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Web Regulation Battles Heat Up

By Pat Newcombe

TWO VICTORIES
BOLSTER THE
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FROM OVER

Two recent incidents involving the Internet and software caused hardly a ripple in the mainstream press, but what happened could have far-reaching implications for publishers, libraries, and the public. In June, a judge ruled that a federal agency's attempt to regulate publishers of online newsletters and software was unconstitutional. That same month in Texas, Gov. George W. Bush signed legislation that overturned a ban on self-help legal software in the state.

In both cases, the forces in favor of deregulation and freedom of speech on the Internet prevailed against those in favor of government regulation and licensing. Federal regulators were told they could not force publishers and software producers—in this case, of newsletters about commodity futures trading—to register with the government simply because their opinions and content were available online.

In Texas, legislators decided that publishers who provide legal information in the form of books, software, or Web sites are protected by the First Amendment and their products are not a substitute for legal advice, as long as they

clearly state they are not an alternative to legal counsel.

For now, these closely watched victories appear to strengthen the view that information, whether in print or electronic format, should be free from unnecessary government control and regulation. That's good news not just for publishers, but also libraries that purchase guides, newsletters, and software, and provide Internet access to their patrons. Without that free flow of information, libraries could be forced to limit the offerings provided by a community service that is growing in popularity.

Regulating speech or a profession?

But the war against cyberspace regulation is far from over. So far this year, state legislators have introduced more than 1,500 bills calling for some type of Internet regulation, according to the U.S. Internet Council, a nonpartisan group of state policymakers and industry leaders committed to advancing public policies essential for the digital era. "Government is interested in expanding its reach," commented Bill Meyers, chief executive officer for the council. These recent victories have made Internet supporters, such as Meyers, more

optimistic. "But it's a long road ahead," he added. "The tough battles haven't started."

Since the days of the Depression, Texas has prohibited the unlicensed practice of law. To uphold that prohibition, the state created the Unauthorized Practice of Law Committee (UPLC), a judicial panel that investigates and prosecutes companies and individuals who practice law without a license.

In 1998, the panel brought charges against Iowa-based Parsons Technology, publisher of Quicken Family Lawyer, an interactive software program that guides users through the steps necessary to draft a will, a contract, a rent or lease form, an agreement, and a variety of other legal documents.

In the eyes of the UPLC, the software crossed the line into practicing-without-a-license terrain. They alleged that the software, which features Harvard University law professor Arthur Miller, gives legal advice and is really an electronic attorney that practices law. Committee members said the software should be banned to protect the

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Cyberspace showdown:

- A federal regulatory agency is appealing a decision that says Web publishers and software producers don't need a license.
- A ban on self-help legal software in Texas was overturned by a bill that requires software to carry a warning label.
- This year alone, state legislators have introduced more than 1,500 bills seeking some type of Internet regulation.

public from shoddy legal advice. Federal Judge Barefoot Sanders of Dallas agreed, and last April issued an order prohibiting the software's sale and distribution in Texas, the first and only state to do so. Parsons appealed the ruling, stating that the ban denies Texans their First Amendment right to free speech by preventing them from being able to choose for themselves what they can read, and that the UPLC failed to name a single consumer who had been injured using the software.

The Texas ruling sent shivers down the spines of self-help publishers, librarians, and many members of the Texas legal community. They saw the actions of the UPLC as nothing more than a small band of lawyers more interested in protecting their turf than in free speech and unfettered access to legal information for a public increasingly unable to afford lawyers. Nolo.com, formerly known as Nolo Press, also a publisher of self-help legal information and under investigation by the UPLC, joined with the Texas Library Association and the American Association of Law Libraries and filed suit against the UPLC, seeking a judgment in favor of the legal self-help industry.

The injunction against the software remained until this summer when the Texas State Legislature passed a bill, signed into law by Gov. Bush, amending the state's code to allow the sale and distribution of legal guides in the form of books or software, as long as they clearly and conspicuously state that the products are not a substitute for the advice of an attorney. In light of the legislation, the UPLC has dropped its investigation of Nolo (*AL*, Aug., p. 24).

Impermissible restraint

As the showdown in Texas played out this summer, another battle involving free speech, the Internet, and regulation was reaching its climax in Washington, D.C. For several years the Commodity Futures Trading Commission (CFTC), a federal regulatory agency, had been steadily expanding its job from simply regulating commodity traders to monitoring and regulating the opinion and content of commodities newsletters and related software

products. Like the Texas lawyers who saw self-help material as thinly veiled efforts at practicing law, the CFTC viewed the newsletters and software as professional advice that required government supervision and regulation.

While the CFTC exempted large publications, such as the *Wall Street Journal*, Reuters, and *Barron's*, because they gave "incidental" commodity advice, other dispensers of advice, such as newsletter and Web site publishers, had to register and submit themselves to fingerprinting and random audits or face stiff penalties: five years in jail and \$500,000 in fines.



Scott Bullock
Senior Attorney
Institute for Justice

"You cannot say that the mere giving of opinions is the equivalent to the giving of professional advice."



William Meyers
Chief Executive Officer
U.S. Internet Council

"Librarians have been among our first and most ardent supporters of the Internet."



Steve Elias
Associate Publisher
and General Counsel
Nolo.com

"There's nothing worse than telling a librarian they have to ban a popular resource."

Several publishers responded by seeking counsel from the Institute for Justice, a Washington-based public-interest law firm, and went to court, suing the CFTC. On June 21, U.S. District Judge Ricardo Urbina ruled in the publishers' favor, stating that the agency's attempts to regulate the publishers created "an impermissible prior restraint upon the exercise of free speech and runs afoul of the First Amendment of the United States Constitution."

