

Regulating Electronic Speech: When, Why, and Where?

Obscenity and hate speech abound on the Internet.

by Janine Hiller and Ronnie Cohen

The Internet is a vast new medium replete with all kinds of images and information, some of which are widely regarded as not suitable for minors or children. This article explores both the new laws passed by Congress and the constitutional constraints imposed by the courts in regulating speech on the Internet.

Early in the history of the Internet, the United States Supreme Court described the new communication medium as “the most participatory form of mass speech yet developed.” That broad categorization of the Internet, in *Reno v. A.C.L.U.*, set the stage for the protection of electronic speech under the First Amendment of the United States Constitution, which states, “Congress shall make no law ... abridging the freedom of speech ...”

Since that time courts, legislators, parents, consumers, and businesses have struggled to find the balance between the protection of free speech and the protection of children and property rights and between the policy of supporting the free flow of information and the policy of promoting a safe and beneficial online environment. These struggles involve values and policies that increasingly come into conflict as Internet activities expand without regard to national boundaries and often without regard to cultural differences.

To understand the nature of the constitutional protection of speech, one must first appreciate that speech can take many forms. The spoken and written word, artistic media, and even expressive action such as burning a flag as a political protest have all been held to be protected speech. Electronic speech encompasses traditional forms of speech in the display of words or images on a computer, and it also includes newer forms of “speech” such as Internet addresses, or domain names, and “code,” the machine-readable language of software programs. Electronic speech expands traditional forms of speech in a particularly significant respect: one person’s speech on a Web site or bulletin board can instantaneously be accessed by millions of users across the globe, thereby raising international legal and policy conflicts. In the following sections, we consider two areas where the

“Conflicts arise as Internet activities expand without regard to national boundaries or cultural differences.”

Janine Hiller (jhiller@vt.edu) is a professor of business law at Virginia Tech University, Blacksburg, Virginia, and Ronnie Cohen (rcohen@cnu.edu) is a professor of business law at Christopher Newport University, Newport News, Virginia. They are co-authors of the book, Internet Law and Policy (Prentice-Hall, 2002).

nature and protection of speech on the Internet are controversial—(1) limiting the access by children to inappropriate material on the Internet, and (2) limiting or prohibiting undesirable speech, such as hate speech.

Protecting Children from Inappropriate Speech

Anyone who has innocently entered a search into a search engine for “free pictures,” instead of “clipart,” will know that there is an abundance of pornographic and adult material easily available on the Web. Even “popup” ads have been known to surprise users by portraying titillating and explicit pictures. The first legislative attempt to regulate the Internet was the Communications Decency Act (CDA) of 1996, a federal law criminalizing the transmission or display of obscene, indecent, or patently offensive material to minors by means of the Internet. First Amendment case law [see, e.g., *Roth v. United States*, 1957; *Miller v. California*, 1973; *Pope v. Illinois*, 1987] has established that “obscene” material, as defined by the courts, is a kind of speech without educational or artistic value and, therefore, is *not* protected by the Constitution. This provision of the CDA is still in effect today. However, Congress sought to protect children from a broader range of inappropriate material with this law.

In *Reno v. A.C.L.U.*, the 1997 case that challenged the constitutionality of the CDA, the U.S. Supreme Court declared that the banning of indecent material on the Internet to minors was unconstitutional because the law was both too vague and too broad. The law was too vague because *indecent* could mean different things to different people; for example, a parent providing explicit material to a child on birth control via e-mail might be found guilty of

providing indecent material if it was received in a community that had strict interpretations of indecency. The law was too broad because there was no technical means to effectively determine whether a user was a child or an adult, thereby requiring that adults’ access be limited to what was appropriate for children in order to avoid liability under the law. Although recognizing the valid attempt to protect children, the Court declared that the CDA illegally limited free expression, a constitutionally protected right in our democratic society.

