Legally Speaking

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Cyberspace and the Communications Decency Act — Onward Libraries, Marching Off to War

by Ron Chepeshuk and Linda Albright
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A battle has been won, and the skirmish continues! Last February (1996), President Bill Clinton signed the historic “Telecommunications Act of 1996,” which affects all aspects of telecommunications, including television, telephone systems, cellular phones, and the Internet. The measure was hailed as a much-needed reform of the Telecommunications Act of 1934 that will bring telecommunications regulations into the Information Age and is an historic milestone that signifies the arrival of a new era of information technology and technological services. One element of the bill, however, has created a firestorm of controversy that has attracted the attention of librarians and publishers. The measure is the Communications Decency Act (CDA), which prohibits the distribution of so-called “indecent” material to minors and holds content providers and carriers responsible for monitoring their sites. Violators could be punished by a $250,000 fine and two years imprisonment.

Civil libertarians and free speech advocates immediately attacked the legislation. “This is the kind of legislation you see from a lot of senators and congressmen who have never lived on,” charged Michael Godwin, staff counsel for the Electronic Frontier Foundation. Godwin’s observation was in reaction to comments such as the one made by Congressman John Spratt (D-SC), who voted for the bill. “Some pretty lewd behavior is going on through the medium of the Internet. I think it’s a bad idea to stop it before it goes too far.”

As challenges to legislative decisions go, the Communications Decency Act was effectively declared unconstitutional, in whirlwind time, on June 12, 1996, by a federal district court panel in Philadelphia as the result of a suit filed by numerous parties.

Along with the civil libertarians and the free speech advocates, librarians and publishers joined the mounting opposition. The arguments against the Communications Decency Act came quickly from various perspectives. The Association of American Publishers called the CDA the “cyberspace equivalent of book burning” and described it as “heavily-handed and imposing government controls that seriously erode First Amendment rights without achieving the desired goal of protecting children.” Judith Krug, Director of ALA’s Office for Intellectual Freedom warned that “this Act would have a chilling effect not only on libraries, but on every provider of information on the Internet and would make it impossible for libraries to provide Internet access without risk of breaking the law.”

The CDA is an important issue for libraries because many have web pages, online catalogs, and gateway services to electronic products. In any of these products, it’s possible to find sexually explicit material someone will find offensive. Consider this scenario: a twelve-year-old patron walks into a public library and asks the reference librarian to help him log on to the Internet. The librarian does her job, and the patron downloads some sexually explicit photos from a web site. Plaintiffs against the CDA said that, under the law, the library would be liable for fines of up to the maximum $250,000 because the librarian had helped the young patron with his/her search. Critics of the CDA see it as ironic that President Bill Clinton signed the Telecommunications Act at the Library of Congress, using an electronic pen on a digital tablet and sending it over the Internet via a high-speed, fiber-optic synchronous network link. Soon after, a group of civil liberties organizations, led by the ACLU, moved to seek an injunction of the Act.

On February 26, the American Library Association and its allies in book publishing and the library profession followed the ACLU’s lead and also filed suit for an injunction. “This law has serious implications for libraries and for everyone who values freedom of information in a democratic society.” Krug said. “If allowed to stand, it would impose criminal penalties for transmitting materials via the Internet that are perfectly legal on library and bookstore shelves. Libraries couldn’t post their catalog cards for fear a book title might be found offensive. This law would have a tremendous chilling effect on librarians and on anyone who values the Internet by restoring communities to a level appropriate for a child.”

