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Legally Speaking/Censorship, Pornography and the ALA

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February has passed and with it New Hampshire’s once-every-four-years moment in the spotlight. As a political junkie, I must confess to getting more than a bit juiced during New Hampshire primary season. If you wish politicians were more accessible, come to New Hampshire during the primary... you’ll probably leave thinking you should be more careful what you wish for.

Events on the intellectual freedom front have me a bit perplexed. This issue, I’ll be discussing a recent U.S. District Court case in which the ALA was a party, dealing with censorship and child pornography. This is one of the rare circumstances in which I find myself sympathizing at all with the censor, although I am not sure what the right answer to the problem is.


Before discussing the case, let me offer this brief chronology of the relevant child pornography laws. In 1977, Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977. In 1986, the Meese Commission released its report. In 1988, Congress responded to the Meese Commission Report by passing the Child Protection and Obscenity Enforcement Act, which was the law challenged by the ALA in ALA v. Thornburgh.

Joining the ALA in its challenge to the 1988 Act were eight other organizations, including the Freedom to Read Foundation and the American Booksellers Association. The object of the suit was to have enforcement provisions of the Act declared unconstitutional on their face. In ALA v. Thornburgh, the court found that certain record-keeping requirements and forfeiture rules of the 1988 Act were unconstitutional. The record-keeping provisions required records to be maintained proving the ages of all performers in a work, and created a rebuttable presumption that performers were under-aged if records were not maintained. The forfeiture provisions provided for pre-trial seizure and post-conviction forfeiture for violation of child pornography or obscenity laws.

The record-keeping requirement and the pre-trial seizure provisions were both found to violate First Amendment rights of free speech and Fifth Amendment due process protections. The court in Thornburgh found that without guaranteeing an adversary proceeding before triggering these enforcement provisions, the Act would have a chilling effect on free speech, leading to the self-censorship of constitutionally protected erotic material. Post-conviction forfeiture was ruled not to be unconstitutional on its face, but its use was limited to situations in which a "pattern of activity" had been established. Both sides appealed, with the ALA seeking to have the post-conviction enforcement provisions also struck down, and the government seeking to have all of the enforcement provisions upheld.

At the time of ALA v. Thornburgh, the provisions of the 1988 Act had not been enforced against any of the plaintiffs. Nor did any of the plaintiffs argue that they were in imminent danger of having material seized. The challenge was to the Act on its face. This fact was of critical importance on appeal.


In ALA v. Barr, the ALA lost the gains of the Thornburgh decision, not on the merits of the arguments, but because the ALA and the other plaintiffs were held in effect to be ineligible players. In legal terms, the plaintiffs were found to lack "standing" to sue, and their claim was held to be "nonjusticiable." Because, by their own admission, none of the plaintiffs were involved in any activities covered by the statute, and because the government had not threatened them with enforcement, the ALA and the others were found not to have the status necessary to challenge the statute on its face. Because of the lack of any imminent harm to the plaintiffs, any self-censorship in which they might engage could only be the result of "subjective chill," which is not by itself enough to grant standing to sue. In short, legitimately or not, the court refused to judge this statute based on hypotheticals.

The dissenting judge found the chill to be more than subjective, and the harm to some of the plaintiffs groups or their members to be quite imminent enough to give them standing to sue. The dissent noted that a number of ABA members have been prosecuted under state anti-obscenity laws in recent years. Further, the dissent found little comfort in certain government policies (i.e. not to abuse pre-trial seizure) which the majority found to be further indication of a lack of imminent harm to the plaintiffs.

Quite frankly, I don’t know what to make of this decision, other than that I continued on page 32.
Foreign Aid
by Pamela Rose (SUNY, Buffalo)

Proposals to support scientists in the former Soviet Union are under review by the current administration. One such plan proposed by Richard Getzinger, Director of International Programs for AAAS “would extend, free of charge, subscriptions to Western journals.” The time required to obtain approval, determine the number of subscriptions and get the program rolling could mean help too late, as the need is critical and immediate.


Serial, Serial, Go Away
by L.K. Carr (Boston Univ.)

In 1990, Margaret Hawthorn, serials librarian with the University of Toronto library system, surveyed 223 general academic libraries in the U.S. and Canada to determine the existence and use of policies for serials selection and deselection. The responses were tracked according to type of library: larger research-oriented institutions with more than 5,000 periodicals subscriptions or smaller curriculum-oriented libraries with 1,500-4,999 subscriptions. Questions focused on the serials selection and review processes. In addition to information about the existence of specific policies, the survey sought responses regarding allocations for new serials, the status of those responsible for initiating new subscriptions, the criteria used in the assessment of possible new subscriptions, and the criteria used in reviews of established subscriptions. A copy of the questionnaire is included, as are charts and graphs illustrating the responses to the survey.


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wish it had been decided on the merits, rather than the lack of “standing” of the plaintiffs and the lack of “ripeness” to their constitutional claim. The chances of enforcement, even wrongful enforcement, against any of the plaintiffs do seem very remote. Whether these chances are remote or not, the severity of the potential consequences may in fact lead to self-censorship of protected erotic material. If that is so, does that render the statute unconstitutional, or even undesirable? Can the legitimate aim of curtailing child pornography be accomplished without casting some chill on borderline material? If not, how do we balance the societal goal of protecting children from exploitation with the constitutional protections of free speech?

I am not sure how we should balance those objectives. The ALA and ABA seem to take the position that no chill on protected speech, no matter how remote, and no matter what the competing objective, is acceptable. That seems extreme to me. The behavior which the government seeks to control here is the use of “minors” in “sexually explicit” productions. “Sexually explicit” is defined as one or more of the following: 1) sexual intercourse; 2) bestiality; 3) masturbation; 4) sadomasochistic abuse; and 5) lascivious exhibition of genitals or pubic area. I recognize the problems associated with this definition, particularly in the vagueness of the term “lascivious.” Further, the seizure provisions of the law are open to abuse, as happened when the FBI raided the San Francisco home of photographer Jack Sturges, seizing both expressive and non-expressive materials.

Yet, pornographic exploitation of children does take place. Is some First Amendment “chill” an acceptable price to pay to prevent such exploitation, and if so, how much? Again, I am not sure. As librarians, publishers and booksellers, we should think about it. I, for one, cannot just follow the lead of the ALA and ABA on this one.

Decision-Making
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mission statements as guidance for appropriate activities.

A perhaps disturbing piece of information revealed at the conference was the fact that Rutgers, due to a staffing shortage, is passing the work of bibliographic verification along to their vendor.

Question: Is bibliographic verification an appropriate role for vendors? What are the implications of this blurring of roles?

7) Decide who is going to monitor the results of the decision, how frequently and on what basis.

Once a decision has been made, some mechanism must be devised for evaluating the consequences of the implementation.

Question: How often do we decide to make a change then neglect to test the results? Is that vendor really getting our rush orders as quickly as we expected?

8) Be conscious of the need to share the decision.

Effective decision-making is not complete until all of the parties involved/affected are informed regarding the change. A theme throughout this conference and those past is the need for continual communication among the parties.

Question: Are we sharing our assumptions/decisions with one another in our daily grind the way we espouse this open sharing at the conference?

The value of questioning assumptions and sharing information/experience are implicit to the Charleston Conference and to an effective decision-making process. If each of us leaves Charleston with a little better understanding of the issues before us and the perspectives of others, and applies this enhanced knowledge in our daily transactions with one another, we improve our abilities to effectively influence the future that lies before us.