

Technology & Free Speech

If liberty means anything at all it means the right to tell people what they do not want to hear. – George Orwell

I never give them hell. I just tell the truth and they think it's hell. – Harry S. Truman



Topics

- Impact of changing communications paradigms
- Tension between "Free Speech" and "Offensive speech"
- Censorship in cyberspace
- Anonymity
- Spam
- Ensuring valuable and diverse content



Changing paradigms

- Regulatory paradigms
 - Communications technologies differ with respect to constitutional protections
 - Also with respect to government regulation
- Print media (Newspapers, magazines)
 - Has the strongest protections for free speech
- Broadcast media (Television, radio)
 - Has protections, but govt controls structure of industry + content
 - E.g. Canadian content regulations, restriction of some words
- Common carriers (Telephone, ISPs?)
 - Content not controlled and carrier not responsible for content



Changing paradigms

- Consider new technologies of the past 20 years
 - Bulletin-board systems (BBS)
 - World Wide Web
- How do these fit into the “print-broadcast-carrier” framework?
 - Not exactly print media
 - Not exactly broadcast media
 - Not exactly common carrier



Constitutional protections

- Canada: Charter of Rights and Freedoms
 - Section 2

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

- According to some, Section 2(b) has created “the most important litigation [which has also had] the biggest impact on Canadian society.”



Protections

- In a liberal democracy, these provisions are meant to protect citizens from government.
- It does this by prohibiting restrictions of:
 - speech
 - press
 - peaceful assembly
 - religion
- Interpretations of the provisions deal with:
 - offensive or controversial speech & ideas
 - spoken and written words (e.g., obscenity)
 - pictures, art, and other forms of expression and opinion
 - commercial speech



Other motivations for free speech

- Justice Beverley McLachlan, Chief Justice, Supreme Court of Canada (summarizing philosophical views in *R. v. Keegstra*)
 - Free speech promotes the free flow of ideas essential to political democracy and democratic institutions.
 - and therefore limits the ability of the state to subvert other rights and freedoms
 - It promotes a marketplace of ideas, which includes, but is not limited to, the search for truth.
 - It is intrinsically valuable as part of the self-actualisation of speakers and listeners.
 - It is justified by the dangers for good government of allowing its suppressions (i.e., governments trying to hide mistakes have historically tended to restrict expression)



Offensive speech: tension

- Examples of such speech can include
 - Political or religious speech
 - Pornography
 - Sexual or racial slurs
 - Nazi (or White Supremacist) materials
 - Libellous (false and damaging) statements
 - Abortion information
 - Alcohol advertisement
- Q: Can you think of any example cases?



Offensive speech & cyberspace

- What is the definition of “obscene” in Canada?
 - “Obscenity” usually applied to sexual acts
 - From the Criminal Code (s. 163 (8))

For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

- What does “undue” mean?
- Example: Pornography – three types –
 - explicit sex with violence
 - explicit sex with violence but treats people in a degrading or dehumanizing way
 - explicit sex that is neither violent nor degrading nor dehumanizing



Difficulties with “obscenity”

- Canada has been criticized for its handling of obscenity.
 - Different approach than that of other jurisdictions.
 - US: What is “obscene” is largely determined by “community standards” - but some courts have ruled that “community standards” are not appropriate for the Net.
 - UK: When courts examine material, they consider whether or not material tends to “deprave or corrupt” people likely to use material.
 - Canada: Courts focus on the nature of the material and its broad impact rather than on the impact of the consumer specifically (i.e., “a national community standard”)



Publicized Canadian Cases

- Little Sisters' gay / lesbian bookstore (Vancouver)
 - customs censored many imported books / magazines they wanted to sell, calling them obscene
 - Many were being sold in other (non-gay) bookstores
 - Supreme court ruled that customs had "systematically targeted" this bookstore
- R vs. Sharpe
 - Sharpe wrote about sexual acts with children
 - Judge: "These writings simply describe morally repugnant acts, but do not actively advocate or counsel the reader to engage in the acts." (Not illegal)



Material inappropriate for children

- Technology changes the context
 - On the web, children have access to the same “adult” text, images, video etc. as do adults
 - Online proprietors do not know if the customer is not an adult
- Regardless of the medium, there are two clearly illegal activities.
 - Creating, possessing, or distributing child pornography.
 - Luring children into sexual activity.



Discussion Questions

- Q: How should children be protected from cyberspace-access to adult material?
- Q: To what extent is violence on the web and in video games responsible for violent acts like shootings in schools? What should be done about it?



Censorship

- Three US laws
 - Communications Decency Act (CDA: 1996) - unconstitutional
 - Child Online Protection Act (COPA: 1998) - injunction against enforcement in 2007
 - Children's Internet Protection Act (CIPA: 2002)
 - Filters required in schools / libraries for receipt of federal funds
- Canada:
 - Canadian Radio-Television and Telecommunications Commission (CRTC) asked for comments on such regulation in 1997
 - In May 1999 they issued a famous press release stating the CRTC would not regulate the Canadian internet
 - Government accepted this (i.e., no new laws introduced as a result)



Offensive speech & censorship

- One approach used in the US
 - Limit Internet access in libraries and schools.
 - Accomplish this via “filtering software”
 - “Funding” control (any school or library receiving US federal funds must install such software on internet terminals)
- Example: Canadian company
 - Useful.com (Calgary)
 - software does much, much more than just web filtering
 - Is CIPA compliant
- Filters block sites containing child pornography, obscene material, anything deemed “harmful to minors”



Discussion Questions

- Q: What are some of the problems with filtering software?
- Should search engines provide complete results to a query or omit very offensive sites? (e.g. suicide How To's, child porn, government torture photos...)



