



Internet Regulation

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- [Background](#)
- [Intellectual Property](#)
- [Free Speech](#)
- [Privacy](#)
- [Contracts](#)
- [Other Legal Considerations](#)
- [Additional Resources](#)
- [Organizations](#)

Background

The Internet is an immense labyrinth of more than 200 million computers, computer networks, and databases interconnected across the world. Through its user interface, known as the World Wide Web, the Internet gives users access to a vast amount of information, including typewritten text, tabular and graphic material, sound recordings, video images, pictures, and computer programs, which are stored at locations called "Web sites." Each Web site has a unique address, identified by its alphabetic Universal Resource Locator (URL) and its numeric Internet Protocol (IP). For example, <http://www.montana.edu> is the URL for Montana State University's Web server, while 153.90.2.1 is the IP for the school's Web site. The Internet also enables users to communicate to each other through e-mail, instant messaging, chat rooms, and message boards.

Most users do not access the Internet directly but instead go through an Internet Service Provider (ISP). ISPs typically charge subscribers an hourly or monthly fee for the service they provide. In addition to providing users with a connection to the Internet, many ISPs offer content of their own, ranging from e-mail and video games to personal banking, home shopping, tax, and research services. Subscribers connect to ISPs in a variety of ways, including cable modems and satellite uplinks. However, the most common means of accessing an ISP is over a telephone line. ISPs provide subscribers with telephone numbers that dial into servers that are connected to the Web.

Once connected, users literally have the world at their fingertips. Web sites today are as diverse as they are countless. Governments, governmental watchdogs, non-profit organizations, commercial entities, [CONSUMER PROTECTION](#) groups, educational institutions, religious institutions, news media, and members of the sports and entertainment industries are just a few of the entities hosting Web sites on the Internet. The group of users visiting these Web sites is similarly large and diverse. In September 2001 researchers estimated that approximately 420 million people were accessing the Internet each day in at least 27 countries. Despite the enormous amount of daily global Internet traffic, no single authority exists to regulate it.

In fact, the Web was designed in part to thwart outside control and withstand foreign attack. The Internet evolved from the Advanced Research Project Agency Network (ARPANET), which was created by the U. S. Department of Defense in 1969 to function as a decentralized, self-maintaining national communications network that permitted computer-to-computer transmissions across vast distances in case the United States came under nuclear attack. ARPANET was programmed to work without human intervention, and sometimes

in spite of it. For example, if a communications processing hub became disabled, ARPANET would re-route all transmissions through a different hub.

In the early 1980s the National Science Foundation relied on Internet technology to create the NSF Network (NFSNET), a high-speed communication network that facilitates research at remote academic and governmental institutions. NFSNET now serves as the technological backbone for all Internet communications in the United States. In 1989 English computer scientist Tim Berners-Lee developed the first prototype of the World Wide Web as means for the general populace to access the Internet. A year later he invented the concept of hypertext browsing, a method for imbedding shortcuts into on-screen text, a look that still defines the Internet today. In 1991 the World Wide Web debuted on the Internet, and by 1995 16 million people were reported "surfing" it each day.

As more people posted content on the Web and more people used the Web for personal, governmental, and business purposes, the Internet soon opened the door to an array of lawsuits and legal disputes. In one sense, the legal disputes were as novel as the Internet itself. But in another sense, the disputes merely presented new variations on longstanding legal controversies. As the millennium approached, law schools, lawyers, and judges were recognizing a distinct area of [JURISPRUDENCE](#) known as Internet law.

Internet law consists of state and federal statutes, [CASE LAW](#), and other legal norms that regulate activity on the World Wide Web. Although the law governing the Internet is in many ways no different than the law governing other areas of life in the United States, legal disputes involving the Internet have generally centered on four bodies of law: (1) intellectual property; (2) free speech; (3) privacy; and (4) contracts.

