



Free Speech

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Background

In the United States, [FREEDOM OF SPEECH](#) is guaranteed by the First Amendment of the U.S. Constitution, the highest law in the land. This law protects what individuals say, what they write, and their right to meet freely with other people in just about any forum: clubs, demonstrations, organizations, and rallies. This cherished protection applies to everyone in the United States.

The advent of the Internet and the huge variety of data it makes accessible has been hailed by free speech advocates as an incredible boon to the United States and the world. On the other hand, the notion that such a vast array of speech can be disseminated so easily and broadly, all without any restrictions or review, concerns and offends many individuals and groups. Some groups have called for an array of content regulations and restrictions, for example, legislative initiatives that would force electronic communications providers to censor the material they distribute or to deny access to various potential users. On the other side of the debate, there are concerns that such regulation contravenes the protections of the First Amendment, ultimately providing control at the cost of free speech.

The Internet poses certain challenges to traditional First Amendment law. Some groups assert that the Internet should be allowed to regulate itself. These groups assert that government regulations would lag behind the rapidly developing technology. Even so, there have been many attempts to regulate the Internet, and these have frequently raised legal questions and challenges.

Radio, Television, and the Internet

To use television or radio airtime, get ideas published in a newspaper or magazine, or use traditional types of communications media to share thoughts with thousands or millions of listeners, people must first obtain the approval and assistance of publishers and broadcasters. But, such concerns are not as relevant in cyberspace. On the Internet, people can publish themselves, and their messages are instantly distributed around the globe. Through the Internet and the World Wide Web, individuals now possess an unprecedented degree of freedom regarding the words and images shared with others.

The urge to regulate new communication technologies is certainly nothing new. Practically every new technological communications development has been subjected to the same legislative fervor for review in its earliest days. Even though the U.S. Supreme Court has traditionally vigorously supported First Amendment

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rights, the Court has been somewhat inconsistent when it applies the First Amendment to providers of mass communications. A typical maneuver is for the Court to find differences in the characteristics of the new medium that it uses to justify different treatment in the First Amendment standards that apply to it.

Previously, radio and television broadcasters encountered similar problems. In the early days of radio, there were calls for restricting broadcasting only to persons licensed by the federal government, and only on the frequencies and at the times assigned to them. Laws such as the Radio Act of 1927 required broadcasters to censor obscene and profane language from their programs. At the same time, the Radio Act purported to prohibit the government's control over the content of broadcasts. In the 1940s, radio broadcasters asserted that such regulations violated their First Amendment rights. But the Supreme Court cited the difference between radio and other forms of communication because it is not available universally. This difference, the Court found, made radio subject to government regulation. One of the consequences of such regulation has been less stringent First Amendment protection for providers of mass communications media. This restricted view dominated legal discourse on the subject for the second half of the twentieth century.

Similar to the legislative and regulatory challenges prior communications media providers endured, there are as of 2002 numerous appeals for legislation and regulation of electronic media. Current events outside the communication industries have also driven the impetus to regulate. For example, after the Oklahoma City bombing, some groups demanded that government control Internet sites on which individuals can learn about making bombs. Following a Carnegie Mellon study on Internet [PORNOGRAPHY](#) and a subsequent Time Magazine article that brought the study's findings to mainstream America, there were fresh calls for immediate legislative and regulatory crackdowns on the content available on electronic networks. These regulations were intended to protect children from seeing materials that would harm them. This Carnegie Mellon study quickly attracted intense criticism for flawed research and distorted statistics of the quantity of porn to be found on the Internet. But public concern pushed attempts by Congress to do something to address these concerns. What resulted was the Communications Decency Act of 1995 (CDA).

The federal courts have helped to provide guidelines for First Amendment rights of online services. The courts have ruled on various challenges to Internet providers and groups who provide content for Web sites. Of course, judicial protection can never be guaranteed. But generally, it is safe to say that the First Amendment allows restriction of speech that is obscene or defamatory in certain situations and the First Amendment does not protect speech that is an imminent threat of action.

The Courts are nevertheless striking out into new territory. For example, in 1991, the Supreme Court case of *Cubby v. CompuServe* helped clarify the parameters of First Amendment protections extended to businesses that provide digitized information. The court held that an online service provider is acting as a kind of digital, profit-based library when it makes publications available online as long as the service provider has no editorial control over the content. This extends First Amendment protections given to news distributors and conventional libraries. In arguing its case, CompuServe asserted that in this age of cyber-publication, there is no way that an online service provider can have knowledge of the content of each message or communication transacted over its service. CompuServe also argued that to do so would be to inappropriately assume editorial control of the speech of its users, and doing so would make the service more like a publisher than a distributor.

