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October 24, 1996

Dear Judith,

Thank you very much for speaking at the recent Annual Meeting of the South Central Research Library Council. The meeting was a great success, and comments were very positive about your presentation. The 1st Amendment is a topic that is dear to the hearts of all librarians as you know, and your talk was very inspiring. We all need to be reminded now and again of the beliefs that are at the core of our profession.

I appreciate your taking time out of your busy schedule to join us at our meeting. I hope we have an opportunity to work together again in the future. I have enclosed your honorarium as we discussed. Please send us a note with the travel expenses you incurred, and we will gladly reimburse you.



Sincerely,

Susan Frey

Susan Frey
Special Programs Manager

P.S. I really enjoyed our time to chat following the meeting.

Judith -
Thank you - great presentation & I was pleased to meet you
Joan Anne

**The First Amendment:**
**Perspectives on the Freedom of Speech**

**presented at the**

**South Central Research Library Council**

**Binghamton, NY**
**Thursday October 10, 1996**

INTRODUCTION

There is an old Chinese curse that goes — "May you live in interesting times."

You can understand where the "curse" part comes from just by looking at the front page of a newspaper — the continuing Middle East crisis, the unsolved crash of TWA flight 800, the unsolved bombing during the Atlanta Olympics, the Presidential race, tax cuts, tax increases, the threatened boycott of the baseball playoffs by the umpires. These times are also very "interesting" in the intellectual freedom arena. And a large part of what makes it "interesting" involves electronic communication. More about that shortly. Right now, I want to explore the term intellectual freedom.

~~So, what exactly is it?~~ Intellectual freedom is the right of all individuals to seek and receive information from all points of view without restriction. To fulfill this responsibility libraries tolerate -- and make available -- ideas some people may consider untrue, or harmful, or even detestable. Free expression is the bedrock of our constitutional republic. We expect our people to be self-governors. But to do so responsibly and effectively, our citizenry must be well-informed. And the best place to become informed is the library. Anyone who goes there should be able to find whatever ideas and information they want or need, either in the collection, through interlibrary loan, or over the Internet. The likes, dislikes, beliefs and values of some library users should not limit the access of others to the materials *they* want to read. A library, then, serves the needs of *all* of the people of the community, not just the most vocal, not just the most well-connected, not just the most powerful, not even just the majority -- but all the people.

The library profession's intellectual freedom position is based on the First Amendment to the United States Constitution. The First Amendment protects unpopular speech, minority opinion, even speech that most people find hateful or offensive. There is a common misunderstanding on the part of many about

individual liberty in a democracy. Many people believe that, since we live in a "democracy," the "majority" should always rule, including deciding what materials should be available to everyone to read or view or listen to. This is not the case. The Bill of Rights was expressly developed and adopted *to protect individual rights, and the rights of minorities, to protect unpopular people with unpopular ideas, and individuals who were different than the "majority."* The Bill of Rights carves out certain fundamental, *individual* liberties for the specific purpose of keeping those rights *inviolate* from majority rule. The founding fathers recognized the potential for the "tyranny of the majority" and drafted the Bill of Rights to protect against it. This aspect of our free society directly impacts public library service, because when it comes to the First Amendment guarantee of freedom of speech, the majority does *not* rule. The First Amendment protects the lone voice crying in the wilderness just as strongly as it protects the shouting of the multitude. Libraries, therefore, make available in their collections materials which present viewpoints that are offensive to some, or even many, people. We do not, in short, conduct popularity polls before adding materials to our collections.

On the other side of the spectrum is the censor: "a person who knows more than he or she thinks you ought to." That definition comes from Dr. Lawrence Peters. Most people who want to censor are well meaning. They are primarily concerned about protecting children, and society at large, from materials they consider harmful. I think we can understand that — if a person doesn't read about something, he or she won't know it — and it can't harm the person! Right?!