Intellectual Property

Trademark Law

TRADEMARKS consist of words, logos, symbols, slogans, and other devices that are used to signify the origin and authenticity of a good or service to the public. Established trademarks symbolize the quality of the goods or services they are associated with, and enable consumers to make effective and reliable buying decisions. For example, the circular black, blue, and white emblems attached to both ends of motor vehicles manufactured by Bavarian Motor Works (BMW) represent a familiar trademark that has come to signify meticulous craftsmanship to many consumers. However, the federal Trademark Act only protects marks that are distinctive and not merely generic. 15 U.S.C.A. sections 1051 et seq. Once a mark is sufficiently distinctive, competitors are prohibited from luring customers away from each other by using confusingly similar marks in commerce. Competitors are also prohibited from using marks that dilute or tarnish the value of another's mark in commerce.

Most Internet trademark [LITIGATION](#) has revolved around domain name disputes. A domain name is the portion of a URL that follows the "[http://www](#)" prefix. A domain name can be reserved for use on the Internet by registering it with any one of several registrars that are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN). Domain-name litigation typically arises when a business that has invested heavily in developing good will for a famous trademark is thwarted from using that mark for its Web site by a so-called "cybersquatter." Cybersquatters are individuals who intentionally reserve a third-party's trademark as a domain name for the purpose of selling it back to the owner for a profit.

A leading case on this issue is *Panavision Intern., L.P. v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998), in which the [DEFENDANT](#) was sued after reserving approximately 240 domain names that were extremely similar to the trademarks of famous commercial entities, including "[deltaairlines.com](#)," "[britishairways.com](#),"

"crateandbarrel.com," and "ussteel.com." One of the commercial entities sued the defendant. The defendant admitted he had no intention of ever using the marks to sell goods or services, and thus the plaintiff could not claim that consumers were likely to be confused by the similar names. Instead, the court found that the defendant diluted the plaintiff's trademark by curtailing the exploitation of its value on the Internet.

A year later Congress codified the rights of Trademark owners against cybersquatters, passing the Anti-Cybersquatting Act of 1999 (ACPA). The Intellectual Property and Communications Omnibus Reform Act of 1999, PL 106-113, 113 Stat 1501 (November 29, 1999). ACPA imposes civil liability upon defendants who have registered, trafficked in, or used a domain name that is identical to or confusingly similar to a trademark owned by the plaintiff, so long as the mark is distinctive and the defendant acted with a **BAD FAITH** intent to profit from the plaintiff's mark. Bad faith can be shown in a number of ways, including a pattern of registering widely known trademarks as domain names to divert Internet users from the trademark owner's Web site. 15 U.S.C.A. section 1125(d). The law empowers courts to dispose of a domain name when the owner cannot be found or served with a **SUMMONS** and complaint in the United States.

Copyright Law

A **COPYRIGHT** is an intangible right granted by **STATUTE** to the originator of certain literary or artistic productions, including authors, artists, musicians, composers, and publishers, among others. For a limited period, copyright owners are given the exclusive privilege to produce, copy, and distribute their creative works for publication or sale. Applicants seeking copyright protection for their work must establish that the work is original and has been reduced to a "tangible medium of expression." 17 U.S.C.A section 102(a). "Originality" does not mean "novelty" for the purposes of copyright law. It simply means that the work in question is the work of the person seeking copyright protection and not the creation of a third party from whom the work was copied. The phrase "tangible medium of expression" means that the work manifests itself in a concrete form, as when something is written on a piece of paper, recorded on an audiotape, captured on a videotape, or stored on a computer disk, hard drive, database, or server.

There are a number of defenses to copyright **INFRINGEMENT** suits, but "fair use" is the most frequently asserted. Fair use refers to the use of a copyrighted work that does not violate the exclusive rights of the copyright owner. The defense allows original works to be reproduced for the purpose of criticism, comment, news reporting, teaching, scholarship, research, and personal consumption. 17 U.S.C.A. section 107. Whether a particular use is "fair" depends on a court's application of the following factors: (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work, including the extent to which the use diminishes the economic value of the work.