The Communications Decency Act of 1996

The Communications Decency Act of 1996 (CDA) was enacted as a means to prevent the transmission of indecent and patently offensive materials to minors over the Internet. There were two key provisions to the CDA:

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1. The first prohibited companies or individuals from knowingly transmitting obscene or indecent messages to anyone under 18.
2. The second prohibited companies or individuals from knowingly sending or displaying patently offensive communications.

The CDA imposed broadcast-style content regulations on the Internet; many felt that this severely restricted the First Amendment rights of U.S. Internet users. Some claimed that the Act threatened the very existence of the Internet itself. A major problem for the CDA, despite its good intentions, was its impracticability. How can such a law be effective at controlling content on a global communications medium when a website in the Netherlands is as accessible as a site in Tulsa?

Soon after the CDA was enacted, the activist group, Citizens Internet Empowerment Coalition (CIEC), was assembled to challenge the CDA. CIEC is a broad coalition of the following groups: book associations, libraries, civil liberties groups, magazines newspapers, online service providers, over 56,000 individual Internet users, and recording industry associations. In terms of composition, CIEC is a fairly good representation of the breadth of the Internet community. CIEC asserted that the Internet is a unique communications medium deserving broad First Amendment protections. Basically, CIEC argued that the inability of Internet users and providers to reliably verify the age of information recipients prevented them from engaging in indecent speech, which traditionally has received strong protection under the First Amendment.

It is important to keep in mind that the CDA was not intended to outlaw child pornography, [OBSCENITY](#), or [STALKING](#) children. These acts were made crimes many years earlier under other laws. Rather, the CDA prohibited users from posting indecent or obviously offensive materials in public forums on the Internet. These included chat rooms, newsgroups, online discussion lists, or web pages. Under the CDA, books such as the *Catcher in the Rye*, *Ulysses*, *Fanny Hill*, and many other texts, although offensive to some people, have the full protection of the First Amendment if they are published in a newspaper, magazine, or a book, or posted in the public square.

After a lengthy [HEARING](#) that included many examples and on-line demonstrations, a special three-judge district court (which was created by the CDA in anticipation of constitutional challenges) agreed with the groups and ruled that the provisions violated the First Amendment. This decision went to the Supreme Court on appeal.

Reno v. ACLU

A major U.S. Supreme Court case on Internet free speech is *Reno v. ACLU*. In that case, the Supreme Court struck down the CDA. As part of its ruling, the Court granted the highest level of First Amendment protection to speech conducted over the Internet. In *Reno*, the Court distinguished the Internet which has much weaker First Amendment protections from broadcast media and placed the Internet squarely among traditional media such as books and newspapers. By doing so, the Court helped establish unequivocally that the Internet is entitled to the broadest First Amendment protections.

In 1997, the Supreme Court held unanimously in *Reno v. American Civil Liberties Union* that the CDA constituted an unconstitutional restriction on speech on the Internet. The court found the Internet to be a "unique and wholly new medium of worldwide human communication" deserving of full First Amendment protection. Lawmakers may only regulate obscenity; consequently, the regulations contained in the CDA would reduce the constitutionally protected material available to adults "to only what is fit for children." According to the Supreme Court, the unique features of Internet communications such as its availability and ease of use were critical to its decision.

The Child Online Protection Act

In October of 1998, the federal government enacted the Child Online Protection Act (COPA). In some ways, COPA can be described as the "sequel" to CDA. COPA provides criminal penalties for any commercial distribution of information harmful to minors. The law was challenged almost immediately, and in February 1999, the plaintiffs obtained an injunction that prevented the government from enforcing COPA. Eventually, COPA was declared unconstitutional by the Supreme Court on the grounds that each individual who tries to disseminate speech over the Internet would have to conform that speech to the most restrictive and conservative state's standard of what constitutes material harmful to minors.

Filters

Internet users can publish material that can reach millions of people at very low cost. This differs greatly from television and radio, which have a limited channel capacity and cede little control to viewers or listeners. Additionally, Internet users can control a great deal of the content they receive online. For example, Internet users can prevent their children from viewing certain material by employing inexpensive and easy-to-use technologies that can block or filter content based on the individual tastes and values of parents.

