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MEMORANDUM

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TO: American Library Association

FROM: Thomas M. Susman
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SUBJECT: Implementation Issues Surrounding the Children's Internet Protection Act.

The American Library Association has requested that we examine a number of issues arising under the Children's Internet Protection Act and its governing regulations (collectively, "CIPA") and analyze their potential impact on ALA members. In light of the recent Supreme Court decision declaring CIPA-mandated Internet filtering constitutional and the subsequent Order by the Federal Communications Commission ordering the implementation and enforcement of its CIPA regulations, libraries should either begin preparing to comply with CIPA or should make appropriate arrangements to forego federal funding.[1] This memorandum explores questions recently posed by ALA regarding the implementation of CIPA and sets out our relevant analysis.

1. While establishing its regulations regarding the enforcement of CIPA, the FCC noted its presumption that Congress did not intend to penalize public libraries acting in good faith to comply with CIPA. Accordingly, public libraries putting forth a good faith effort should not expect the FCC to penalize them for instances of unintentional or unavoidable noncompliance. With regard to this presumption, what efforts are sufficient to constitute "good faith"?

There is no specific set of actions that can be identified as satisfying a required "good faith" effort to comply with a federal statute. Rather, a good faith effort depends upon the requirements of the particular statute and the context in which the statute is applied. However, most courts examining the issue have determined that a good faith effort requires the actor to perform duties with *a state of mind* characterized by "(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of

[1] *United States v. American Library Association, Inc.*, 123 S. Ct. 2297 (2003); Federal-State Joint Board on Universal Service:Children's Internet Protection Act, FCC 03-188 (July 23, 2003) (order).

fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[2]

In the context of CIPA, good faith efforts by a public library would likely include: (1) the thorough consideration and analysis of a proposed Internet safety policy in compliance with the statutory and regulatory requirements, (2) the assessment of options relating to installation, maintenance, and enforcement of an Internet filter that the library genuinely believes can afford protection against access to the CIPA-described visual depictions, and (3) the preparation of the certifications required under CIPA. (We use the term "filter" in this memorandum to mean what the statute refers to as "technology protection measure" – including blocking and filtering technology.) Imperfections in the technology will not automatically constitute bad faith, particularly if they were unforeseen. However, each library should have a policy for the prompt handling of any problems with its enforcement of its Internet safety policy or the operation of its Internet filter. Having such a policy in place and abiding by it will assist a library in a good faith analysis.

The FCC recognizes that there is a wide variety of Internet filtering technology currently available and that none of that technology is flawless.[3] Neither the FCC nor CIPA mandates that public libraries use a particular Internet filter or that the filter utilized be completely effective. As long as the library believes that its Internet filter protects, to the extent practicable, against access to obscene visual depictions, child pornography, and, when the computer is used by a minor, visual depictions that are harmful to minors, the filter should be acceptable. Engaging in serious evaluation regarding available Internet filters before choosing a technology will be indicative of a library's good faith effort to comply.

Public libraries that routinely submit untimely certifications, do not submit certifications, certify compliance with CIPA with the knowledge that they are not in compliance, install an Internet filter known to be nonworking, or fail to enforce their Internet safety policy or operate their Internet filter will likely to be found to be acting in bad faith and not in compliance with CIPA. These libraries will be subject to a loss of their federal E-rate or LSTA funding and may have to reimburse the federal government for E-rate funds utilized during noncompliance. Libraries that fail to remain diligent regarding upgrades in Internet filtering technology may also be determined to be acting in bad faith.[4]

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[2] BLACK'S LAW DICTIONARY (7th ed. 1999).

[3] Federal-State Joint Board on Universal Service/Children's Internet Protection Act, FCC 01-120 ¶¶ 34-6 (March 30, 2001) (report and order).

[4] The Restatement (Second) of Contracts states, "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205 cmt. d (1981).

2. What are the implications of failing to make a good faith effort to comply with CIPA?

By failing to make a good faith effort to comply with CIPA, public libraries will be, by definition, in violation of CIPA. Noncompliant libraries are subject to a withdrawal of their federal E-rate or LSTA funding, as well as an obligation to refund all E-rate funds and discounts[5] received during the period of noncompliance.[6] This period of noncompliance includes only the time during which a library has not been making a good faith effort to comply with CIPA. Libraries are expected to return the E-rate funds and discounts received during, but not before or after, this period of noncompliance. For example, a library that is in compliance with CIPA during Funding Year One, but not in compliance during six months of Funding Year Two, will have to return only the E-rate funds and discounts received during the six noncompliant months of Funding Year Two. A library may remedy its noncompliance by ensuring that its Internet safety policy and filtering technology meet the CIPA requirements and by submitting valid certifications of that compliance.[7] Once a library's noncompliance is remedied, its eligibility for federal funding and discounts will be restored.[8]

3. The FCC has recently adjusted compliance dates for CIPA. For Funding Year 2003, libraries without Internet safety policies and technology protection measures must certify that they are undertaking actions to implement an Internet safety policy that meets CIPA requirements to receive the applicable federal funding. For Funding Year 2004, all libraries must certify that they are in compliance with the CIPA requirements to receive the applicable federal funding.[9] What are the implications of a library's choosing to halt efforts to implement an Internet safety policy after Funding Year 2003?