Copyright thus has important implications for the Internet. It is not uncommon for Web sites to make copyrighted works available to Internet users or for users to alter copyrighted works downloaded from the Internet. Nor is it uncommon for either Web site owners or Internet users to distribute original or altered copyrighted works across the Internet. But unless they are doing so with the permission of the copyright owner, both Web site owners and Internet users face possible claims for infringement, even if the distribution does not directly profit the distributor and even if the recipients are using copyrighted works for personal pleasure.

For example, in the case of *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), where the U.S. Court of Appeals for the Ninth Circuit ruled that the fair use doctrine does not allow an Internet service to facilitate the transfer of copyrighted MP3 digital audio files between service users who pay no fee to the copyright owners. Napster, the defendant Web service, created a system whereby service users interested in obtaining MP3 files, which reproduce high-quality music in a compressed and easily transferable format,

could connect to Napster and contact others interested in exchanging digital recordings. The users would then send MP3 files to each other through the Internet, but the files would never pass through Napster's servers. Recognizing that the individual users were mostly high school and college students exchanging the music for personal consumption, the court still found that the purpose and character of their use was commercial in nature. "Napster users get for free something they would ordinarily have to buy," the court observed. The court said that Napster reduced audio CD sales among those students who used its service, thereby diminishing both the size of the copyright owners' market and the value of the copyrighted work.

Patent Law

PATENTS give individuals and businesses the exclusive rights to make, use, and sell specific types of inventions, such as software programs, mechanical devices, manufacturing processes, chemical formulas, and electrical equipment. Federal law grants these exclusive rights in exchange for full public disclosure of an original work or invention. The inventor or author receives complete legal protection for his or her intellectual efforts, while the public obtains valuable information that can be used to make life easier, healthier, or more pleasant. For example, U.S. **PATENT** No. 5,625,781 gives International Business Machines Corporation (IBM) the exclusive rights over a Web browsing tool that allows users to navigate through a list of hypertext links that are displayed on a Web site and then return to the list without having to backtrack through the intermediate links. Were another company to make the same technology available for its own Web-browsing product, IBM would have a viable claim for patent infringement.

Free Speech

Obscenity and Pornography

The Supreme Court has always had difficulty distinguishing obscene material, which is not protected by the First Amendment, from material that is merely salacious or titillating, which is protected. Justice Potter Stewart once admitted that he could not define **OBSCENITY**, but quipped, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964). Nonetheless, the Supreme Court has articulated a three-part test to determine when sexually oriented material is obscene. Material will not be declared obscene unless (1) the average person, applying contemporary community standards, would find that the material's predominant theme appeals to a "prurient" interest; (2) the material depicts or describes sexual activity in a "patently offensive" manner; and (3) the material lacks, when taken as a whole, serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

The Internet added new challenges to free speech regulation by making hardcore **PORNOGRAPHY** readily available to Web users young and old. Congress tried to curb children's access to indecent and offensive material by passing the Communications Decency Act of 1996 (CDA). Pub.L. 104-104, 110 Stat. 56 (1996). The CDA made it unlawful to knowingly transmit indecent messages or "patently offensive" displays or images to all persons under 18 years of age. But the CDA failed to withstand scrutiny in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), where the U. S. Supreme Court declared the law violative of the First Amendment. The Court reasoned that the law imposed a blanket restriction on the targeted speech, and thus was not narrowly tailored to accomplish the government's objective of curtailing minors' access to obscene material.

