
Freedom of Speech



What is “Freedom of Speech”?

- You can say anything?
- You can say most things, subject to some restrictions?
- What might those restrictions be?
- Does the Internet change anything?

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

A Core American Value

- Restrictions exist
- What these are has varied over time
- Obscenity, “fighting words”, “clear and present danger”, etc.
- Some justices think that that’s wrong:

It should be noted at the outset that the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” That leaves, in my view, no room for governmental restraint on the press.

New York Times Co. v. United States, 1971, Justice Douglas, concurring

“Abridging the Freedom of Speech, or of the Press”

- Note the distinction between “speech” and “the press”
- Many things qualify as “speech”
- The “press” has a long-standing traditional role as a public critic

The Traditional Press

- Traditional newspapers and other publishers
- Radio and television
- Cable TV

Characteristics

- Corporate structures
- High financial barrier to entry
- Some content-based regulation of radio and TV: limited spectrum forces the government to make allocation decisions
- Other regulation must be content-neutral

Speech

- Originally, just that: speech
- Were private pamphlets and leaflets “speech” or “press”?
- Since then, many other activities, including things like dancing, art, flag-burning, and more have been held to be speech within the meaning of the First Amendment
- It is now held to protect *expression*

Protected Speech

To block some speech, a “compelling government interest” must be shown. The restraint must be narrowly tailored, and its beneficial effects are measured against the harm it causes.

Political speech Very heavily protected; “compelling interests” are rare or non-existent

Ordinary speech Still well-protected, but there may be context issues, i.e., graphic nudity in a scientific or legitimate artistic context, as opposed to the same images designed to titillate

Commercial speech Can be restricted (e.g., tobacco ads)

Some Speech is Never Protected

- Obscenity—but *very* hard to define
- 👉 “perhaps I could never succeed in intelligibly doing so. But I know it when I see it”. (Justice Potter Stewart, 378 U.S. 184 (1964))
- Speech inciting dangerous actions—as opposed to ideas—can be outlawed

Libel

- In the U.S., a statement must be *factual, false, and defamatory* to be libelous
- To libel a “public figure”, the statement must be not just false; rather the “statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” (New York Times v. Sullivan, 376 U.S. 254 (1964))
- Statements of opinion, by definition, are never libelous

Enter the Net

- The net changed everything
- There was no longer a high barrier to entry
- Or was there?

The Net is Decentralized

- The Internet was designed to be decentralized
- Slightly older technologies—Usenet, FIDO, dial-up “bulletin boards”—required only a PC and a modem to participate

A Court's View

“It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the ‘democratizing’ effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche.”
(ACLU v. Reno, 929 F. Supp. 824 (1996))

But...

- You don't connect to the "Internet", you connect to an ISP
- Anyone can create an ISP—but anyone can create a newspaper
- More and more of the net is controlled by large ISPs
- Is there a problem?

Internet Structure

- Big ISPs—the so-called “Tier 1”s—*peer* with each other at multiple points, and generally share the cost of the physical interconnection
- Small ISPs purchase *transit* from big ISPs. They may or may not peer with each other; they also may peer at *exchange points*
- ☞ Many (but not all) consumer ISPs are in this category
- End-sites, including colos (colocation facilities), buy connectivity from one or more ISPs

Publishing: Individuals

- Consumer ISP—but some have restrictions on what you can do
- From Verizon Internet Terms of Service: “You may NOT use the Service as follows: . . . (b) to post or transmit information or communications that, whether explicitly stated, implied, or suggested through use of symbols, are obscene, indecent, pornographic, **sadistic, cruel, or racist** in content . . . of the newsgroup; (h) to interfere with another persons usage or **enjoyment** of the Internet or this Service” (http://onlinehelp.verizon.net/consumer/bin/pdf/pdfs_post071807/73157_verizon_ConstOS0707.pdf)
- The government could not impose such restrictions; such speech, though distasteful, is protected
- Employers generally have more stringent policies
- Schools? Sometimes available, but not to most people

Publishing: Small Group

- Often use a hosting service
- Example: Pair Networks says “Adult-oriented sites, designed for entertainment or commercial purposes, are not allowed on pair Networks servers.”

`(http://www.pair.com/policies/adult.html)`

“Operating any service which enables or assists anonymous or abusive behavior by third parties is forbidden.”

`(http://www.pair.com/policies/misuse.html)`

- Other companies have their own restrictions

Publishing: Larger Organization

- Put a server in a “colo”—a co-location facility
- Requires system administration expertise
- Cost: about \$100/month for a small server
- May be bandwidth-limited; more bandwidth consumption increases costs

Your Own Location

- Expensive—must pay for “local loop” to provider, as well as the provider’s fee
- Typical total cost is several thousand dollars/month
- Need your own machines, staff, etc.
- Generally for larger companies only
- But—fewest restrictions

What's the Point?

- Connecting cheaply often comes with publishing restrictions
- Usually, the restrictions aren't onerous
- At times, especially in copyright cases, web sites do pull the plug

Examples

- Diebold (which made widely-criticized electronic voting machines) demanded that ISPs pull down allegedly-copyrighted content (Diebold found liable; the judge said “no reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold’s voting machines were protected by copyright”)
- Uri Geller, the alleged psychic, got YouTube to yank a video critical of him (Geller backed down in an out-of-court settlement)
- YouTube’s Content-ID system flagged a video of a cat purring as infringing copyright (<https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-1>)

Big Brother versus Little Brother

- As noted, the First Amendment does not apply to private parties
- More and more, online access is controlled by a few large companies.
- Is this a problem?
- So far, it hasn't been too serious—but for some content overseas servers have been safer

Who is Responsible for Content?

- If something is improper, the individual who posted it should be the liable party
- ISPs are protected from liability for user-created content
- However, they may have to take down offending content if properly notified of the problem
- Exception: this applies only if they're more or less passive conduits, and do not exercise any editorial control

Speech on the Web: Good News

- Generally, very cheap and easy to post things—the court was right; very low barrier to entry
- Without too much effort, it's possible to find ISPs and hosting companies that have many fewer restrictions
- Controversial content is easily mirrored outside the US (i.e., Wikileaks)—and can sometimes be found in Google's cache. . .

Speech on the Web: Bad News

- Increasing concentration of power
- Increasing use of lawsuits to force takedown of material
- Increasing push for regulation and censorship by many governments

Anonymity

- Anonymity is often a vital part of free speech
- Many lawsuits seek to discover the poster's identity
- More on this on Monday

Student Speech Online

- What can (pre-college) students say online?
- On-campus, students have free speech rights unless they “materially and substantially disrupt the work and discipline of the school.”
- Can web sites, Facebook postings, etc., done from home be regulated by schools?
- Courts have disagreed; will likely end up in the Supreme Court soon

Blogger Rights

- Bloggers, of course, have full First Amendment protections
- But—are they “journalists”?
- In some states, journalists have special privileges, such as protecting sources
- Not yet clearly settled

Was I a “Journalist” in the Eyes of the Law?



Across the street from SIPA, Spring '72

Look Who's There...



Outside Hamilton Hall, Spring '72