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Legally Speaking

S. 314: The Communications Decency Act and Cyberspace

Column Editor: Glen M. Secor (YBP, Inc.) (GSECOR@OFFICE.YBP.COM)

When we talk about the Internet and the future of digital communication, we tend to stress the enormous potential for information sharing. While we are concerned about the development of digital networks, especially in terms of adequate access for all members of society, most of us are excited about the current explosion of information and the new technologies available for information access.

In cyberspace, though, what one regards as "bad" information can flow just as easily as what one regards as "good" information. This is not unlike the situations which exist with television and radio, which bring us CSPAN and "Beavis and Butthead," or Howard Stern and All Things Considered, respectively. But television and radio can be more easily controlled than cyberspace can be. The government, through the FCC, controls the franchise for television and radio. There is no "franchise" for the Internet or other forms of online access. It is not easy to set up a pirate television or radio station to broadcast material not acceptable to the FCC. Virtually anyone with a modem can tap into the Internet or a BBS and "broadcast" anything they want.

This situation frightens the hell out of some people, especially since a good chunk of what is being shared out in cyberspace is, shall we say, "adult-oriented." In cyberspace, there are no ticket takers to confirm the age of the viewers, no scrambling devices, and limited blocking mechanisms. This means that children potentially have access to the adult-oriented content of cyberspace, including pornographic and obscene material. It also means that children and adults can come into online contact with people whose intentions might be nefarious and who might use the Net to stalk or harass others.

One response to this reality is currently moving its way through the U.S. Congress under the high-minded title of the Communications Decency Act of 1995, also known as S.314 (the number of the bill in the Senate). The bill, which has been attached to broader telecommunications deregulation legislation, was introduced by Sen. Jim Exon (D-NE) and is frequently referred to as "the Exon Amendment."

Current law prohibits the use of telephones to make harassing calls and to make

indecent audiotext (i.e. "dial-a-porn") available to minors. S.314 would extend these prohibitions to all forms of telecommunication. Most importantly, S.314 would impose criminal penalties on anyone who "makes, transmits, or otherwise makes available any comment, request, suggestion, proposal, image, or other communication" which is "obscene, lewd, lascivious, filthy, or indecent" via the use of a "telecommunications device." (see CDT Policy Post 2/9/95).

It is the breadth and scope of this wording which has set off a firestorm among free speech advocates and telecommunications providers. Think about the effect of the words "makes, transmits, or otherwise makes avail-

able." This covers everyone along the line of an offending communication, including telephone companies, online services, Internet access providers, independent BBSs and anyone whose network or site through which an offending communication passes. Think also about the vagueness of the terms "obscene, lewd, lascivious, filthy, or indecent." The definition of obscenity is squishy enough in cyberspace (see the discussion of the Thomas AA-BBS case in this column in the February issue of *ATG*). But "lewd, lascivious, filthy, or indecent"? How in the world is a potentially liable party supposed to screen material against this standard? How is a court to evaluate it after the fact, for that matter?

Recent amendments to S.314, proposed by Sens. Exon and Gorton (R-WA), offer a number of defenses to prosecution under the broad language quoted above. These defenses include: provision of access only (i.e. without involvement in creation or al-

teration of the material); lack of editorial control; good faith efforts to provide users with means to restrict offending communications and to respond to user complaints about offending material; and not being engaged in a commercial activity which has as its "predominant purpose" the provision of offending material.

These defenses go a long way toward mitigating the harsh effects of the bill as originally drafted. Left exposed, perhaps, are the small BBS operators who cannot afford sophisticated blocking technology or to whom, because of their size, editorial control will be imputed. Further, these defenses are just that - defenses. They do not necessarily stop the prosecution from bringing its case, backed by the resources of the government, even if they do provide a successful defense at trial. By then, of course, the defendant could be up to his or her neck in legal fees. And the language of these defense provisions is open to interpretation. What is "editorial control"? "Good faith effort"? "Predominant purpose"? If the bill passes, we can expect to see these matters litigated.

The issue here, though, is perhaps less about the legal effect of the specific language of S.314 than about the concept of free speech in a wired society. The debate right now is being dominated by extremists on either end of the spectrum: those who wrap everything up in a "for the good of our children" argument and those who oppose any governmental control or restriction on speech. In the view of this writer, the problem with S.314 is that it does seem to recognize the interactive, consensual, and decentralized nature of cyberspace. Of course, many people oppose the current restrictions on television and radio content, arguing that those offended can simply change the channel. Further, many commentators question the constitutionality of the "dial-a-porn" restrictions placed into law a few years ago at the initiative of Sen. Jesse Helms. Even if one accepts these restrictions on television, radio, and telephone communication, though, it does not follow that such restrictions should also be imposed in cyberspace or that they will be workable there.