It always amazes me that censorship is seen as a solution. And, it raises the question of "why?" Yes, this is a complex society; yes, we have little control over what happens to us on a day to day basis; yes, we lack understanding about some of the things that are happening in this society. But does this explain it all? I don't think so. Part of the answer may be found in an opinion piece written by Jean Otto for the First Freedom Op-ed Service. This First Freedom Op-ed Service was begun last June, under the sponsorship of the ALA Intellectual Freedom Committee and the Freedom to Read Foundation Board of Trustees. It provides to small and medium sized newspapers across the United States monthly thought pieces on the First Amendment and its importance to us as a society. Jean Otto's article talks about fear. Quoting President Franklin D. Roosevelt

who, early in the depression, told his countrymen, "We have nothing to fear but fear itself," Otto pointed out that "it was more than a nice bit of rhetoric. It was a prescription for life. Yet fear remains a driving force for many of us." She continues: "Few of us still fear the Russians, but we are impelled by what we see all around us to fear for both our lives and our futures."

What are we afraid of? Well—crime, rampant violence, people whose skins are a different color, people who are rich, people who are poor, people who are driven by ambition, people with no ambition at all. And overriding all of these and many others, we fear books, magazines, videos, paintings, photographs, dance, and other communication formats that use vulgar or sexist or racist words or images — words we don't like — or words that refer to ideas we don't like — or use words that depict our fears realistically, that force us not only to think, but also to consider deeply held beliefs from perspectives that others hold. In short, we seem to fear information -- a disquieting idea for a nation of self-governors.

This seeming fear of information could not have been more evident than in an attempt in Fairfax County, Virginia, to establish an "adults only" section of the library. That section would contain all materials -- regardless of format -- that

the complainant believed to be bad or improper for young people, namely, materials on AIDS, homosexuality, abortion, sex education, masturbation, and a few other topics dealing specifically with issues of major importance to the very audience she wanted to keep the information from. The proposal died aborning because the community put a stop to it. The person who proposed the "adults section," rebuffed by her own community, turned her sights to creating Family Friendly Libraries elsewhere!

The seeming fear of information is also visible in the many challenges to library materials. Last year, OIF recorded 740 challenges. That's bad enough, but research has shown us that for every incident reported, there are as many as four or five that, for one reason or another, are not reported. These numbers, then, still represent only the tip of the iceberg.

But in 1995, that tip of the iceberg was most interesting! But first, let me go back to 1994. In that year, the focal points of challenges were:

(1) homosexuality -- "Daddy's Roommate," "Heather" -- (2) witchcraft.

**1995**

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| 1. | *I Know Why the Caged Bird Sings* | Maya Angelou | 15 |
| 2. | *The Giver* | Lois Lowry | 11 |
| 3. | *The Adventures of Huckleberry Finn* | Mark Twain | 10 |
| 4. | *The Chocolate War* | Robert Cormier | 9 |
| 5. | *Of Mice and Men* | John Steinbeck | 8 |
| 6. | *Forever* | Judy Blume | 7 |
| 7. | *Bridge to Terabithia* | Katherine Paterson | 6 |
| 8. | *Catcher in the Rye* | J.D. Salinger | 6 |
| 9. | *More Scary Stories to Tell in the Dark* | Alvin Schwartz | 5 |

These titles comprise 1995's "Top 9" list, but they reflect adults' concern that no "child" should see or read or listen to anything that touches on the "S's": sex (including homosexuality), swear words, Satanism, sensitivity (meaning cultural sensitivity or "political correctness") and suicide. And when materials containing one or more of these topics are "discovered" to be accessible to children and young people, there are usually at least some people who will step in to "protect" the kiddies.

But we're living in a time when an extremely important part of public policy is to "protect" children. Such protection was behind the Fairfax County proposal; it was also behind controversies over videos in Indianapolis and New York City. The issue in both cases was why libraries make available "R," "NC-17," and "unrated" art and foreign films and, worse, are willing to loan them to young people. Put in other words: Why don't libraries do with films and videos what theaters and video stores do, namely, limit access for children and young people? The answer to this question, in short, is that the MPAA rating code is the creation of the Motion Picture Association of America, a private, independent organization. Private organizations can do anything they want to do. Motion picture theaters and video stores are also private enterprises, and as such, can adopt, or create, their own rules or standards for operation. If they want to adopt the MPAA rating code -- they are more than welcome to do so.

