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Legally Speaking

Telecommunications Act of 1996

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

by **Ron Chepesiuk** 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 logged on," charged **Michael Godwin**, staff counsel for the Electronic Frontier Foundation.[1] 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 not a bad idea to stop it before it goes too far."[2]

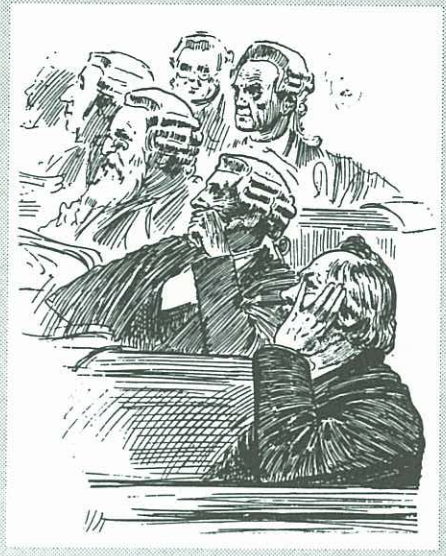
As challenges to legislative decisions go, the Communications Decency Act was effectively declared unconstitutional, in whirlwind time, on June 12, 1996, by a federal district court panel in Philadelphia as the result of a suit 6that was filed by numerous parties.

Along with the civil libertarians and the free speed advocates, librarians and publishers joined the mounting opposition. The arguments against the Communications Decency Act came quickly from verious perspectives. The **Association of American Publishers** called the CDA the "cyberspace equivalent of book burning" and described it as "heavy-handed and imposing government controls that seriously abridge First Amendment rights without achieving the desired goal of protecting children."[3] **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."[4]

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."[5]

Last May, the ALA and ACLU formed an united front, consolidating their lawsuit. 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.[6] 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."[7] 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."[8]

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 members graciously accepted their applause for opposing censorship and then, in a legislative 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.[9]

But both the House and Senate in votes of 414-16 and 91-5 respectively overwhelmingly approved the passage of the telecommunications 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 communicate with each other. I don't agree with it and I don't think it's a serious way to discuss a serious issue."[10]

The ALA and its allies have marshaled their forces and resources and are attacking the CDA legally on many fronts. Their Memorandum 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 respects. For example, the Internet's global and decentralized nature gives ordinary citizens unparalleled ability to communicate with others on a scale never before possible. Secondly, the Act criminalizes adults for speech that is constitutionally protected. Thirdly, because of the way the Internet works, "the Act effectively 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.[11] The Memorandum noted that "in addition to criminalizing a broad category of speech, the Act subjects an usually broad category of speeches to the risk of important and substantial fines. Nearly every online user and service provider will of necessity employ either a "telecommunication device" or an "interactive 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...."[12]

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 applications 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 sections would block access to everyone, including adults," Krug explained. "Some services use a password, but how long do you think the password would remain a secret with hundreds of computer users in libraries everyday. Since online services and web sites are constantly changing, what was considered "decent" yesterday might suddenly have a forbidden word or picture tomorrow. Even having a special Internet source for children would be a risk because libraries would never know when these sources might change."[13] Krug and other librarians who oppose the indecency provision of the CDA say parents worried about what is on the Internet should come to the Library with their children and together explore cyberspace. "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.[14]

The controversy surrounding the CDA has deflected attention away from the historic and powerful impact that the **Telecommunications Act of 1996** will have on society and libraries. The experts say that the new legislation will effect every aspect of telecommunications and redefine the communications industry so rapidly that it will effect practically every segment of American society, including libraries. For example, the legislation calls for discounted rates for interstate telecommunications devices for libraries and schools. The ALA has filed comments with the **Federal Communications Commission**, recommending 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 unmitigated disaster," **Andrew Blau**, a member of the Executive Board of the **Urban Libraries Council** and advisor to the **Microsoft/American Library Associates Online** initiative, told *Library Journal*. "It's premature to write the obituary for the public interest as a result of the new legislation. 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."[15]

In the meantime, the library community's attention will continue to focus on challenging 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 upheld 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 unwarranted."

Her ruling further explained that both publications "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 compiling a Massachusetts directory of lawyers and judges, Skinder-Strauss did not exercise even a minimal degree of creativity in a Festoon sense."

The Judge also ruled that a jury will have to decide whether MCLE engaged in unfair trade practices by describing the *1994 Massachusetts Legal Directory* as "official" in its print advertising and marketing brochures. Judge Saris wrote, "even though attorneys are sophisticated consumers, MCLE's advertising might give the impression that its directory somehow carried an imprimatur of state authority."

Despite ruling that the parts that make up the Skinder-Strauss *1994 Massachusetts Legal 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 excluded from copyright, the 'selection, arrangement, and coordination' of the elements taken as a whole may be protected." Quoting directly from the **Feist** decision, Judge Saris wrote, "originality requires only that the author make the selection or arrangement independently (without copying the selection or arrangement from another work) and that it display some minimal level of creativity."

Judge Saris then pushed the entire copyright infringement matter back to square one when she ruled "the difficult question is whether or not, as a matter of law, the compilation 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."[16] 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.[17] **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."[18]

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."[19]

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 telecommuncations discounts and have been given the designation 'universal service providers.'[20] Turock goes on to explain that: "A challenging period is ahead as we attempt to make the definitionof 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 tomake those promises and pirfalls "better known, so that the pubilc will help us advance just, equitable, affordable access, and to inform Americans about what;'s at stake."[21] Continued participation in such group activities like the 25-member Citizen Internet Empowerment Coalition (which became the name of the plaintiffs' group that challenge 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.[22]

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Endnotes

[1]Ron Chepesiuk and Jeff Rosen, 'Beyond Cyber Space," Fifty Years of Modern Computing. *Faircount International Media, 1996*, p. 109
[2]Ibid. p. 109
[3]*Publishers Weekly*, Feb. 12, 1996, p. 12.
[4]"Libraries and Communications Decency Act," *Cognotes*, July 7, 1996, p. 6A.
[5]Interview with Authors, July 19, 1996.
[6]"Decency and the Internet,"*Newsletter on Intellectual Freedom*, September 1995, p. 125
[7]Libraries and the Communications Decency Act," *Cognotes*, July 7, 1996, p. 6A
[8]"Decency and the Internet,"*Newsletter on Intellectual Freedom*, September 1995, p. 125.
[9]"Telecommunications Act Includes Decency Clause,"*Newsletter on Intellectual Freedom*, March 1996, p. 35
[10]"Decency and the Internet," *Newsletter on Intellectual Freedom*, September 1995, p. 123
[11]"Focus on the Internet: Excerpts from a Memorandum of Law in Internet 'Indecency' Suit," *Newsletter on Intellectual Freedom*, May 1996, p. 73.
[12]Ibid.
[13]"Libraries and the Communications Decency Act," *Cognotes*, July 7, 1996, p. 6A.
[14]Ibid.
[15]*Library Journal* , March 15, 1995 p. 31
[16]Interview with authors, July 19, 1996.
[17]Ibid.
[18]Interview with authors, July 9, 1996.
[19]Ibid.
[20]Betty J. Turock, "Advocating the Unfettered Electronic Access," *American Libraries*, June/July 1996, p.34.
[21]Ibid.
[22]Ibid.

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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.