LEGAL UPDATE

Filtering the Internet: The Children's Internet Protection Act

by Martha M. McCarthy

Accompanying the explosive growth of the Internet have been concerns about protecting children from viewing pornographic and other harmful images through cyberspace. In the past few years, Congress has passed several acts to censor Internet sites available to children, but only the Children's Internet Protection Act (CIPA) has received Supreme Court endorsement to date.[1]

CIPA focuses on the *recipients* of Internet transmissions, unlike earlier measures that placed criminal penalties on those transmitting pornographic or sexually explicit materials to minors.[2] Signed into law in 2001, CIPA requires public libraries and school districts receiving federal technology funds to enact Internet safety policies that protect children from access to obscene or pornographic images or other visual depictions harmful to minors.[3] In short, public libraries and schools must install filtering software on their computers as a condition of receiving the federal subsidies. CIPA does not specify which filters must be used and stipulates that the filters can be disabled in certain situations for adult patrons. Under the law, local communities have latitude to decide what materials are inappropriate for minors, and the federal government cannot impose national standards in this regard.

In a six-to-three ruling that reversed the court below, the Supreme Court rejected the facial challenge to CIPA in *United States v. American Library Association*.[4] Chief Justice Rehnquist stated for the Court plurality that Congress has wide latitude to attach conditions to the receipt of federal aid, as long as the conditions are consistent with public policy objectives. Recognizing that Congress cannot induce recipients of federal aid to engage in unconstitutional activities, the plurality concluded that libraries do not violate the First Amendment by using the filtering software required by CIPA. The Court agreed with the government that since public libraries do not have pornographic movies and magazines on their shelves, they should not have to offer patrons access to pornography via library computers.

The Court also distinguished CIPA from earlier provisions, emphasizing that Congress is not imposing criminal penalties under CIPA but is merely conditioning the receipt of certain federal funds on adopting a policy of Internet safety for minors that includes blocking measures. The plurality found that the federal government's refusal to fund an activity differed significantly from the imposition of criminal sanctions for engaging in the activity.[5]

The Court concluded that a library does not acquire Internet terminals to provide a forum for Web publishers to express themselves, any more than it purchases books to provide a forum for the books' authors.[6] The plurality reasoned that the library's primary concern is not to encourage the expression of diverse views, but rather "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[7] The Court considered it irrelevant that the library reviews every book it makes available but does not review all websites; mere provision of Internet access does not create a public forum for expression. With no public forum at issue, the Court reasoned that Congress did not have to pursue alternatives that are less restrictive than filtering software. It even questioned whether less-restrictive options were available, because it is not practical to have librarians police all computer monitors, and moving computers to more secluded areas where others could not inadvertently see the monitors might actually increase pornography viewing.

The plurality reasoned that the ease of disabling the blocking apparatus for individual adult viewers adequately addressed legitimate concerns about filters screening out some constitutionally protected speech. CIPA indicates that the filters can be disabled for adults for bona fide research and other lawful purposes, but during the Supreme Court oral arguments the U.S. Solicitor General conceded that the law would allow adults to ask for filters to be disabled without specifying such purposes.[8]

Justices Stevens, Souter, and Ginsburg dissented in this case, contending that the law went too far in restricting access to Internet materials, because some of the blocked materials represent protected speech. Justices Souter and Ginsburg strongly disagreed with the plurality's conclusion that libraries themselves could impose these content-based restrictions on materials accessible to adults without violating the First Amendment. They distinguished selection decisions from censorship decisions, arguing that the latter should be subjected to the highest level of judicial scrutiny.

