COLLECTION MANAGEMENT, CONCEPTUAL ANACHRONISMS, AND CIPA

by Jeremy Mauger

...the claim that cyberspace is deeply and essentially different from "real space" was a compelling one for many scholars. Even though conventional wisdom now rejects the initial exceptionalist claim that cyberspace is inherently more free than "real space," the belief that it is nonetheless inherently different has persisted. At the same time, however, court decisions in cases challenging unauthorized access to web-based information have invoked place- and space-based metaphors to serve a variety of far more pragmatic purposes relating to the demarcation of virtual "property." Perhaps predictably, the tenor of the judicial embrace of "cyberspace" has caused some cyberlaw scholars to rethink their own metaphoric commitments. What began as a relatively narrow critique of the property metaphor's doctrinal and political entailments has now blossomed into a full-blown debate about the merits of cyberspatial reasoning and rhetoric.

from "Cyberspace as/and Space" by Julie Cohen

Simile, metaphor, and analogy help us shape and make sense of the world around us. These conceptual tools give us a framework to compare one item to another or, more importantly, one idea to another. As legal scholar James Boyle has noted, “There is nothing wrong with analogies. They help us understand things that are new by comparing them to things we think we understand better. Analogies are only bad when they ignore the key difference between the two things being analyzed” (Boyle, 2008, p. 107). In the legal sense, analogy gives our judicial system the ability to group seemingly disparate actions or concepts under a unifying and (hopefully) consistent set of rules. This is how precedent is set; by using lessons learned in previous disputes judges, lawyers, and juries are able to create an internally consistent structure for laws which then provide a functional guide for legally acceptable practice. However, this mechanism of metaphor and analogy can have a detrimental effect when applied to circumstances beyond the scope of what has been seen and ruled on before.

Precedent is a powerful tool in the analog world, but in our increasingly digital lives it can hinder progress and even damage our ability to think in new ways. Specifically, the use of physical metaphors to describe virtual circumstances can be inadequate and, quite often, misleading. For the purposes of this article, this kind of comparison will be referred to as a
Conceptual Anachronism. This term will be used to discuss the traditional, precedentiated analogies and metaphors used to describe, categorize and regulate contemporary technology, digital information, and virtual environments. The use of these archaic, physical metaphors can lead to misapplication of the law and the misapprehension of technology.

In *Free Culture*, Lawrence Lessig describes just such a Conceptual Anachronism. In the realm of intellectual property the debate, legislation, and jurisprudence have all made the mistake of falling into a very specific kind of conceptual trap. Lessig advances the idea that, in the case of patent and copyright, the law turns the intangible into property (Lessig, 2004, p. 84). This, in itself, is not necessarily bad or untrue but, when the scope of this analogy is extended into the technological realm, it results in an overly restrictive and Byzantine set of regulations that stifle creativity and curtail the free expression of ideas. The metaphor itself rests on sound reasoning and logical principles but, when extended into our digital lives, it ceases to provide structure and begins to impose limitations on our ability to act in the ways the law originally intended and behave in new ways that only technology can allow. The very word *property* implies a concrete reality which can be weighed, counted, and measured but this “*thingness*” (Id.), as Lessig puts it, is a conceptual dead end in the context of the Internet. Digital objects are non-rivalrous goods and can be shared and copied *ad infinitum* with no loss to the owner. If I steal a copy of a novel from your bookshelf you no longer have that copy, but if I take a digital copy from your website and share it with two thousand friends, your copy still exists and no harm has been done. The issue of compensation to the creator of that copyrighted work is a different story, but I use this example to make an important point. When we use analogies from the physical world and apply them to the Internet, we risk creating a “conceptual muddle” (Moor, 1985, p. 266) which distorts how we understand virtual circumstances. This is what Alfred North Whitehead referred to in his philosophy as the “fallacy of misplaced concreteness” – the “error of mistaking the abstract for the concrete” (1925, p. 51). Not only are these analogies sometimes false, they can result in regulations and legislation which deny us the ability to explore the potential of new technologies. By legally tying the virtual to the physical, the law may limit us.