Following the Supreme Court’s decision declaring portions of the CDA unconstitutional, the U.S. Congress made a second attempt to protect children from inappropriate materials. The Child Online Protection Act (COPA), passed in 1998, was similar to the CDA, but limited its reach to commercial entities, and narrowed its scope to materials harmful to minors. Commercial speech can be regulated more easily than other forms of expressive speech, and material that is harmful to minors is more specific than indecent materials. Not surprisingly, COPA was challenged in court soon after its passage, and six years later the issues are still unsettled. The lower court (*A.C.L.U. v. Reno*, 3d Cir., 2000) held that the law was too vague because it is impossible to identify a community standard to determine what is harmful to minors when dealing with the Internet since the Internet recognizes no community boundaries. The U.S. Supreme Court disagreed in *Ashcroft v. A.C.L.U.* (2002), however, stating that a court could determine community standards, and sent the case back to the lower court for a further hearing. While recognizing the compelling goal of protecting children, the lower court once again held COPA unconstitutional because it was

Cases

Roth v. United States, 354 U.S. 476 (1957)

Miller v. California, 413 U.S. 15 (1973)

Pope v. Illinois, 481 U.S. 497 (1987)

Reno v. A.C.L.U., 521 U.S. 844 (1997)

A.C.L.U. v. Reno, 217 F.3d 162 (3d Cir. 2000)

Yaboo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme, 169 F. Supp. 2d 1181 (N.D.Cal.2001)

Ashcroft v. A.C.L.U., 535 U.S. 564 (2002), appeal argued 3/04/2004, U.S. No. 03-218

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir.2002)

still too broad to preserve free speech rights. In June of 2004, the U.S. Supreme Court again sent the case back to the lower court, this time suggesting COPA was unconstitutional (See sidebar on page 27).

Why is the attempt to protect children so difficult and fraught with conflicting court decisions? The Internet is an incredible communication medium, as the Supreme Court recognized in its first review of the effort to protect children. It facilitates the communication of ideas to, and among, a wide audience and therefore promotes discussion and the free flow of information, important goals of a free and democratic nation. Within this context of free expression, it is difficult to find the appropriate limitations on speech in order to protect children from access to material that adults have a constitutional right to see.

Regulation of Hate Speech on the Internet

The United States

The use of Web pages and chat rooms to encourage and spread hatred of certain groups increased dramatically in the 1990s, from only one site in the early part of the decade to more than 1,400 sites by the year 2000. The majority of these sites are housed in the United States. One reason why hate sites have migrated to this country is that speech that is commonly referred to as “hate speech” is protected by the First Amendment. The policy of protecting speech as a fundamental right, however offensive, prejudiced, or reprehensible, is a strong one in the United States. When speech incites action against a person, posing a “clear and present danger,” however, it is not protected. At what point does protected speech generally advocating hatred and violence cross the line to the unprotected speech of inciting specific illegal acts?

A crime that targets a victim because of race, religion, gender, national origin, or sexual orientation can also violate federal or state hate-crime legislation. E-mail threats have been held to violate hate crime statutes, for example. However, a statement of opinion would not violate any statute if it does not incite action. Consider, for example, the



Student using computer in class.

question of whether an American Coalition of Life Activists Web site was protected by the First Amendment when it posted the pictures of doctors who performed abortions in a “most wanted” format, with pictures crossed out when the individual doctors were ultimately murdered.

After a series of cases and appeals, the 9th Circuit Court of Appeals (*Planned Parenthood v. American Coalition of Life Activists*, 2002) ruled that the context of the entire Web site constituted a threat of harm to the physicians, and, thus, was not protected speech.

International Law

Although the constitutional traditions in the United States protect speech unless there is an actual threat of harm

to someone, many other countries around the world allow restrictions on speech in order to promote competing national policies. For example, in Germany, it is illegal to incite racism or hatred in any medium, including the Internet. However, many groups that are outlawed in Germany have relocated to Web servers and remailer sites in other countries, notably the United States. In response, Germany has sought to close down Web sites and hold ISPs liable across national borders.