Last May, the ALA and ACLU formed an unified front, consolidating their lawsuits. Other plaintiffs include the American Booksellers Association, the Association of American Publishers, the American Society of Newspaper Editors, Prodigy Services Inc., the Special Libraries Association, the Association of Research Libraries, and American Online. According to the ALA’s Office on Intellectual Freedom, two recent stories reported by the media fueled the concern of Spratt and other congressmen for the welfare of children who want or have access to the Internet. The first involved 16-year old David Montgomery of Seattle who left his home and went to San Francisco to meet another person who he had been exchanging messages with via an online gay discussion forum. The media incorrectly reported that an older man wanting sex had lured the boy to the Bay Area. Actually, it was another teenager who was more interested in friendship. No sexual encounter took place and police found Montgomery, but the incident led to many calls for censorship of the Internet. The second news item involved a Time magazine article that was published as a cover story. Time gave great credence to a Carnegie Mellon University study concluding that 83.5 percent of all images posted in the Usenet are pornographic. Further, the study claimed that “computer materials represent an efficient global distribution mechanism for extremely pornographic images that are commonly available in adult bookstores.” The study was lauded by Christian fundamentalists and antipornography activists and their allies in Congress, but criticized by many experts, who described the study as misleading, contradictory, and flawed. Donna L. Hoffman, an associate professor of management at Vanderbilt University, said, “It’s a very bad piece of misleading research, and the way it was released shows a clear pattern of media manipulation.”

The story, however, was used by conservative Christian groups to lobby Congress and build support for the “indecency” provision of the Telecommunications Act. The intense lobbying changed the positions of those representatives who had initially supported a House version of the bill that focused on getting Internet providers to develop better technological devices that would help parents con...
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trol what their children had access to in cyberspace. “Unfortunately, the House mem-
bers graciously accepted their applause for opposing censorship and then, in a legis-
slative sleight of hand, turned right around and came up with their own scheme to censor
what people say and see on the Internet,” said Donald Haines, the ACLU’s Legislative
Counsel.

But both the House and Senate in votes of 414-16 and 91-5 respectively overwhelmingly
approved the passage of the telecommunica-
tions bill. Not all conservative representatives,
however, were in favor of the CDA. On June 21, 1995, powerful Republican House Speaker
Newt Gingrich attacked the proposed act,
charging that “It was clearly a violation of free
speech, and the right of adults to communi-
cate with each other. I don’t agree with it and I
don’t think it’s a serious way to discuss a
serious issue.”

The Ala and its allies have marshaled
their forces and resources and are attacking
the CDA legally on many fronts. Their Memo-
randum of Law noted that four points are
“critical” in their suit. First, the Internet is an
entirely new communications medium that is
different from other media in important re-
spects. For example, the Internet’s global and
decentralized nature gives ordinary citizens
unparalleled ability to communicate with oth-
ers on a scale never before possible. Second,
the CDA criminalizes adults for speech that is
constitutionally protected. Thirdly, because of
the way the Internet works, “the Act effect-
ively bans the vast majority of that speech
and severely burdens the other.” Fourth, the
plaintiffs argue that there are already ways to
protect children from inappropriate speech
without having to deny adults access to that
speech. The Memorandum noted that “in
addition to criminalizing a broad category of
speech, the Act subjects an usually broad cat-
egory of speeches to the risk of important and
substantial fines. Nearly every online user
and service provider will have to comply with
either a “telecommunication device” or an “in-
teractive computer service,” or both. Almost
all of the tens of millions of users of the
Internet are “content providers.” By the very
nature of the Internet, most material that is
stored in a database or made part of a bulletin
board can be accessed by anyone and ‘ipso facto’ displayed in a manner available to
persons under 18. Thus the Act regulates the
behavior of everyone who uses the Internet or
cyberspace...”

Screening technology is available, the
Memorandum pointed out. For example, online
services have control systems available for
parents at no additional cost, while a variety
of software providers have developed applica-
tions to use in conjunction with commercial
online services. Krug said it’s unrealistic to
expect libraries to use blocking mechanisms
to restrict children’s access to the Internet.
“Programs that block access to certain sec-
tions would block access to everyone, includ-
ing adults,” Krug explained. “Some services
let users use a password, but how long do you think the
password would remain a secret with hun-
dreds of computer users in libraries everyday.
Since online services and web sites are con-
stantly changing, what was considered “de-
cent” yesterday might suddenly have a forbid-
den word or picture today. Even having a
special Internet source for children would be
a risk because libraries would never know when
these sources might change.”