**Conceptual Justification of CIPA**

The debate around CIPA (the Children’s Internet Protection Act, Title XVII, 2000) has raged for a decade now – the merits and application of this law have been argued again and again. The aim of the law is not necessarily a bad one and it is difficult indeed to disagree that the Internet contains a vast amount of material that is inappropriate for children. Shielding children from violent and pornographic content online is an admirable goal, but the mechanism for accomplishing this, specifically Internet filtering, is what is at issue. Public libraries have largely been caught in the middle of this debate and libraries risk forfeiting federal funding if they do not apply some technological protection measure to filter “obscene” or “harmful”
content when patrons are online (CIPA, 2000, p. 7). The constitutionality of this practice has been a central question in the CIPA debate. Can public institutions such as libraries limit the right of adult patrons to receive information on the Internet? Can constitutionally protected speech be filtered because it may be deemed harmful to minors within the definitions of CIPA? Should the Internet, in a sense, be managed and monitored and are adult patrons harmed by this management? The answer of the judiciary to these questions has rested heavily on a conceptual framework that attempts to reconcile past practice with current technology. This reconciliation in turn rests on extending an analog metaphor into the digital world and the courts have by no means been consistent in their view.

In the eyes of the courts, the constitutionality of Internet filtering in general and CIPA in particular rests primarily on two assumptions. First, even constitutionally protected speech may be filtered and access to this material, even by adult patrons, may be restricted in the interest of protecting children from obscenity. However, the Supreme Court ruled emphatically that any such restriction of adult access must be removed at the request of an adult. The filter must be disabled immediately in order to ensure that the rights of adult patrons are not being trampled.

Justice Kennedy concluded that if, as the Government represents, a librarian will unblock filtered material or disable the Internet software filter without significant delay on an adult user’s request, there is little to this case. There are substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that adult library users’ access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. If some libraries do not have the capacity to un-block specific Web sites 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 this facial challenge (U.S. v. ALA Syllabus, 2003, pp. 3-4).

From a purely conceptual point of view, this rationale does not appear to offer any problems – there is no misleading metaphorical extension of the physical world into the digital one. However, as will be described below, even this straightforward constitutional argument can be subverted when confronted with a Conceptual Anachronism.

The second basis for the Supreme Court’s decision assumes, and indeed requires, that past practice guide a public library’s use of Internet filters. In order to remain constitutional, the Court concluded that Internet filtering must not be a means for excluding or restraining protected speech, it should instead be viewed as a mechanism for selecting desirable speech which the
library deems to be of value and worthy of inclusion in its collection. The historical practice of precise and careful collection management has been a hallmark of good librarianship for decades, if not centuries. Consequently, the Supreme Court heavily relied on this practice when justifying the use of Internet filters. The Court needed a way to legitimize content restrictions in a public venue without exercising Strict Scrutiny and, therefore, latched onto a convenient and superficially sensible metaphor supplied by the plaintiffs. Specifically, the government argued and the Court agreed that public libraries have a long tradition of managing their physical collections by making decisions regarding which items to include or not include based on merit, and tailoring their collections to suit the needs of their audience. The Court reached back to the 1930’s to illuminate this historical practice of book selection quoting Drury’s treatise on the subject, “It is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to its advantage” (Drury, 1930, p. xi). The Court also borrowed from a slightly more contemporary work (only 23 years old at the time); “The librarian’s responsibility . . . is to separate out the gold from the garbage, not to preserve everything” (Katz, 1980, p. 6). These citations served the useful function of justifying the Court’s analogy that collection management (that is the selection of physical items) is directly comparable to filtering Internet content (that is the exclusion of digital information). Inappropriate content was simply not being included in the collection and Internet filters accomplished this goal. Tradition dictated, in the context of the metaphor, that libraries continue the practice of selecting only the “gold” while filtering out the “garbage” (Id.). Free speech and the unfettered access to information were not being restricted because, within the structure of this analogy, libraries were simply continuing to do something they’d always done.

A library’s decision to use filtering software is a collection decision, not a restraint on private speech...a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected (U.S. v. American Library Association, 2003, p. 210).

As Congress recognized, ‘[t]he Internet is simply another method for making information available in a school or library...It is no more than a technological extension of the book stack” (U.S. v. American Library Association, 2003, p. 207).