CIPA clearly states that any library "that is unable to certify compliance with [CIPA] requirements in [the] second program year shall be ineligible" for E-rate funding and discounts for that "second year and all subsequent program years…until such time as such library comes into compliance…"[10] CIPA provides only one exception to this withholding of funds for noncompliance in the second program year. If a library is unable to comply due to state or local procurement rules or competitive bidding requirements, it may receive a waiver of the CIPA certification requirements for the second program year, but it will have to undertake the necessary actions to procure an Internet safety policy and Internet filtering technology before the

[5] CIPA does not apply to E-rate funds and discounts for telecommunication, as opposed to Internet, services.
[6] 20 U.S.C. § 9134(f)(5)(A) (2003); 47 U.S.C. § 254 (h)(6)(F)(i)-(ii) (2003).
[7] 20 U.S.C. § 9134(f)(4)(B)(ii) (2003); 47 U.S.C. § 254(h)(6)(E)(ii)(II) (2003).
[8] Id.
[9] Federal-State Joint Board on Universal Service/Children's Internet Protection Act, FCC 03-188 (July 23, 2003) (order).
[10] 47 U.S.C. § 254(h)(6)(F)(iii) (2003). Libraries receiving only LSTA funding are subject to a loss of those funds. 20 U.S.C. § 9134(f)(5)(C) (2003).

start of the third program year.[11] Libraries with waivers will continue to receive federal LSTA or E-rate funding and discounts during the waiver period.[12]

Nonimplementation of CIPA in the second program year will not in itself demonstrate the absence of good faith in certifying that efforts toward compliance were being undertaken in the first year. However, this circumstance is likely to motivate the FCC and public to inquire into the good faith nature of the undertaking that was certified; the burden will likely fall on the library to provide evidence of such good faith, which might include records of review of alternative filters, minutes of meetings with discussions of the library's intent to comply, and similar materials.

4. **If a library is accepting federal funds and not complying with CIPA requirements, who has the right to pursue legal action against the library?**

Two governmental entities are provided the explicit right to penalize libraries for noncompliance under CIPA. The Director of the Institute of Museum and Library Services may withhold future LSTA payments, issue a cease and desist order, or enter a compliance agreement with a library if he "has reason to believe that any [library receiving only LSTA funding] is failing to comply substantially with the [CIPA] requirements."[13] The FCC is granted the right to prescribe regulations for the administration of the penalty provisions applied to libraries receiving E-rate funding or discounts, with or without LSTA funding. No other individuals or entities are granted an explicit right of action under CIPA.

There is no private right of action explicitly created by CIPA. That is, according to the text of CIPA, an individual who encounters objectionable material on a library computer or who cannot access non-offensive material on a library computer may report that information to the Director of the Institute of Museum and Library Services or the FCC, but may not file a civil lawsuit against the library based on an alleged CIPA violation. Federal courts have, in the past, inferred a private right of action from various acts of Congress and have accorded private rights of action under a variety of federal statutes. The Supreme Court, however, recently discussed the propriety of imputing rights of action to private individuals in *Gonzaga Univ. v. Doe*.[14] In that case, the Court stated that a private right of action should not be read into a legislative act or federal statute unless "Congress intended to confer individual rights upon a class of beneficiaries" by its action.[15] The Court noted multiple factors that play a role in deciding whether to adopt a private right of action including: (1) whether the text of the congressional act explicitly grants a private right of action, (2) whether the text of the act focuses on the benefited class of individuals or on the regulated entities, (3) whether the text of the act focuses on benefits to individuals or aggregate groups, (4) whether the act requires absolute compliance or substantial compliance, and (5) whether the act provides for administrative procedures through which individuals can file complaints against the regulated entities.

[11] 20 U.S.C. § 9134(f)(4)(B)(iii) (2003); 47 U.S.C. § 254(h)(6)(E)(ii)(III) (2003).
[12] Id.
[13] 20 U.S.C. § 9134(f)(5)(A) (2003).
[14] 536 U.S. 273 (2002).
[15] Id at 285.