The Children's Internet Protection Act

In December 1999 Congress passed the Children's Internet Protection Act (CIPA). This legislation requires schools and libraries receiving federal funds for Internet access to install filtering software on their computers in order to block access to materials that are obscene or otherwise harmful to minors. CIVIL RIGHTS and Free Speech advocates filed suit to block implementation of the law citing the potential that filtering software would block protected, harmless, or innocent speech. As of 2002, the case had been argued and the court's opinion was pending.

The plaintiffs in the CIPA case caution that software limiting the availability of electronic material may jeopardize free expression and facilitate government [CENSORSHIP](#). Proponents of filters and rating systems frequently characterize these systems as features or tools. On the other hand, filters and rating systems also are seen as fundamental architectural changes that may actually suppress speech far more than laws ever could. For example, several popular Internet filters block the Web sites of benign [HUMAN RIGHTS](#) organizations. Basically, the problem with filters appears to be their inability to consider context. What troubles free speech advocates far more than inadvertent context-based blocking is blocking legitimate sites based on a set of morals or political points of view. In a similar fashion, blocking software at libraries can prevent adults as well as children from getting access to valuable speech in the areas of sex education, abuse recovery discussions, and protected speech concerning lesbian and gay issues.

The Yahoo! Case

In 2000, a French court ruled that the Internet company, Yahoo!, must ban its French users from English-language sites that auctioned Nazi books and other paraphernalia. Basically, the court was asking Yahoo! to filter out French users to certain parts of its many sites. Yahoo! claimed that because [Yahoo.com](#) services are governed by U.S. law, auctions of such materials cannot be barred because of the U.S. constitutional right to freedom of speech. In November 2001, a U.S. District Court ruled that this French decision could not be enforced in U.S. courts. The court held that the First Amendment protects content created in the United States by American companies from regulation by countries that have more restrictive free speech laws. Subsequently, the League Against Racism and Anti-Semitism and the French Union of Jewish Students have sought an appeal claiming that French law should not be overruled by U.S. law.

Anonymity

Anonymity in the context of communications is the ability to hide one's identity while communicating. Doing so helps individuals to express their political ideas without fear of government intimidation or public retaliation in three important areas:

1. Participate in governmental processes
2. Membership in political associations
3. The practice of religious belief

In three cases between 1960 to 1999, the Supreme Court reaffirmed the notion that sacrificing anonymity "might deter perfectly peaceful discussions of public matters of importance." Additionally, the Supreme Court has upheld disclosure laws (laws that reduce anonymity in political contexts) only in cases in which the government can demonstrate the existence of a compelling government interest. For example, a compelling governmental interest exists in assuring the integrity of the election process by requiring campaign contribution disclosures.

The feature of anonymity has been embraced by a huge number of Internet users. Some of the venues especially suitable for anonymity are message boards, chatrooms, and various informational sites. Anonymity allows individuals to consume and/or provide unpopular, controversial, or embarrassing information without sacrificing privacy or reputations. But such anonymity is increasingly being assailed as civil litigants have begun using the adversarial [DISCOVERY](#) process to get around online anonymity measures. Since 1998, there have been many [DEFAMATION](#) lawsuits filed against "John Doe" defendants by plaintiffs who [ALLEGE](#) they have been harmed by anonymous Internet postings.

As of 2002, any civil litigant may allege defamation against an Internet poster and bring a civil suit. If, during discovery, the court approves a [SUBPOENA](#) calling for the identity of a poster, the Internet service provider must disclose the individual's name, even before the poster's statement is proven defamatory. This enables companies or other powerful groups to use the legal discovery process to intimidate anonymous users. This issue has been litigated in New Jersey; that court imposed strict rules to protect the identities of anonymous Internet posters in the discovery process. Nationally, the law is far from settled:

Additional Resources

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Governance in 'Cyberspace': Access and Public Interest in Global Communications. Grewlich, Klaus W., Kluwer Law International, 1999.

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The Law of the Internet. 2nd ed. Delta, George B., and Jeffrey H. Matsuura, Aspen Publishers, Inc., 2002.

Liberating Cyberspace: Civil Liberties, Human Rights, and the Internet. Edited by Liberty (National Council for Civil Liberties), Pluto Press, 1999.

Organizations

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