Krug and other librarians who oppose the indecency provi-
sion of the CDA say parents worried about
what is on the Internet should come to the
Library with their children and together ex-
plorcyberspace. “It’s important for parents
to guide their children’s Internet use the same
way they supervise their children’s reading
and television viewing,” Krug said.

The controversy surrounding the CDA has
deflected attention away from the historic and
powerful impact that the Telecommunica-
tions Act of 1996 will have on society and
libraries. The experts say that the new legisla-
tion will effect every aspect of telecommunica-
tions and redefine the communications indus-
try so rapidly that it will effect practically
every segment of American society, including
libraries. For example, the legislation calls for
discounted rates for interstate telecommuni-
cations devices for libraries and schools. The
ALA has filed comments with the Federal
Communications Commission, recommend-
ing ways to implement these provisions.

Libraries will play an important role in the
implementation of the Telecommunications
Act of 1996, experts say, even though much
of the library community objects to the CDA.
“The bill is not an unabated disaster,” Andrew
Blau, a member of the Executive Board of
the Urban Libraries Council and advisor to
the Microform/American Library Associa-
tes Online initiative, told Library Journal.
“It’s premature to write the obituary for the
public interest as a result of the new legisla-
tion. Legislative concerns notwithstanding,
libraries should not view the new law as a threat
but rather a succession of opportunities that
will roll out over the next several months and
years to help define what the public interest
will mean in the Digital Age.”

In the meantime, the library community’s
attention will continue to focus on challeng-
ing the CDA. This past June 12, a federal
district court panel in Philadelphia declared
the CDA unconstitutional. The case will go
before the U.S. Supreme Court after the U.S.
Department of Justice announced on June 28
that it would appeal the lower court decision.
“We are excited; the decision is everything
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of facts is not copyrightable, Judge Saris up-
held MCLE’s claim that it did not violate
copyright law in its selection of data and in its
publication of the 1993 Lawyers Diary. The
Judge ruled that “this case is indistinguishable
from Feist and copyright protection is unwar-
ranted.”

Her ruling further explained that both pub-
lations “include numerous charts, lists, maps
and similar items, which contain information
that is so-called ‘common property’ and does
not vary with the creativity of the compiler.”
Judge Saris also commented that “in compil-
ing a Massachusetts directory of lawyers and
judges, Skinder-Strauss did not exercise even
a minimal degree of creativity in a Feston
sense.”

The Judge also ruled that a jury will have
to decide whether MCLE engaged in unfair
trade practices by describing the 1994 Massa-
chusetts Legal Directory as "official" in its
print advertising and marketing brochures.
Judge Saris wrote, "even though attorneys are
sophisticated consumers, MCLE’s advertis-
ing might give the impression that its direc-
tory somehow carried an imprimatur of state
authority." Despite ruling that the parts that make up
the Skinder-Strauss 1994 Massachusetts Le-
gal Directory are not copyrightable, the Judge
ruled the directory as a whole is copyrightable
as a compilation, even if the compilation’s
elements, considered individually, are ex-
cluded from copyright, the ‘selection, arrange-
ment, and coordination’ of the elements taken
as a whole may be protected.” Quoting di-
rectly from the Feist decision, Judge Saris
wrote, "originality requires only that the au-
thor make the selection or arrangement inde-
pendently (without copying the selection or
arrangement from another work) and that it
display some minimal level of creativity."

Judge Saris then pushed the entire copy-
right infringement matter back to square one
when she ruled “the difficult question is
whether or not, as a matter of law, the com-
pliation of features” in the MCLE directory “is
substantially similar to those” in the Skinder-
Strauss directory. “The Court cannot conclude
on summary judgment, however, whether the
two works are substantially similar as a matter
of law.”