Congress attempted to refine its approach by passing the Child Online Protection Act (COPA). Pub. L. No. 105-277, § 231, 112 Stat. 2681-2736 (1999). COPA called for the implementation of an age-verification system that would shield minors from accessing hard core pornography on the Internet. This law was also

Encyclopedia of Everyday Law: Internet Regulation

successfully challenged in court. The U. S. District Court for Eastern District of Pennsylvania issued an injunction barring enforcement of COPA. In affirming the district court's decision, the U. S. Court of Appeals for the Third Circuit said that the law would allow the most conservative communities in the country to dictate the level of [CENSORSHIP](#) for the rest of the country, a result directly contrary to the Miller test that required a community-by-community approach to obscenity. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3rd Cir. 2000). However, the case was appealed to the Supreme Court, which is expected to rule on it in 2002.

Meanwhile, Congress passed Children's Internet Protection Act (CIPA) in 2000. Pub. L. No. 106-554, 114 Stat. 2763 (2000). The law requires public schools and libraries that receive federal technology funding to block objectionable material on the Internet by installing filtering software. CIPA was challenged in March of 2001 when the American Civil Liberties Unions (ACLU) filed a lawsuit in federal court. However, the trial is not slated to begin until sometime in 2002.

Commercial Speech

The First Amendment permits governmental regulation of commercial speech so long as the government's interest in doing so is substantial, the regulations directly advance the government's asserted interest, and the regulations are no more extensive than necessary to serve that interest. The Supreme Court has ruled that the government has a "substantial interest" in regulating false, deceptive, and misleading advertisements. However, the Supreme Court had not been asked to consider whether the First Amendment allows the government to regulate the distribution of unwanted advertisements. It may be asked shortly to do so with the prevalent use of "spamming" on the Internet.

Spamming is a term that describes the mass distribution of unwanted and unsolicited e-mail that advertises the sale of goods and services. Large-scale delivery of electronic advertisements on the Internet is not only annoying to users but also to ISPs and Web site owners whose mail servers can be overburdened by bulk e-mail. Sixteen states have banned spamming to some extent, and Congress has several bills before it aimed at achieving the same purpose. However, legal challenges are slowly creeping into courts across the country.

The Washington State Supreme Court, for example, upheld the state's anti-spamming law. *State v. Heckel*, 143 Wash.2d 824, 24 P.3d 404 (Wash. 2001). The court concluded that the law served the legitimate purpose of banning cost-shifting inherent in the sending of deceptive unsolicited bulk e-mail, and the only burden it placed on spammers was in prohibiting the distribution of e-mail with misleading subject lines. RCWA 19.190.010 et seq. The court found that this prohibition was consistent with other state statutes outlawing false and deceptive advertising. However, not all courts agree on this issue. The U. S. District Court for the Southern District of Ohio found that spamming constitutes an illegal form of [TRESPASS](#). *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D.Ohio 1997).

Defamation

The law of [DEFAMATION](#) addresses harm to a party's reputation or good name through the torts of [LIBEL AND SLANDER](#). The [COMMON LAW](#) rules underlying the doctrines of libel and slander have developed over time and typically vary from state to state. At common law libel law governed injurious written communications, while slander law governed injurious oral communications. In general the elements for libel and slander are a false and defamatory statement concerning another, made in a negligent, reckless, or malicious manner, and which is communicated to at least one other person in such a fashion as to cause sufficient harm to [WARRANT](#) an award of [COMPENSATORY DAMAGES](#). As long as these elements are satisfied, a suit for defamation will not offend the First Amendment to the U. S. Constitution. A stricter set of elements must be satisfied when the allegedly injured party is a public official or a [PUBLIC FIGURE](#). *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The Internet makes it easier than ever before to disseminate defamatory statements to a worldwide audience. The risk of liability associated with defamatory statements is an important consideration for parties seeking to communicate with others on the Internet, as well as for parties that provide the technological means for such communications. Even satirical or humorous communication can give rise to a cause of action for libel or slander if the communication reasonably asserts a factual charge that is defamatory. However, the U. S. Court of Appeals for the Fourth Circuit limited the liability of ISPs, when it ruled that 47 U.S.C.A. § 230(c)(1) insulates them from libel or slander claims stemming from defamatory statements that are made by persons using the Internet through their service. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

Privacy

Privacy Concerns on the Internet

Advances in technology now allow Web site operators, advertisers, and others to intercept, collect, compile, and distribute personal information about users browsing the Internet. Every time individuals browse the Internet they leave a trail of electronic information along the way, and most Web sites employ a variety of devices to automatically gather this trail and analyze it, sometimes offering it for sale to third parties who may use the information for targeted marketing. Known as "clickstream data," this information may include the user's e-mail address, the type of computer, and the browsing software.