At some point the information flow will overwhelm the attempts to control and re-

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strict the content of what is being shared. Perhaps we are already there. At that point, we will have no choice but to defer to individual responsibility and parental control. As a parent, I appreciate the fact that America Online allows me to block certain types of content and interaction for the account which my children use. I also appreciate the fact that I can maintain an account on AOL under which I can have full access to the AOL rooms, including some in which the discussions get heated and the language can get rough. If AOL did not provide the blocking capability, I probably would not allow my children to use the service. If AOL did not contain grown-up rooms with grown-up interaction, I personally would not enjoy the service as much. But those are my choices to make. And it is AOL's choice to design their service in such a way as to appeal to people like me. Neither one of us

needed government intervention to make those choices.

Attempts to control cyberspace, because

of its nature, will almost by definition have to be onerous in order to be successful, and even then such attempts probably would not

succeed. There seemingly are no delicate ways for the government to intervene in cyberspace. We saw that with the failed Clipper Chip initiative, in which the government sought to have the key to all encrypted communications. We saw that in the Thomas AA-BBS case, in which the long arm of federal law hauled the California couple to Tennessee for prosecution, simply because that is where the user who downloaded the material was located. We see it again with S.314, which, even with the insertion of the new defenses, seeks to impose restrictions on the content of all telecommunications, however consensual, at every step along the way.

One can conclude from these efforts that it will be difficult for the government to protect us from ourselves in cyberspace without impinging on individual responsibilities.

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tions man and my mentor. I had 2 kids in diapers. Then Dick moved me from Oregon to New Jersey and into Approval Plan sales. This combined background led me to the position of head of library acquisitions at SUNY Binghamton when it appeared that the Abel Company was in some trouble. (The kids were still in diapers . . . now they've both graduated from college.) I've always felt this was a great way to round out my business perspective by working first hand in a library.

I left SUNY and ended up eventually at Blackwell North America after Blackwells bought Abel. I worked at Blackwells from 1977 to 1987, when my dear friend, Becky Lenzini, got me involved in the serials business. She recruited me to work for Faxon and was my boss until she left to create CARL UnCover. I left Faxon for a brief time to be VP Sales at Yankee Book Peddler but returned to Faxon after 6 months for a senior management position with national and finally international responsibilities. And, now, this . . .

ATG: Mike, you are so active in the profession. You spoke at the first Charleston Conference 15 years ago. You are on the Conference Planning Committee for the upcoming NASIG meeting at Duke. What all else are you involved in?

MM: Well I really like the profession and all the trappings . . . the people, the

conferences, the work. I have only missed two Charleston Conferences and remember the first one way back in that dormitory commons room behind the library with 25 attendees. What a difference now, Katina!

I was truly honored to be asked to serve on the UNC-Chapel Hill School of Information and Library Science's Board of Visitors. It is exciting to see where library education is heading and to meet and work with highly motivated library school students, a wonderful dean in Barbara Moran, and the other wonderful Board members. I have been active in ALA Committee work as well as local Virginia activities like the Friends of the Library Booksale at Richmond Public Library. All very rewarding.

ATG: And let's not forget about all your extra-curricular activities. I'll bet you are glad the baseball strike is over.

MM: For sure. In Exton, I'll be an hour and a half closer to Camden Yards (Orioles ballpark) than in Richmond. It's a true win/win situation. This area has the Braves on the cable and the Orioles close by. I also learned a lot about myself by running five marathons in the past 8 years and am basically pleased to have begun and finished all five. I hope to do one more and then retire. And, as you know, I've been playing golf for over 40 years (getting worse and enjoying it more each year). Actually, I was pleased to read about Dan Tonkery's pas-

sion for golf in his ATG interview last issue [April 95]. Now we can meet on the golf course . . . and maybe I can win one for a change.

ATG: Well, Mike, we wish you lots of luck and look forward to talking more with you once you have been in the saddle at Swets for a little while. Also, we are looking forward to seeing and hearing you speak at the next (Fifteenth) Charleston Conference.

MM: I promise to start immediately preparing the presentation for the Conference on "Vendor Vision" about perspectives on the current serials environment now and for the immediate future. We surely do live and work in a time of fascinating change. It does keep us all energized to say the least. Thanks, again, for taking the time for this interview.

Mike Markwith is a voracious reader. He says he read *Lust for Life* as preparation for his first trip to Amsterdam in April. Meanwhile he has read the new Anne Tyler and the new Ellen Gilchrist in the past week. Besides the 1995 Charleston Conference, we can see him in Chicago at ALA. In the meantime, if you want to reach him, try — <mmarkwith@swets.nl> or by phone at 800-44-SWETS. His address is: Swets Subscription Service, 440 Creamery Way, Ste. A, Exton, PA 19341. — KS