A continuing dispute between French and United States’ groups, and the respective court decisions, illustrates the conflicting values of free speech and the prohibition of racism. At issue is whether Web sites must meet the laws of all countries in which they can be accessed. A French law bans the display or sale of merchandise that incites racism. A French anti-Semitism group sued, in French court, the Yahoo! auction site based in the United States, because Yahoo! advertised Nazi memorabilia and artifacts for sale. A French judge ordered Yahoo! to implement technological procedures within three months to block French Web surfers from accessing these auction sites. At the end of the three months, the court imposed a daily fine of about \$13,000

FOR DISCUSSION

Does the First Amendment protect all speech? If not, what kinds of speech have been identified by the courts as exceptions?

Congress has passed several laws seeking to restrict children’s access to offensive or harmful materials. On what grounds have the courts curbed these efforts of Congress?

How and why do France and Germany, among other European nations, treat hate speech differently from the United States?

Explore the Web

www.firstamendmentcenter.org/speech/internet/index.aspx

The First Amendment Center is a program of the Freedom Forum and is affiliated with the Vanderbilt University Institute for Public Policy Studies; it has a special section on the Internet and the First Amendment.

www.adl.org/issue_education/parents_guide_hate_net.asp

The Anti-Defamation League site has a guide for parents regarding hate sites on the Internet and links to reports about hate speech and the Internet.

www.epic.org

The Electronic Privacy Information Center has information about free speech as it relates to privacy.

www.cdt.org/

The Center for Democracy and Technology has many good resources about electronic speech and is a very good source for documents about the Yahoo! case.

www.wired.com/news/politics/

Wired.com is a news source, written in an understandable and interesting manner, about many Internet subjects, including free speech rights; it has much current news about speech issues.

until access was blocked. Yahoo! brought a suit in federal court in California (*Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 2001), asking the court to declare that the decision was unenforceable because it violated the U. S. policy of free speech. That court held that the French court decision could not be enforced because it violated the First Amendment. Angered by this U.S. decision, another French group sued the president of Yahoo! personally for "justifying crimes against humanity." The French court is scheduled to hear this case in October 2004.

The Yahoo! case is a stark illustration of the international nature of the Internet, as well as how the strongly embedded value of free speech in the United States may not be similarly val-

ued above other competing societal interests around the world. As the Internet continues to expand, and international boundaries continue to blur, it is likely that these disputes will continue to arise.

In addition, many countries actively censor speech on the Internet. In Australia, the Broadcasting Services Amendment (Online Services) Act of 1999 extends a rating system, such as the one for films, to Internet content. Content that is sexually explicit, violent, or otherwise offensive may be ordered removed, or ultimately blocked, from the Web by the agency charged with implementing the new law. The Chinese government adopted the Internet Practice Code that requires Web site operators to block content that is deemed

socially or politically harmful. Prohibited content under the Code ranges from pornography to gambling to political commentary viewed as threatening by the governing Communist Party. China's first human rights Web site has been shut down and its operator arrested. The *Wall Street Journal* Web site was also banned in China under this code. In China, Web site operators must be licensed, and in order to obtain a license, they must submit a plan for the site and agree to censor and report illegal content.

Conclusion

Throughout American constitutional history, the right of the people to be free of government restrictions on speech has evolved to meet changing forms of expression. Likewise, the right of free speech has been challenged by changing societal and governmental interests in limiting speech. The easily accessible adult material on the Internet and the policy of protecting children from seeing harmful material conflict with the policy of open access to information and the free speech rights of adults.

The Internet also brings new challenges because of its international nature and the ability of a single user to disseminate information more widely than ever before—around the world and without regard to physical borders. The lack of physical boundaries means that the closely held values of nations will conflict, as illustrated by the conflict between the free speech rights of United States' citizens and the fight against anti-Semitism in France and hate speech restrictions in other countries. The evolution of First Amendment rights will undoubtedly continue in American jurisprudence and be the subject of much international debate as well.