Impact on Public Schools

Because only a small portion of schools used Internet filters prior to the enactment of CIPA, this law and the Supreme Court's decision

upholding it affect public schools nationwide. Given the Court's rejection of a facial challenge to the public library component of CIPA, it is quite unlikely that a successful challenge to the public school portion of the law could be mounted. Courts have recognized restrictions on the rights of children that would not be allowed for adults and traditionally have found broader First Amendment rights to access to information in public libraries than in public schools.[9] In the one Supreme Court decision addressing censorship in a public school library, *Board of Education v. Pico,* clear guidance was not provided on the First Amendment issues.[10] In this 1982 ruling, the plurality affirmed the appellate court's remand of the case for trial because of irregularities in the procedures the school board used in removing library books and unresolved factual questions regarding the school board's motivation for the censorship. But even the three justices who would have recognized a protected right for students to receive information noted the broad authority of school boards to remove materials considered vulgar or educationally unsuitable.[11]

In more recent rulings the Supreme Court strengthened the broad discretion of public school personnel to curtail students' lewd and vulgar expression and to censor expression in school-related activities for pedagogical reasons.[12] Therefore, it seems within the school's authority to adopt filtering software for school computers, and indeed, most parents expect schools to shield their children from viewing obscene or sexually explicit materials.[13]

Nonetheless, legislation and litigation pertaining to Internet censorship in schools are especially sensitive because of the tension between safeguarding the free exchange of ideas and protecting children from harmful materials via the Internet, both of which are valid governmental interests. Critics of the Supreme Court's recent decision are primarily concerned that Internet filters block a considerable amount of speech that is protected, including some political expression.[14] Even though CIPA prohibits federal agencies from interfering with the process used in local communities to determine what materials are inappropriate for minors, most schools and libraries are complying with CIPA by purchasing filtering software from a few major companies. Since software companies actually are making the censorship determinations, the decisions may not conform to local norms as much as envisioned.

Public schools are being cautioned about buying filtering systems from organizations connected to any ideological or religious groups or from firms that will not reveal the criteria used to block sites.[15] Once specific filters are selected, school personnel should strive to avoid misunderstandings by providing students and their parents with the criteria used in blocking sites. Of course, schools and libraries can refuse to

install any filters at all if they are willing to forgo the federal subsidies, but few will select this option.

Although the facial challenge to CIPA failed, the possibility remains that a challenge to a specific *application* of the law could be successful. Since the law authorizes, but does not require, librarians to unblock sites upon the request of adult patrons, if a particular library cannot unblock websites or disable the filter (or the process is quite laborious), a legitimate First Amendment challenge to the application of CIPA might be mounted.[16] Another possible challenge to the law's application might include allegations that, because the companies that produce Internet filters decide what materials will be blocked, public school boards are unlawfully delegating their authority to determine the curriculum. Students also might assert that their protected expression is being censored by the software filters. Increasingly, students are creating their own web pages where they post material of interest to them, and if filters overblock student expression that is not vulgar or disruptive, students might have a valid First Amendment claim.[17]

In light of CIPA's requirements, students may be able to receive some Internet messages from classmates through their home computers, but not have access to the messages at school. Thus, one result of CIPA might be the creation of a disadvantaged class of students denied access to certain materials because they do not have computers at home. Even so, those students are not likely to succeed in asserting that CIPA violates equal protection rights or parental rights to direct the upbringing of their children, given the overriding interest in shielding children from viewing harmful materials on the Internet at school.[18]

The Supreme Court's endorsement of CIPA, although clearly a victory for groups trying to shield children from cyberspace pornography, does not resolve all the legal issues. Challenges involving the Internet seem destined to increase, and the Supreme Court recently agreed to review a case involving another federal law that imposes penalties on creators or transmitters of indecent Internet materials for commercial purposes if the materials are known to be accessible to minors.[19] The legal questions go beyond concerns about freedom of speech and the protection of minors; there also are significant privacy concerns related to the increasing ease of cyberspace access to personal information about individuals.[20] Undoubtedly, courts will continue to be confronted with complicated legal issues pertaining to sending and receiving transmissions via the Internet, and this is an area of law that school personnel should carefully watch.

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Notes

1. *United States v. Am. Library Ass'n,* 123 S. Ct. 2297 (2003), upholding 47 U.S.C. § 254 (2003). For a more detailed discussion of litigation involving this law and earlier measures, see Martha McCarthy, "Internet Censorship: Values in Conflict," *Education Law Reporter* (in press).