Judge Saris will preside at the trial, which
will be held in U.S. District Court in Boston
before a six-member jury and is expected to
last about one week. The trial date has been
tentatively set for Oct. 7.
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we could have wished," Krug explained. "The ALA will now make history." Krug expects the case to go to the Supreme Court by January 1997.

The three judges recognized the case as a "fast track" case and immersed themselves in it, Krug told Against the Grain. They even learned how to use the Internet to lend credibility to their decisions as being valid and appropriate. "The judges proved their interest in doing the right thing and their interest in ALA by learning how to use the Internet," Krug stated. John Perry Barlow, co-founder of the Electronic Frontier Foundation and spokesperson at the ALA's annual meeting in New York City this past July, told Against the Grain that he was "grateful that we have a part of our political system that is not democratic" and explained, "Because of the pervasive impact of television, we have government by hallucinating mind, which means that many people are insisting that their congressmen pass laws to solve problems that don't exist. The perceived flow of pornography in cyberspace is an example. That issue is basically irrelevant, but so many people are willing to sacrifice their civil liberties to get rid of it. Fortunately, we have judges in Philadelphia who are not running for office and who were willing to take a look at the situation rationally and toss out the bizarre anomaly know as the CDA." Barlow decried government sponsored legislation like the CDA as "savagely anti Internet" and predicted that "those government efforts are going to put libraries at the front lines of the coming battle in cyberspace. I see libraries as the guerrilla fighters who will lead the fight to maintain freedom of expression in cyberspace." Betty J. Turock, President of the American Library Association, in comments made after the defeat of the CDA, sums up the role of libraries as advocates on behalf of "public interest in national legislation and public policy." Through the signing of the Telecommunications Act of 1996, libraries are scheduled to receive special telecommunications discounts and have been given the designation "universal service providers." Turock goes on to explain that: "A challenging period is ahead as we attempt to make the definition of universal service and the special discounted rates [which affect the cost of access] meaningful in infrastructure implementation ... the promises and pitfalls of the electronic 21st century are known only to a few." She concludes that the job of librarians is to make those promises and pitfalls "better known, so that the public will help us advance just, equitable, affordable access, and to inform Americans about what's at stake." Continued participation in such group activities like the 25-member Citizen Internet Empowerment Coalition (which became the name of the plaintiffs' group that challenged the CDA) is one way that librarians can "help develop a national information infrastructure in the public interest" which is essentially what the challenge to the Communications Decency Act was about.

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appropriate to the value of the information. Nor can the rights management system substantially disrupt productivity possibilities of digital information. Flexibility and productivity are at the heart of the possibilities of digital information.

It has never been more imperative to the future of scholarly publishing that publishers, scholars, and librarians keep on talking, talking and talking to the technology vendors. All technology is developed to "specifications". The scholarly community must retain control over these "specifications". We must also learn to listen: and understand the technology well enough to share it to the purposes that bring their community together in the first place.

So, some advice:

Think "function": What are the core functions to be performed? How can they be streamlined? If we attempt to replicate every task and burden of paper copyright management, we will never finish: at least not cost effectively!

Think "80/20": Eventually rights management schemes will have to accommodate every "what if", but at the outset they must manage the most central, most common types of material and types of usage. We need to get started: in the present environment, more users are becoming skilled at avoiding copyright management than at embracing new approaches.

Think "simple": Complexity slows performance, both human and computing.

Many of us deeply involved in these issues on a daily basis have come to accept our fascinating, frustrating, and often wonderful fate. We have, fallen under collectively one of the oldest curses of all: "May you live in interesting times." So be it.

Endnotes

1Ron Chepesiuk and Jeff Rosen, 'Beyond Cyber Space,' Fifty Years of Modern Computing, Faircount International Media, 1996, p. 109
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