A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries’ judgments to block online pornography any differently, when
these judgments are made for just the same reason (U.S. v. American Library Association, 2003, p. 208).

Thus the Court relied extensively on a misleading Conceptual Anachronism to legitimize its position as to the constitutionality of CIPA. This rationale is problematic at best and was not, even within the Court, universally accepted. In fact, in a lower court’s discussion of the same case, the decision explicitly rejected this analogy and emphasized the important differences between the physical and the virtual. This lower court described at length the participatory and open nature of the Internet – a feature that has no relationship (metaphorical or otherwise) to traditional collection management.

The fundamental difference between a library’s print collection and its provision of Internet access is illustrated by comparing the extent to which the library opens its print collection to members of the public to speak on a given topic and the extent to which it opens its Internet terminals to members of the public to speak on a given topic… Any member of the public with Internet access could, through the free Web hosting services available on the Internet, tonight jot down a few musings on any subject under the sun, and tomorrow those musings would become part of public libraries’ online offerings and be available to any library patron who seeks them out (American Library Association v. U.S., 2002, pp. 128-129).

It should be pointed out that the Supreme Court here has grossly mischaracterized the purpose and intent of collection management. Traditional collection management is intended to allow public libraries with both limited funds and limited space to choose items that add worth to the collection as a whole while representing the interests of the community they serve. “Librarians have an obligation to… select and support access to materials and resources on all subjects that meet, as closely as possible, the needs, interests, and abilities of all persons in the community the library serves” (ALA Council, 1990). The Court seems to have missed the point that collection management is designed to maximize resources and filtering Internet access is actually more burdensome than not filtering.

Unlike outright book purchase, no appreciable expenditure of library time or resources is required to make a particular Internet publication available to a library patron. In contrast, a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available (Mainstream Louden v. Board of Trustees of the Loudon County Library, 1998, p. 793).

If a library were to have an unlimited budget and an infinite amount of space to house items, then it would surely include a much wider range of material.
The purpose of any collection management policy is to include books that are of the greatest interest and utility, not to remove material that may be contentious or unpopular. “[Evaluation of library materials] is not to be used as a convenient means to remove materials presumed to be controversial or disapproved of by segments of the community” (ALA Council, 1981). This Conceptual Anachronism not only ignored this important point, it actually disempowered librarians from making true collection management decisions.

The analogy between traditional collection development and text-based Internet filtering is flawed. While the analogy has a certain facial appeal, it fails when applied to text-based filtering because librarians are not making judgments about the sites blocked by the filter, but rather, are using filters as a blunt instrument to avoid making judgments. In doing so, they undoubtedly deprive library patrons of many valuable information sources that are authoritative and fit well into their library’s collection and collection goals. At the same time, many sites that escape the filter may have little or no value to the community being served, may be of questionable authoritativeness, and in other ways may be outside the scope of the collection development objectives of the library (Laughlin, 2003, p. 259).

Unfortunately, in the Supreme Court case, the more archaic view prevailed. The Internet was, for legal purposes at least, no different than physical items occupying space on library shelves. The authority librarians have traditionally enjoyed in selecting material for their collections was subverted, by virtue of this Conceptual Anachronism, to exclude digital material.

**Extension and Misapplication of the Conceptual Anachronism**

The metaphor of Internet filtering as collection management delineated by the Supreme Court has since led to constitutional difficulties in the application of CIPA. In May of 2010, the Washington State Supreme Court ruled on a matter directly related to this Conceptual Anachronism. In the case of Bradburn et al v. North Central Regional Library District, the court rejected plaintiffs’ argument that adult patrons were indeed guaranteed the right to access constitutionally protected material on a library’s Internet terminals. The Court’s decision again rested heavily on the supposition that the exclusion of digital content via Internet filtering was no different from the selection of materials for a library’s print collection. In this instance, the Court extended the metaphor to deny adult access to speech that was clearly protected by the Constitution (specifically, speech related to the Second Amendment). Because the library deemed this material to be detrimental to the education of children and antithetical to the mission of the library, it refused to allow adult patrons to view this content. The Washington court agreed and, despite the Supreme Court’s suggestion to the
contrary, ruled that the library had no obligation to disable Internet filters and allow access to material that they deemed unworthy of inclusion in the collection. Again, the Conceptual Anachronism of collection management was used as the basis for the exclusion of online content, constitutionally protected though it may be.