What about “hate speech”?

- Racist and hateful comments are offensive...
 - ... but not necessarily illegal.
- Criminal Code, s. 318 & 319
 - It is a criminal offence to do the following with respect to an identifiable group.
 - advocate genocide
 - publicly incite hatred
 - wilfully promote hatred
 - An “identifiable group” is any section of the public distinguished by:
 - colour
 - race
 - religion ethnic origin
- Criminal Code, s. 320.1
 - A judge has the authority to order removal of hate propaganda from a computer system available to public.
 - Authority extends to all computer systems in Canada.



What about “hate speech”?

- Canadian Human Rights Act
- Section 13: Applies to e-mail, web sites, and any other telecommunications activity.
- Prohibits messages likely to expose a person to hatred or contempt on any one of several categories.
 - race
 - national or ethnic origin
 - colour
 - religion
 - age
 - sex
 - sexual orientation
 - marital status
 - family status
 - disability
 - conviction for which a pardon has been granted
- Ernst Zundel ordered to cease and desist publishing hateful messages
 - But his site remains up because it is located in the United States.



Challenges to Regulation

- For certain kinds of activity, a licence is required:
 - To practice law
 - To practice medicine (e.g., prescribe medication)
 - To practice engineering
 - To offer financial advice (e.g., investing in equities, futures, commodities)
- For other kinds of activity, no licence is required
 - To create downloadable, self-help legal software.
 - To publish newsletter / website about, or develop software for commodities and futures investing.
- Q: Would you purchase medications from an online pharmacy?



Censorship & the global net

- Internet technology has a global impact on free speech
- Can be used to **avoid censorship**
 - Global nature of Internet allows restrictions in one country to be circumvented by using networks in other, less restrictive countries.
 - Such sites are usually posted in the US.
- Can be used to **establish censorship**
 - Global nature of Internet makes it easier for one nation to impose restrictive standards on others.
 - eBay bans some items for sale (i.e., hate-group memorabilia) because of different cultural standards in different countries.



Anonymity

- A range of possibilities
- True anonymity
 - “Unlinkability”
 - Inability of anyone to determine the true author’s identity
 - Legally problematic
- Pseudonymity:
 - State of disguised identity from the use of a pseudonym
 - public pseudonyms: link between pseudonym and human being is easy for the public to know or discover)
 - non-public pseudonyms: link known by sysadmins, but no one else
 - unlinkable pseudonyms: link not known and not discoverable by service operators
- Anonymous re-mailers:
 - Return address stripped off and then forwarded to recipient
- Anonymous web browsers - hide user’s IP address, do not track or store activity



Anonymity

- Relatively recent history
 - Early years of American Republic
 - “Federalist Papers”: several authors under the name “Publius”
 - Chose to do so to help focus on the ideas, not the personalities of the writers.
 - Used to avoid discrimination
 - Nineteenth-century women who used pen names
 - Contemporary women in Persian Gulf countries
 - China
 - Speaking out against government → ruining family name
 - Therefore many must use pseudonyms (and therefore have their writings unattributed)



Anonymity vs. Community?

- Supporters of anonymity
 - Claim that it is necessary to protect privacy and free speech.
 - Helps those who are concerned about political or economic retribution.
 - Whistleblowers
 - Human rights workers
 - Victims of domestic violence
- Opponents of anonymity
 - Claim that it is anti-social and allows criminals to hide from law enforcement.
 - Threatens civil discourse (“marketplace of ideas”)
 - Examples:
 - Online harassment
 - Fraud
- Q: Should a law require ISPs to keep records of the real identity of all users (ban true anonymity)?



Spam

- Unsolicited, mass e-mail
 - Is cheap to senders but may impose costs on recipient's time or the recipient's online account (or both).
 - May contain objectionable content (political, commercial ads, solicitations for funds, pornography, etc.)
 - May contain a disguised return address.
 - May pass through filters.
 - Invades privacy.
 - Creates a financial and managerial burden on ISPs.
- How do you handle spam?



Spam & free speech

- AOL vs. Cyber Promotions
 - AOL and other service providers have successfully sued spammers - spam imposes a cost on AOL.
- Disgruntled Intel employee
 - Initially a lower US court ruled that non-commercial spam to Intel employees at their Intel e-mail accounts was a form of trespass.
 - The California Supreme Court ruled that it was not because it did not cause economic harm to Intel.



Spam: solutions (?!)

- Technology: Filters that screen out spam.
- Market pressure: Services that list spammers
- Small “microfee” for sending an email?
- Antispam laws (e.g. US CAN-SPAM 2004)
 - Canada - no specific law. But PIPEDA requires consent for email marketing
- Vigilantism: Punish spammers by hacking into their phone or computer systems.



Ensuring diversity

- Is there a balance between commercial and educational information on the Web?
- Should diverse content on the Web be subsidized with public money (i.e., taxes)?
- Should telecommunications providers be allowed to provide “tiered” service to content providers?
- Do we need to ensure the existence of sites containing civic information?
- Are more sites that promote the arts and culture needed?

