIPA, the fractured opinions undergirding the plurality decision suggest the decision's scope will be relatively limited. While four justices failed to find any constitutional problems with CIPA, the remaining five justices signaled their clear discomfort with imposing mandatory content-based restrictions on adult users' Internet access. The case should not be seen as a sound basis for predicting what the Supreme Court will do when faced with future First Amendment claims concerning the Internet or public libraries, nor should it be interpreted as a wholesale endorsement of mandatory filtering within public libraries.

Attorneys assisting public libraries in complying to with CIPA's mandates should take care to understand the regulatory environment surrounding CIPA. Under CIPA, only the FCC and the Director of the Institute of Library and Museum Sciences are provided with an explicit right to issue regulations and to penalize libraries for failing to comply with CIPA.[58] CIPA does not create a private right of action, and individuals dissatisfied with a library's implementation of the statute are limited to reporting any alleged violations of the law to the FCC or the Director of IMLS.[59] CIPA does not impose criminal penalties, but provides, instead, for the withholding and reimbursement of benefits when a library fails to comply.[60] In this regard, the greater risk of future litigation arises from library patrons using the First and Fourteenth Amendments to mount an "as applied" challenge to CIPA's restrictions.

Notes

1. *See, e.g.*, the Communications Decency Act, 47 U.S.C. § 223 (1996) and the Children's Online Protection Act, 47 U.S.C. § 231 (1997).
2. Reno v. ACLU, 521 U.S. 844 (1997) (Communications Decency Act); ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000) (Children's Online Protection Act).
3. United States v. American Library Ass'n, Inc., 123 S. Ct. 2297 (2003).
4. Public Law 106-554 §§ 1701-1721, codified at 47 U.S.C. § 254(h)(5), (h)(6) (2003); 20 U.S.C. § 9134(f) (2003).
5. 47 U.S.C.§ 254(h)(5)(B) (schools); 47 U.S.C. § 254 (6)(B) (libraries); 20 U.S.C. § 9134(f)(1) (libraries).
6. 47 U.S.C. § 254(h)(1)(B); *See also* Federal-State Joint Board on Universal Service/ Children's Internet Protection Act, FCC 01-120 (March 30, 2001) (Report and Order).
7. 20 U.S.C. § 9141(a)(1) (2003).
8. *See* 20 U.S.C. § 9134(f)(5)(A) (describing sanctions for non-compliant libraries subject to IMLS supervision under CIPA); 47 U.S.C § 254 (6)(F) (describing sanctions for non-compliance for libraries subject to FCC supervision under CIPA).
9. American Library Ass'n, Inc. v. United States, 201 F. Supp.2d 401, 438-450 (E.D. Pa. 2002) (discussion and findings of fact addressing effectiveness of filtering software).
10. American Library Association Policy 53.1.16, Resolution on the Use of Filtering Software in Libraries (1997); *see also* ALA Policy 53.1.6, Restricted Access to Library Materials: An Interpretation of the Library Bill of Rights (Adopted 1973, amended 1981, 1991, and 2000); Office for Intellectual Freedom, American Library Association, *Intellectual Freedom Manual* 245-252 (2002).
11. 201 F. Supp.2d 401 (E.D. Pa. 2002).
12. *Id.* at 407.
13. P.L. 106-554, Appendix D 1741 (2000) (requiring any constitutional challenge to be heard by a three-judge panel and providing for immediate review by the Supreme Court).
14. 201 F. Supp.2d at 496.
15. *Id.* at 469.
16. *Id.* at 470-71.
17. *Id.* at 471-72.
18. *Id.* at 476.
19. *Id.* at 476-77.
20. *Id.* at 479.
21. *Id.* at 488.
22. *Id.* at 495-496.
23. 123 S. Ct. 2297 (2003).
24. *Id.* at 2309.
25. *Id.* at 2304.
26. *Id.*
27. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).
28. National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).
29. United States v. American Library Ass'n, Inc., 123 S. Ct. 2297, 2304 (2003).
30. *Id.* at 2305.
31. *Id.* at 2306.
32. *Id.* at 2308, quoting Rust v. Sullivan, 500 U.S. 173 (1991). In Rust, the Court upheld conditions placed on family planning funds that prohibited recipients from providing abortion counseling.
33. *Id.*
34. *Id.* at 2310.
35. *Id.*
36. *Id.* at 2311.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2312.
41. *Id.*
42. *Id.*
43. *Id.* at 2309.
44. Transcript of Oral Argument, No. 02-361, United States v. American Library Ass'n, Inc. at 4, 11.
45. United States v. American Library Ass'n, Inc., 123 S. Ct. 2297, 2309 (2003).
46. *Id.*
47. Federal-State Joint Board on Universal Service: Children's Internet Protection Act, CC Docket No. 96-45, FCC 03-188 (July 23, 2003) (order).
48. 47 C.F.R. § 54.520; Federal State Joint Board on Universal Service: Children's Internet Protection Act, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182 (2001).
49. FCC 03-188 at ¶ 11.
50. *Id.* at ¶ 12.
51. 47 U.S.C. § 254(h)(6)(E)(ii)(II) (2002).
52. FCC 03-188 at ¶ 11 (July 23, 2003) (order).
53. Id. at ¶9.
54. *Complying With the Children's Internet Protection Act*, Institute of Museum and Library Services (August 1, 2003) (guidelines). Available at http://www.bluehighways.com/docs/Compliance2004.pdf (last accessed on Sept. 28, 2003).
55. *Id.* at 1, 4.
56. *Id.* at 2, 4.
57. *Id.* at 3.
58. 47 U.S.C § 254 (6)(F) (2002); 20 U.S.C. § 9134(f)(5)(A) (2003).
59. *Id.*; see also Gonzanga University v. Doe, 536 U.S. 273 (2002) (counseling that a private right of action should not be read into a federal statute unless Congress clearly intended to confer such individual rights upon a class of beneficiaries).
60. 47 U.S.C § 254 (6)(F) (2003); 20 U.S.C. § 9134(f)(5)(A) (2003 ML