A public library has traditionally and historically enjoyed broad discretion to select materials to add to its collection of printed materials for its patrons' use. We conclude that the same discretion must be afforded a public library to choose what materials from millions of Internet sites it will add to its collection and make available to its patrons. A public library has never been required to include all constitutionally protected speech in its collection and has traditionally had the authority, for example, to legitimately decline to include adult-oriented material such as pornography in its collection. This same discretion continues to exist with respect to Internet materials…we answer that in accord with our analysis in this opinion a public library may…filter Internet access for all patrons without disabling the filter to allow access to web sites containing constitutionally protected speech upon the request of an adult patron (*Bradburn et al v. North Central Regional Library District*, 2010, pp. 29-30).

This is an extraordinary extension of the Supreme Court’s ruling and would have been impossible without the underlying metaphor of collection management. The comparison of physical items to online content allowed the Washington court to expand and stretch the rationale of the Supreme Court beyond recognition. It bears repeating that the Supreme Court ruling requires that the constitutional application of CIPA must include the immediate unblocking of Internet filters at the request of an adult patron. As the Supreme Court noted, a challenge to the law is necessary “…if it is shown that an adult user’s election to view constitutionally protected Internet material is burdened in some substantial way” (*U.S. v. ALA Syllabus*, 2003, p. 4). Arguably, if access to protected speech were being so limited in any other context, or under some other metaphor that does not rely on physicality, such limitations would immediately be ruled unconstitutional.

The *Bradburn* court has not only misinterpreted the Supreme Court’s intent but has further limited the ability of patrons to fully access the unprecedented resources available on the Internet. The Conceptual Anachronism inherent in the analogy of collection management may confine adults – it may confine them to accessing only those materials the library deems suitable for its physical collection. Internet filtering through CIPA was never intended to constrict adult access in this manner. It was solely meant to shield minors from harmful content, not to create a burden on the right of adults to freely receive information – especially constitutionally protected speech. Only through this Conceptual Anachronism was the *Bradburn* court able to make this leap. Collection management allowed the library
and the Court an excuse to impose a government-mandated restriction on constitutionally protected speech without invoking Strict Scrutiny.

As noted at the outset of this piece, “Analogies are only bad when they ignore the key difference between the two things being analyzed” (Boyle, 2008, p. 107). The Bradburn decision ignores the unique, open, and participatory nature of the Internet. It ignores the unprecedented opportunity which public libraries now have to circumvent the traditional constraints of budget and shelf space. It ignores the legislative intent of CIPA and the Supreme Court’s requirement that filters be disabled for adults. In short, this Conceptual Anachronism has limited our ability to freely access information in public libraries.

Notes

1 For the purposes of this article, I’m deliberately setting aside the detailed and extensive analysis of what kind of forum a public library actually is. My point here is to describe the Court’s basis for relying on a physical and historical metaphor to conceptualize a modern, technological issue.

2 Strict Scrutiny would have required that CIPA address a compelling government interest (such as protecting children from material deemed harmful to minors as confirmed by Justice Kennedy), be narrowly tailored, and be the least restrictive means for achieving the government’s interest. It could easily be argued that filtering software is neither narrowly tailored nor the least restrictive means for protecting children from material that is considered harmful to minors. For instance, a lower court strongly implied that filtering would not pass the test of Strict Scrutiny. “First, the installation of privacy screens is a much less restrictive alternative [to filtering software] that would further defendant’s interest in preventing the development of a sexually hostile environment...Second, there is undisputed evidence in the record that charging library staff with casual monitoring of Internet use is neither extremely intrusive nor a change from other library policies...Third, filtering software could be installed on only some Internet terminals and minors could be limited to using those terminals. Alternately, the library could install filtering software that could be turned off when an adult is using the terminal...however we do not find that any of [these alternatives] would necessarily be constitutional if implemented” (Mainstream Louden v. Board of Trustees of the Louden County Library, 1998, p. 567).

References