Information about a user's activities may also be obtained through the use of Persistent Client-Side Hypertext Transfer Protocol files, commonly referred to as Internet "cookies." A cookie is a small file generated by a Web server and stored on a user's hard drive. Internet sites use cookies to count the users visiting their Web pages, and collect information about a user's personal preferences based on the other sites they visit. Most Web browsers allow users to prevent cookies from being stored on their hard drives, though Internet sites can in turn deny access to users who block cookies from being deposited on their hard drives.

Privacy may also be compromised on the Internet by "hackers" who unlawfully intercept Web transmissions without authorization or consent. In the early days of the Internet it was far more common to hear reports of individuals breaking into commercial, governmental, academic, or private sites or transmissions for the purpose of stealing credit card numbers, social security numbers, phone numbers, passwords, and other information that could facilitate a [FRAUDULENT](#) scheme to make money. While such incidents still occur, encryption software is now widely deployed to keep hackers out. By and large, encryption software is effective. However, some experts predict that the next generation of computer viruses will allow hackers to take over control of infected operating systems from remote locations.

Laws Regulating Privacy on the Internet

There is no comprehensive legislation in the United States that regulates the collection, storage, transmission, or use of personal information on the Internet. As new technologies have developed, the response has been to enact laws designed to target specific privacy-related issues on an [AD HOC](#) basis. As a result, the law governing privacy issues on the Internet consists of an assortment of state and federal legislation, regulations, and court decisions interpreting them.

In 1999 Congress enacted the Financial Modernization Act (FMA), which requires federal agencies to issue regulations implementing restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties. Pub. L. No. 106-102, 113 Stat. 1338 (1999). Affected agencies include the Federal Trade Commission (FTC), SECURITIES and Exchange Commission (SEC), and the Federal Reserve. Pursuant to the act, the FTC issued a final rule requiring

Encyclopedia of Everyday Law: Internet Regulation

financial institutions to provide notice to consumers about its privacy policies and practices and set forth the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated individuals and entities.

The Electronic Communications Privacy Act (ECPA) regulates intrusions into electronic communications and computer networks. 18 U.S.C.A sections 2510 et seq. Subject to various exceptions, ECPA makes it illegal to intercept e-mail at the point of transmission, while in transit, when stored by an e-mail router or server, or after receipt by the intended recipient. ECPA specifically prohibits the intentional interception, disclosure, or use of any wire, oral, or electronic communication. The act provides both criminal and civil penalties for its violation. However, one federal court ruled that ECPA could not be interpreted to support a [CLASS ACTION](#) alleging that an advertising corporation had unlawfully stored cookies on the hard drives of Web users who had visited particular Internet sites. *IN RE DoubleClick Inc. Privacy Litigation*, 154 F.Supp.2d 497 (S.D.N.Y. 2001)

The [FAIR CREDIT REPORTING ACT](#) (FCRA), as amended by the Consumer Reporting Reform Act of 1996, regulates the collection and use of personal information by consumer reporting agencies. Fair Credit Reporting Act of 1970, 15 U.S.C.A sections 1681-1681u (1997); Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-426 (1996). The law requires that consumer reporting agencies establish "reasonable measures" addressing the commercial need for consumer credit information in a manner that ensures "confidentiality, accuracy, [RELEVANCY](#), and proper utilization" of the information. Among other things, the law prohibits the disclosure of a consumer report in the absence of written consent from the consumer, unless the disclosure is made pursuant to a court order or for legitimate business purposes.