Libraries, however, are public bodies, supported by public monies. As such, they cannot adopt policies and procedures (or rating systems) developed by private organizations or individuals. In short, you cannot codify into public policy rules, procedures, or *modus operandi* developed by private entities.

This does not mean that libraries can't make available discussions of rating systems that apply to movies. In fact, I believe libraries have a responsibility to do so. I would say, in addition, that libraries should not only have the MPAA rating code and its applications, but should also have a selection of the many other codes that are available.

Neither bill passed - but as long as "protecting" is the public ploy, they may be back.

Given the general environment that I have just described, and the focus on "protecting" children, it should come as no surprise that cyberspace or electronic communications or the Internet, is seen as the newest threat to our children.

The *mis*information about electronic communication is absolutely laughable, or would be laughable, if it weren't so serious.

Computer bulletin boards are said to "prey upon" or "stalk" children. There have been some disturbing incidents: 1) A young man agreed to physically get up from his computer, go out of his house, and travel to meet a total stranger he had conversed with on a computer bulletin board dealing with homosexuality. They met at the strangers' house, and the young man was subsequently raped. Who got blamed? The computer bulletin board, not the rapist -- nor, I might add, the

young man who was so naive. In another incident, a 16 year old in the Pacific Northwest was "lured" to San Francisco by a 'net acquaintance -- who was also 16 -- and a Denver Post Executive resigned last fall when he was caught meeting a teenager in Ft. Lauderdale. He had set up the meeting over the Internet and thus became the subject of a sting operation by the Denver *Post*.

I warned my kids about strangers.

Don't get me wrong -- in the voluminous information available on the Internet, there is some that most parents (or adults) would not want children -- whether their own or other peoples' -- to see. For instance, there is information on how to build bombs and other incendiary devises.

And, of course, there is SEX!! -- some in the form of pornography and pedophilia. Indeed, some people believe it is rampant on the 'net!

The truth is, I have never once turned on my computer and been assaulted by sex, violence, or anything else that I didn't want to see -- except maybe a few e-mail messages. The other explanation for not being assaulted by this kind of

material is that I am not -- by any stretch of the imagination -- a day under 18 -- and, therefore, this material automatically hides itself from me. I know that's true because I have spent innumerable hours trying to find it -- to no avail.

Electronic communication *is* different. It is, in my opinion, the most important advance in communications since the invention of the printing press. I believe it is the communications medium of the future. But, it's merely a new *tool*, a new mechanism through which we communicate.

That new tool of communication with all of its frightening implications landed on our doorstep on February 8, 1996, when President Clinton signed into law the Telecommunications Reform Act of 1996. Included in the Act is the Communications Decency Act, which is about keeping "indecent" material from anyone under 18. The CDA says that if you "merely" provide access to the internet, you have no liability. But — if you provide content, you risk fines up to $250,000 and two years in prison — if you allow *anyone under 18* to access "indecent" material.

What's "indecent?" Who knows. The truth is that the term "indecency" has never been defined by Congress or the courts, but is a far broader concept than "obscenity." Examples of "indecency" include George Carlin's "7 Dirty Words" monologue, at least some portions of Howard Stern's broadcasts and, according to one court, the text of Allen Ginsburg's poem "Howl." "Indecent" is one of those words whose definition changes with the user.

In the beginning, some librarians were skeptical about the CDA's impact on them. We doubted that merely putting card catalogs on the 'net or starting our own home page put us in the same category as the crass commercial producers. Well, these activities certainly didn't make us AOL's or Microsoft's equals -- but the legislation lacked carefully honed definitions of who and what constituted "providers." In the CDA, we suddenly became bedfellows, tarred by the same brush (but not, unfortunately, by the same benefits!). And when Clinton signed the Telecommunication Reform Act of 1996, which included the Communications Decency Act, we were as concerned as our new bedfellows. In short -- we panicked -- all of us!

In response to the passage of the Act, the Freedom to Read Foundation and the American Library Association put together a broad coalition of non-profit, business and consumer organizations to counter the legislation. Calling ourselves the Citizens Internet Empowerment Coalition, it includes, in addition to ALA and the Freedom to Read Foundation, America Online; American Booksellers Association; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer; Association of American Publishers; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe; Families Against Internet Censorship; Health Services Libraries Consortium; Hotwired Ventures; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network; National Press Photographers Association; Netcom On-Line Communications Services; Newspaper Association of America; Opnet; Prodigy Service Company; Society of Professional Journalists and Wired Ventures.