2. The Communication Decency Act of 1996, 47 U.S.C. § 223, in part criminalized Internet transmissions of obscene or indecent messages to recipients under 18, and these provisions of the law were struck down in *Reno v. ACLU,* 521 U.S. 844 (1997). The Child Online Protection Act of 1998, 47 U.S.C. § 231 (2003), prohibits materials harmful to minors from being distributed for commercial purposes through the World Wide Web and establishes criminal penalties for those knowingly transmitting such materials. This law was struck down by the Third Circuit, and the Supreme Court has agreed to review the ruling. *ACLU v. Ashcroft,* 322 F.3d 240 (3d Cir. 2003), cert. granted, 124 S. Ct. 399 (2003).

3. See 20 U.S.C. § 9101 et seq. (2003) (providing grants to link libraries electronically with educational, social, or information services); and 47 U.S.C. § 254(h)(1) (2003) (providing discounted Internet access for qualifying libraries). In 2002, Congress appropriated more than $200 million under these two programs.

4. 201 F. Supp. 2d 401 (E.D. Pa. 2002), rev'd, 123 S. Ct. 2297 (2003). Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas signed the plurality opinion. Justices Kennedy and Breyer concurred with the judgment but offered slightly different reasoning. Justices Stevens, Souter, and Ginsberg dissented.

5. 123 S. Ct. at 2308 (citing *Rust v. Sullivan,* 500 U.S. 173, 193 [1991]). But see notes 2 and 19; the Court has not yet resolved the constitutionality of the Child Online Protection Act.

6. 123 S. Ct. at 2305. For a discussion of forum analysis, see *Cornelius v. NAACP Legal Defense and Educ. Fund,* 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 47–48 (1983).

7. 123 S. Ct. at 2305.

8. Id. at 2306, citing Tr. of Oral Arg. at 4.

9. For an example of restrictions on the rights of children, see, e.g., *Ginsberg v. New York,* 390 U.S. 629 (1968) (upholding conviction of a store owner who violated the state statutory prohibition on selling obscene materials to minors, even though the material at issue would not be obscene by adult standards).

10. 457 U.S. 853 (1982). Seven separate opinions were written in this case.

11. Id. at 871.

12. See *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988) (censoring expression in school-related activities); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (curtailing lewd and vulgar expression).

13. Kelly Rodden, "The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?" *Fordham Law Review* 71 (2003): 2158–2166.

14. Michael J. Miller, "Weeding Out Spam," *PC Magazine* (August 19, 2003): 7.

15. John Berry, "The Disarray of Defeat: There Is a Small Victory for Free Access in Our CIPA Setback," *Library Journal* (August 15, 2003): 8.

16. See 123 S. Ct. at 2310 (Kennedy, J., concurring); id. at 2319 (Souter, J., dissenting).

17. For a discussion of cases involving disciplinary actions against students for Internet transmissions, see Nelda Cambron-McCabe, Martha McCarthy, and Stephen Thomas, *Public School Law: Students' and Teachers' Rights* (Boston: Allyn and Bacon, 2004), chapter 4; and T. K. Daniel and Patrick Pauken, "The Electronic Media and School Violence: Lessons Learned and Issues Presented," *Education Law Reporter* 164 (2002): 1–15.

18. See Rodden, "Children's Internet Protection Act in Public Schools," 2154–2160.

19. *Ashcroft v. ACLU,* 124 S.Ct. 399 (2003), interpreting the Child Online Protection Act. See note 2.

20. The U.S.A. Patriot Act of 2001, P.L. 107-56, in part expands lawful intrusions into libraries' and bookstores' records, including computer usage, to identify potential terrorists. There are concerns that this law in conjunction with required Internet filters will have a chilling effect on what people read. See "ALA: Exceeding Expectations," *Library Journal* (August 15, 2003): 38.