Many states have enacted laws that mirror or expand upon the above federal acts. For example, Article 250 of New York's Penal Law prohibits intercepting or accessing electronic communications without the consent of at least one party to the communication. N.Y. Penal L. sections 250 et seq. States have also enacted privacy legislation relating to medical records and employment records. Conn. Gen. Stat. Ann sections 13-128a et seq. One state has modified its existing privacy laws so they apply to information collected over the Internet. Va. Code Ann. § 2.1-379. Another state passed a law prohibiting gambling on the Internet to quell concerns over the kinds of information that might be exchanged to partake in such activity. 720 ILCS 5/28-1.

Contracts

At the heart of electronic commerce is the need for parties to form valid and legally binding contracts online. Basic questions relate to how contracts can be formed, performed, and enforced as parties seek to replace paper documents with electronic equivalents. It is often difficult, if not impossible, to be certain about the identity of the party with whom one is dealing on the Internet. Web transactions, particularly consumer-oriented transactions, often occur between parties having no preexisting relationship. Not knowing the identity of a party to an online transaction can raise concerns about whether a seemingly valid contract is actually enforceable. Appropriate use of digital signatures has been one solution to this problem.

The term "digital signature" describes a technology that is not based upon hand-signed instruments but rather on complex mathematical algorithms that facilitate the verification, integrity, and authenticity of electronic communications to make them nonreputable. "Nonreputable" means that [EVIDENCE](#) exists to link the identity of a party to the substance of an electronic message or data and that the evidence is sufficient to prevent a party from falsely denying having sent the message or data. The evidence usually comes in the form an electronic "seal" on a digital work, which typically requires that the parties signing a contract have access to cryptographic software.

Encyclopedia of Everyday Law: Internet Regulation

The Uniform Electronic Transactions Act (UETA) endorses the use of digital or electronic signatures. UETA provides that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form." It also provides that electronic records may substitute for typewritten or handwritten records when the law requires that a document be in writing. Finally, for contracts and agreements that require a signature to be enforceable UETA provides that an electronic or digital signature will suffice. UETA has been adopted in 22 states.

Other Legal Considerations

The four areas of law discussed above are amongst the most heavily litigated for cases involving Internet-related issues. But by no means are they the exclusive and definitive source for Web jurisprudence. Depending on the circumstances of a particular case, Internet law and regulation can be nearly as inclusive and encompassing as the entire corpus of all U. S. law. If a Web site fails to accommodate a blind person with voice-recognition software, handicapped users might have a claim for [DISABILITY DISCRIMINATION](#). If another Web site entices users to visit it and then preaches anti-race and anti-gender sentiments, visitors may have a claim under relevant harassment or hate speech laws. Stockowners desiring to trade shares over the Internet will need to determine what disclosure rules they must comply with before consummating a deal. Consumers living in one state and buying goods over the Internet in another state should be aware of applicable sales taxes in both jurisdictions. Protestors condemning a foreign government's behavior on an Internet message board might want to consider if they are in violation of foreign or international laws by doing so.

But the biggest challenge facing the future of Internet regulation may come from random attacks by computer viruses and worms unleashed by Web terrorists. The increase of virus outbreaks over the past two years has been highlighted by the widespread recognition they have received. "SirCam," "Melissa," and "Love Bug" are just three widely known viruses that experts estimate to have caused more than a billion dollars in damage worldwide. Security breaches by hackers cost U. S. companies another \$10 billion every year. Private companies, government agencies, and academic institutions invest millions more in developing technology and educating their employees to protect their computer systems from these dangers. Nonetheless, the dangers persist. As a result, many federal lawmakers have urged changing the focus from preventing the spread of worms and viruses to developing effective means of identifying the individuals who have released them and then punishing those individuals severely enough to deter others from engaging in similar behavior.

Additional Resources

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Organizations

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