Analyzed under these factors, the text of CIPA, like the text of the federal act in question in *Gonzaga*, does not appear to support the inference that Congress intended individual patrons to be able to bring suit under the act. Rather, it appears that Congress intended for schools and libraries to suffer only a withdrawal and repayment of federal funds under CIPA. Based on the Supreme Court's analysis in *Gonzaga,* it is unlikely that a court would allow an individual library patron to file suit against a library for violation of CIPA.

A patron may, however, have a cause of action against a public library under the First or Fourteenth Amendment (rather than under CIPA): Justice Kennedy's concurring opinion in the *ALA* case raises the specter of an "as-applied" constitutional challenge against public libraries that do not have "the capacity to unblock specific Web sites or to disable the filter."[16] While libraries can avoid such a possibility by ensuring that their filtering technology does have these capacities, it is not clear what such an as-applied challenge would accomplish beyond requiring the library defendant to acquire new technology.

5. What penalties can be levied against a library that is not complying with CIPA? Is violation of CIPA a criminal offense?

As federal legislation enacted pursuant to Congress' spending power, the penalties provided for under CIPA are termination and repayment of federal funds. Libraries that receive E-rate funding or discounts that knowingly fail to submit a certification of CIPA compliance are not eligible for E-rate funding or discounts until they submit a valid certification.[17] Libraries that receive E-rate funding or discounts that do not comply with their certification are ineligible for E-rate funding or discounts for as long as they remain noncompliant and must reimburse all E-rate funds and discounts received during the period of noncompliance.[18] Penalties under CIPA's E-rate provisions are administered by the FCC. Libraries that receive only LSTA funding that fail to institute a valid Internet safety policy may have their LSTA funds withheld or receive a cease and desist order from the Director of the Institute of Museum and Library Services.[19]

CIPA does not provide for any penalties for noncompliance beyond the withholding and reimbursement of federal funding; there are no criminal penalties provided for under CIPA. However, there are federal criminal laws that apply to the submission of fraudulent information or false certifications to the government. *See* 18 U.S.C. § 1001 (2003).

[16] 123 S. Ct. at 2310.
[17] Under CIPA, libraries that receive both E-rate and LSTA funding are required to comply only with the E-rate provisions. 47 U.S.C. § 254(h)(6)(F)(i) (2003).
[18] Id at § 254(h)(6)(F)(ii).
[19] 20 U.S.C. § 9134(f)(5)(A) (2003).

6. Under CIPA, public libraries receiving E-rate funding are allowed to disable the Internet filter "during use by an adult, to enable access for bona fide research or other lawful purpose." A similar provision is not provided for access during use by a minor. Must libraries disable the Internet filter or unblock "overblocked" sites when requested by a minor?

The Supreme Court's holding in *United States v. American Library Association, Inc.* relied, in part, on the legitimate interest of the government in protecting minors from inappropriate material.[20] The Supreme Court has held in multiple cases that protecting minors from access to obscenity and indecent material is a legitimate and compelling government interest.[21] As such, minors have no right to access obscenity or other indecent material. For a library to disable the Internet filter generally during use by a minor, would undermine CIPA's purpose and would violate CIPA.[22] Libraries receiving E-rate funding should not disable their Internet filters at the request of minors.

The Supreme Court emphasized the disabling of the Internet filter for adults and the unblocking of "overblocked" websites at the request of patrons as protection for any constitutional rights that might be infringed by erroneous blocking by the Internet filter.[23] As noted by the Court, "When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site."[24] The Court did not address whether unblocking services must be provided for both minors and adults. However, the Court did emphasize that public libraries have "broad discretion to decide what material to provide to their patrons."[25]

Libraries might consider including within their Internet safety policy a provision allowing librarians to unblock sites at the request of minors after the librarian has made a reasonable decision that the Internet site is not obscene, does not contain child pornography, and is not harmful to minors as defined by CIPA and the local Internet safety policy. This provision, if implemented successfully, would allow minors to access legitimate Internet sites, would avoid the potential of "as-applied" constitutional challenges by minors, and would preserve the library's CIPA compliance.

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[20] 123 S. Ct. 2297 (2003).

[21] See, *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

[22] Under CIPA, libraries receiving only LSTA funding (and not E-rate discounts) are allowed to disable the Internet filter for any patron to access Internet sites for bona fide research or other lawful purposes. 20 U.S.C. § 9134(f)(3) (2003).

[23] "Overblocked" Internet sites are sites that do not contain obscenity, child pornography, or material harmful to a minor, but have been erroneously blocked by a library's Internet filter.

[24] 123 S. Ct. at 2306.

[25] Id at 2304.