Having put together this incredible coalition, we turned our attention to the issues being litigated.

- The Act effectively banned a broad category of communication that is constitutionally protected; thereby violating the First Amendment's guarantee of freedom of speech. But the speech we challenged did **NOT** include obscenity, child pornography, stalking laws, or any speech currently prohibited by law. Our litigative effort focused on the speech this law would ban which included valuable works of art and literature, information about health and medical issues, and examples of popular culture.

- The Act attempted to prohibit material on the Internet that was "indecent" or "patently offensive as measured by contemporary community standards." These terms were challenged on the grounds that they were undefined, vague and over broad and, therefore, unconstitutional. For example, there was no distinction made between material on the Internet appropriate for a five- year old and that appropriate for a 17 year-old college student. As a result, this legislation would have chilled constitutionally protected speech.

- Given the reality of the Internet, and the way information is stored, transmitted and received both here and abroad, access restrictions for

minors (the only defense for non-commercial Internet providers) did not work in this new cyberspace medium. The net effect was a ban on constitutionally protected speech.

- We also pointed out that there are alternative ways to protect minors from inappropriate materials on the Internet that would not violate the First Amendment rights of adults and would be more effective than this law. For example, parents can already block pornographic materials through devises available in the marketplace and other technological solutions. These alternative measures were not considered by Congress, which held no hearings, nor invited any testimony on this issue before passing this sweeping legislation.

- The government argued the Internet is close to television and radio, where courts have imposed content restrictions on what may be broadcast. We argued that the Internet is more like print -- a newspaper, a bookstore, a library -- than it is like a broadcast, whether radio or television, because the audience is not captive. Each member of the audience has control over

what he or she can access. Accordingly, the Internet deserves the same First Amendment protection as books and newspapers.

We rested our case on May 10. The three-judge panel's decision was handed down on June 12, and declared the CDA unconstitutional. The panel, composed of Doris Sloviter, Chief Judge of the Third Circuit Court of Appeals, and Judges Ronald Buckwalter and Stewart Dalzell of the United States District Court for the Eastern District of Pennsylvania, issued a preliminary injunction barring the government from enforcing, prosecuting, investigating or reviewing any complaints regarding Internet materials based on allegations other than obscenity or child pornography.

The decision includes 123 specific findings of fact which present an overview of the nature of the Internet, methods of restricting access to materials and information on the Internet, the practicality of the defenses included in the legislation and the problem of Internet transmissions from outside the United States. The findings of fact closely follow the language of the complaint filed by CIEC. These are followed by separate opinions by the federal panel, with each

judge discussing a separate aspect of the CDA and each concurring that the Act is unconstitutional.

Congress had stated, and the Justice Department had argued, that the intent of the CDA was to prevent pornography on the Internet. The judges noted, however, that the legislation went well beyond that goal because it failed to define "indecency" and instead ensnared constitutionally protected materials in the legislation's net. In fact, the ruling noted that Broadway plays, discussions of female genital mutilation, photographs in *National Geographic,* novels, and even ribald conversations between adolescent boys might be considered to fall within the scope of the statute. The court noted that there are better, and less restrictive, ways to protect children — for instance, the use of blocking devices such as SurfWatch and Net Nanny — than this sweeping legislation.

The clearest and best First Amendment language in the ruling was that of Judge Stewart Dalzell. In contrast to centralized broadcast media where more restrictive standards on speech have been applied by the courts, Judge Dalzell noted that the Internet is quite the opposite — decentralized and global. Thus, "any content-based regulation of the Internet, no matter how benign the purpose, could burn

the global village to roast the pig....Cutting through the acronyms and argot that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The government may not, through the CDA interrupt that conversation. **As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from government intrusion....**"

Judge Dalzell ends his opinion with this powerful comment, "The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of the plaintiffs' experts put it with such resonance at the hearing: 'What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.' **Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.**"

Highlights of the decision include:

* The CDA is unconstitutional on its face and flawed when it attempts to restrict the rights of adults to free speech in the name of protecting children from pornography

* A rejection of the government's position that the scope of the CDA is limited to content providers who are commercial pornographers since it is not supported by the statute

* The "indecency" standard is vague and over broad

* The government could have, but did not, limit the CDA to obscene or pornographic materials

* The Internet deserves as least as much protection under the First Amendment as printed material, if not more — leading to a even freer, more robust medium than ever imagined.