In August, the CFTC appealed Judge Urbina's decision to the U.S. Court of Appeals for the D.C. Circuit.

Can't license information

For software developers and publishers, these rulings have helped clear the air over regulation and the Internet. In the CFTC case, the issue came down to whether or not Web publishers, as well as software producers, must have government approval, in the form of a license, before they may offer opinions over these media.

With Judge Urbina's ruling, the message is now

clear: "You cannot license people who provide information and opinions and you cannot say that the mere giving of opinions is the equivalent to the giving of professional advice," said Scott Bullock, senior attorney at the Institute for Justice. "This is an important message for people who are establishing

Librarians who were once dispensers of information are now facilitators of information.

ing Web sites and developing software and are not licensed and do not wish to be licensed. The government cannot require these people to be licensed."

In Texas, the case against Quicken Family Lawyer showcased just how rapidly technology has opened up information to

people in ways never before thought possible. Lawyers suddenly found a low-cost software program offering information they charged several hundred dollars to provide. They felt threatened and turned to the government—in this case, the UPLC—to regulate a new information market.

Had the government and the court prevailed in banning the legal software, the effect on Texas's libraries would have been dramatic. "I think a number of librarians would have fought that removal order," said Steve Elias, associate publisher and general counsel for Nolo.com. "There's nothing

worse than telling a librarian they have to ban a popular resource."

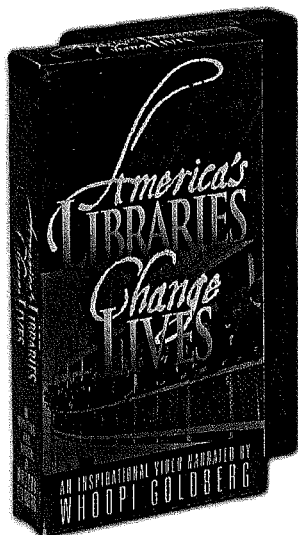
Avoiding the regulatory beachhead

With Internet laws still in the development stage, both cases are viewed as important tests of government regulation of electronic media. Had the government won either of these cases, the development and distribution of information in an electronic format would have dramatically changed. "You would have seen a lot of government bodies and professional licensing boards and the like start to impose the same types of requirements on all types of content on the Internet and all kinds of software that is being produced," said Bullock. "Once the beachhead is there and established, the natural tendency is to push the envelope on these regulatory matters."

Not only would consumers find it harder to locate and download legal and investment information, but information from other highly specialized professions would have faced new scrutiny. For instance, Internet users increasingly surf the Web and buy software for answers to complex tax questions. But nothing is more popular right now than medical information. Nearly 30% of Internet users seek out medical information. Of that group of users, 70% do so before visiting a doctor's office.

For libraries, these numbers are not trivial. A re-

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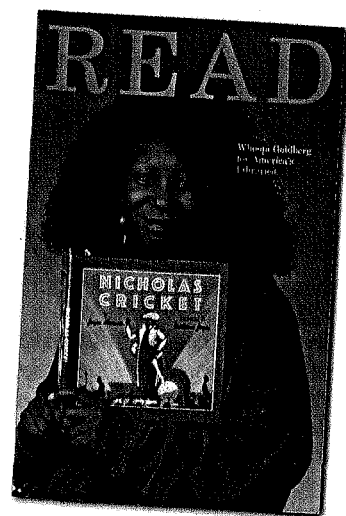
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cent ALA survey found that 73% of public libraries provide some kind of Internet access to patrons. Since 1994 there has been a 113% increase in Internet connectivity in public libraries. That number continues to grow.

The growth is changing the way librarians think of the Internet, which is a terrific repository of information for reference purposes. Because it is unregulated, the Internet has become an important source of free information. As a result, librarians have been bombarded with more sophisticated information requests, because patrons know they can search for all kinds of information, including medical, tax, investment, and legal advice. Librarians who were once dispensers of information are now facilitators of information. They are putting information into the hands of people who could not afford it before.

Too early to claim victory

Keeping that information free and unfettered is going to be a tough task, according to Judith Krug, director of ALA's Office for Intellectual Freedom. "It's going to take constant vigilance," she said. "Librarians will play a part in this fight for the free flow of information. Right now the biggest challenge is to make sure the library profession remains a united force behind the free flow of information and ideas."

But will it remain free and flowing? Some be-

lieve that the enormous investment of capital and user interest in the Internet will prove too powerful a force for regulators to keep in check. "I predict it is too much in the interest of too many people in this country to allow these old 19th-century regulatory, guild-type apparati to survive," explained Nolo.com's Elias. "You can sweep a physical product off the shelf," he added, "but not the Internet. There are no state boundaries. You'd have to get between a person's computer and server somewhere to stop the flow of information."

But even if the tide of progress is against the regulators, they are not likely to give up without a good fight. "The battle is not over yet," said Bill Meyers. "It's too early to claim victory." He points out that, so far, there hasn't been any loss of jobs among the professions that have begun to fight the unregulated Internet, but that could change.

For that and other reasons, Internet advocates are counting on librarians to stand fast in the fight against regulation of the Web—the great democratizer of information. "Librarians have been among our first and most ardent supporters of the Internet," Meyers observed. "They are absolutists on issues concerning freedom on the Internet." ♦

• *The Internet will*
• *prove too powerful*
• *a force for*
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