* There is no effective way to limit materials on the Internet to adults — the CDA, therefore, intrudes on constitutionally protected speech

* The CDA will fail to accomplish the Government's interest in shielding children from pornography on the Internet because nearly half of the Internet communications originate outside the United States

* There are less restrictive means to protect children from obscenity and pornography including blocking devices and enforcement of existing obscenity and child pornography laws

On July 1, (at 4:00 p.m.!) the Justice Department filed its notice of appeal to the United States Supreme Court. This was the expected course of action since President Clinton indicated that he wanted the legislation reviewed by the high court. Although the government's papers were initially due September 1, with ours to follow on September 30, the government asked for and was granted an extension of time. Their documents were filed on Monday, September 30, and ours will follow in 30 days. Then the government can rebut. We anticipate the case will be argued in the opening months of 1997, with a decision before the court adjourns in the summer of 1997. It will not be a cakewalk, however. The Solicitor-General's Office will handle it -- the Solicitor-General handles all Supreme Court cases -- and we think Walter Dellinger, the Acting Solicitor-

General, will come out swinging. ~~The jurisdictional statement doesn't appear to have very much that it new in it.~~

The jurisdictional statement holds few surprises. The government argues that the Communications Decency Act is not unconstitutionally vague or overbroad; that the Communications Decency Act's definition of "patently offensive" materials is similar to one of the elements in *Miller v. California*, the Supreme Court's pronouncement on the definition of obscenity; and that the lower court erred in holding that the Communications Decency Act unconstitutionally interferes with adult communication. The government relies heavily on the recent Supreme Court decision in *Denver Area Educational Telecommunications Consortium v. F.C.C.* (also known as the *Alliance* case). Parts of the *Denver* decision are troubling to our challenge, and it is not a surprise that the government is using this case to buttress its arguments.

The most unique argument is that by preventing the enforcement of the Communications Decency Act, the district court has not only imperiled the government's ability to protect children from sexually explicit material on the Internet (significantly not "indecent" material), but that parents who do not want

to expose their children to these materials will have "little choice but to severely limit or altogether deny their children access to the Internet." Apparently, the government is very concerned about the First Amendment Rights of children!!

Along with the Jurisdictional Statement, the government also filed an 172 page appendix containing documents filed in the lower court.

In the meantime, any and all complaints to the Justice Department made under the CDA, such as the American Family Association's charge in April that the CompuServe's MacGlamour Forum violated the CDA will, of course, be suspended unless the Supreme Court reverses the decision of the special three judge federal panel.

We live in an often dangerous, nasty, disease-ridden, violence prone world -- but suppressing information about the state of our world cannot and will not change it or make it better.

As authors continue to push the outside of the envelope of social tolerance, in all media of communication, librarians will be right there with them, offering the

public the opportunity to engage in what many regard as the crowning glory of a free society -- informed public debate.

I'd like to close with a vignette told by John Henry Faulk, folklorist and champion of speech, whose career was shredded during the McCarthy era. John Henry used to tell a story about his boyhood in rural Texas.

One hot summer day, Faulk remembered, his mama asked him and his little friend to gather eggs in the henhouse. As one of those barefooted boys reached into a nest a chicken snake trailed behind his emerging hand.

Johnny and his friend, he remembered, cut a new door in the chicken house. Breathless and terrified, they ran to mama, who told them, "Lawsy, Johnny, don't you know a chicken snake can't hurt you?" "Yes'm," he answered. "But it can scare you so bad you hurt yourself."

We cannot permit fear to scare librarians -- to scare us -- so much we limit our professionalism -- thereby accomplishing what our detractors cannot. We are the