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# Lecture-7

**LECTURE 7:** Freedom of expression on the internet: global value

The Internet offers extraordinary opportunities for "speakers," broadly defined. Political candidates, cultural critics, corporate gadflies -- anyone who wants to express an opinion about anything -- can make their thoughts available to a world-wide audience far more easily than has ever been possible before. A large and growing group of Internet participants have seized that opportunity.

Some observers find the resultant outpouring of speech exhilarating. They see in it nothing less than the revival of democracy and the restoration of community. Other observers find the amount -- and, above all, the *kind* of speech -- that the Internet has stimulated offensive or frightening. Pornography, hate speech, lurid threats -- these flourish alongside debates over the future of the Democratic Party and exchanges of views concerning flyfishing in Patagonia. This phenomenon has provoked various efforts to limit the kind of speech in which one may engage on the Internet -- or to develop systems to "filter out" the more offensive material.

This module examines some of the legal issues implicated by the increasing bitter struggle between the advocates of "free speech" and the advocates of filtration and control.

# Current Controversies

## 1. Restrictions on Pornography

Three times in the past five years, critics of pornography on the Internet have sought, through federal legislation, to prevent children from gaining access to it. The first of these efforts was the Communications Decency Act of 1996 (commonly known as the "CDA"), which (a) criminalized the "knowing" transmission over the Internet of "obscene or indecent" messages to any recipient under 18 years of age and (b) prohibited the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Persons and organizations who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications, or who restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, were exempted from these prohibitions.

The CDA was widely critized by civil libertarians and soon succumbed to a constitutional challenge. In 1997, the United States Supreme Court struck down the statute, holding that it violated the First Amendment in several ways:

- because it restricted speech on the basis of its content, it could not be justified as a "time, place, and manner" regulation;
- its references to "indecent" and "patently offensive" messages were unconstitutionally vague;

- its supposed objectives could all be achieved through regulations less restrictive of speech;
- it failed to exempt from its prohibitions sexually explicit material with scientific, educational, or other redeeming social value.

Two aspects of the Court's ruling are likely to have considerable impact on future constitutional decisions in this area. First, the Court rejected the Government's effort to analogize the Internet to traditional broadcast media (especially television), which the Court had previously held could be regulated more strictly than other media. Unlike TV, the Court reasoned, the Internet has not historically been subject to extensive regulation, is not characterized by a limited spectrum of available frequencies, and is not "invasive." Consequently, the Internet enjoys full First-Amendment protection. Second, the Court encouraged the development of technologies that would enable parents to block their children's access to Internet sites offering kinds of material the parents deemed offensive.

A year later, pressured by vocal opponents of Internet pornography -- such as "Enough is Enough" and the National Law Center for Children and Families -- Congress tried again. The 1998 Child Online Protection Act (COPA) obliged commercial Web operators to restrict access to material considered "harmful to minors" -- which was, in turn, defined as any communication, picture, image, graphic image file, article, recording, writing or other matter of any kind that is obscene or that meets three requirements:

(1) "The average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest."
(2) The material "depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual conduct, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast."
(3) The material, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

Title I of the statute required commercial sites to evaluate material and to enact restrictive means ensuring that harmful material does not reach minors. Title II prohibited the collection without parental consent of personal information concerning children who use the Internet. Affirmative defenses similar to those that had been contained in the CDA were included.

Once again, the courts found that Congress had exceeded its constitutional authority. In the judgment of the Third Circuit Court of Appeals, the critical defect of COPA was its reliance upon the criterion of "contemporary community standards" to determine what kinds of speech are permitted on the Internet:

Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site

based on the geographic locale of a each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standard in order to avoid criminal liability.

The net result was to impose burdens on permissible expression more severe than can be tolerated by the Constitution. The court acknowledged that its ruling did not leave much room for constitutionally valid restrictions on Internet pornography:

We are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

In late 2000, the anti-pornography forces tried once more. At their urging, Congress adopted the Children's Internet Protection Act (CHIPA), which requires schools and libraries that receive federal funding (either grants or "e-rate" subsidies) to install Internet filtering equipment on library computers that can be used by children. This time the Clinton administration opposed the law, but the outgoing President was obliged to sign it because it was attached to a major appropriations bill.

Opposition to CHIPA is intensifying. Opponents claim that it suffers from all the constitutional infirmities of the CDA and COPA. In addition, it will reinforce one form of the "digital divide" -- by subjecting poor children, who lack home computers and must rely upon public libraries for access to the Internet, to restrictions that more wealthy children can avoid. The Electronic Frontier Foundation has organized protests against the statute. In April of this year, several civil-liberties groups and public library associations filed suit in the Eastern District of Pennsylvania seeking a declaration that the statute is unconstitutional. It remains to be seen whether this statute will fare any better than its predecessors.

The CDA, COPA, and CHIPA have one thing in common: they all involve overt governmental action -- and thus are subject to challenge under the First Amendment. Some observers of the Internet argue that more dangerous than these obvious legislative initiatives are the efforts by private Internet Service Providers to install filters on their systems that screen out kinds of content that the ISPs believe their subscribers would find offensive. Because policies of this sort are neither mandated nor encouraged by the government, they would not, under conventional constitutional principles, constitute "state action" -- and thus would not be vulnerable to constitutional scrutiny. Such a result, argues Larry Lessig, would be pernicious; to avoid it, we need to revise our understanding of the "state action" doctrine. Charles Fried disagrees:

Note first of all that the state action doctrine does not only limit the power of courts to protect persons from private power that interferes with public freedoms. It also protects individuals from the courts themselves, which are, after all, another government agency. By limiting the First Amendment to protecting citizens from government (and not from each other), the state action doctrine enlarges the sphere of unregulated discretion that

individuals may exercise in what they think and say. In the name of First Amendment "values," courts could perhaps inquire whether I must grant access to my newspaper to opinions I abhor, must allow persons whose moral standards I deplore to join my expressive association, or must remain silent so that someone else gets a chance to reach my audience with a less appealing but unfamiliar message. Such inquiries, however, would place courts in the business of deciding which opinions I would have to publish in my newspaper and which would so distort my message that putting those words in my mouth would violate my freedom of speech; what an organization's associational message really is and whether forcing the organization to accept a dissenting member would distort that message; and which opinions, though unable to attract an audience on their own, are so worthy that they must not be drowned out by more popular messages. I am not convinced that whatever changes the Internet has wrought in our environment require the courts to mount this particular tiger.

"Perfect Freedom or Perfect Control," 114 Harvard Law Review 606, 635 (2000).

The United States may have led the way in seeking (unsuccessfully, thus far) to restrict the flow of pornography on the Internet, but the governments of other countries are now joining the fray. For the status of the struggle in a few jurisdictions, you might read:

- Joseph C. Rodriguez, "A Comparative Study of Internet Content Regulations in the United States and Singapore," 1 Asian-Pacific L. & Pol'y J. 9 (February 2000). (Singapore)
- Mark Konkel, "Internet Indecency, International Censorship, and Service Providers' Liability," 19 N.Y.L. Sch. J. INt'l & Comp. L. 453 (2000). (Canada, Maylasia, and China)

In a provocative recent article, Amy Adler argues that the effort to curb child pornography online -- the kind of pornography that disgusts the most people -- is fundamentally misguided. Far from reducing the incidence of the sexual abuse of children, governmental efforts to curtail child pornography only increase it. A summary of her argument is available here. The full article is available here.

## 2. Threats

When does speech become a threat? Put more precisely, when does a communication over the Internet inflict -- or threaten to inflict -- sufficient damage on its recipient that it ceases to be protected by the First Amendment and properly gives rise to criminal sanctions? Two recent cases addressed that issue from different angles.

The first was popularly known as the "Jake Baker" case. In 1994 and 1995, Abraham Jacob Alkhabaz, also known as Jake Baker, was an undergraduate student at the University of Michigan. During that period, he frequently contributed sadistic and

sexually explicit short stories to a Usenet electronic bulletin board available to the public over the Internet. In one such story, he described in detail how he and a companion tortured, sexually abused, and killed a young woman, who was given the name of one of Baker's classmates. (Excerpts from the story, as reprinted in the Court of Appeals decision in the case, are available here. **WARNING:** This material is very graphic in nature and may be troubling to some readers. It is presented in order to provide a complete view of the facts of the case.) Baker's stories came to the attention of another Internet user, who assumed the name of Arthur Gonda. Baker and Gonda then exchanged many email messages, sharing their sadistic fantasies and discussing the methods by which they might kidnap and torture a woman in Baker's dormitory. When these stories and email exchanges came to light, Baker was indicted for violation of 18 U.S.C. 875(c), which provides:

Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

Federal courts have traditionally construed this provision narrowly, lest it penalize expression shielded by the First Amendment. Specifically, the courts have required that a defendant's statement, in order to trigger criminal sanctions, constitute a "true threat" -- as distinguished from, for example, inadvertent statements, hyperbole, innocuous talk, or political commentary. Baker moved to quash the indictment on the ground that his statements on the Internet did not constitute "true threats." The District Court agreed, ruling that the class of women supposedly threatened was not identified in Baker's exchanges with Gonda with the degree of specificity required by the First Amendment and that, although Baker had expressed offensive desires, "it was not constitutionally permissible to infer an intention to act on a desire from a simple expression of desire." The District Judge's concluding remarks concerning the character of threatening speech on the Internet bear emphasis:

Baker's words were transmitted by means of the Internet, a relatively new communications medium that is itself currently the subject of much media attention. The Internet makes it possible with unprecedented ease to achieve world-wide distribution of material, like Baker's story, posted to its public areas. When used in such a fashion, the Internet may be likened to a newspaper with unlimited distribution and no locatable printing press - and with no supervising editorial control. But Baker's e-mail messages, on which the superseding indictment is based, were not publicly published but privately sent to Gonda. While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment. Whatever Baker's faults, and he is to be faulted, he did not violate 18 U.S.C. § 875(c).

Two of the three judges on the panel that heard the appeal agreed. In their view, a violation of 875(c) requires a demonstration, first, that a reasonable person would interpret the communication in question as serious expression of an intention to inflict bodily harm and, second, that a reasonable person would perceive the communications as being conveyed "to effect some change or achieve some goal through intimidation." Baker's speech failed, in their judgment, to rise to this level.

Judge Krupansky, the third member of the panel, dissented. In a sharply worded opinion, he denounced the majority for compelling the prosecution to meet a standard higher that Congress intended or than the First Amendment required. In his view, "the pertinent inquiry is whether a jury could find that a reasonable recipient of the communication would objectively tend to believe that the speaker was serious about his stated intention." A reasonable jury, he argued, could conclude that Baker's speech met this standard -- especially in light of the fact that the woman named in the short story had, upon learning of it, experienced a "shattering traumatic reaction that resulted in recommended psychological counselling."

For additional information on the case, see Adam S. Miller, The Jake Baker Scandal: A Perversion of Logic.

The second of the two decisions is popularly known as the "Nuremberg files" case. In 1995, the American Coalition of Life Activists (ACLA), an anti-abortion group that advocates the use of force in their efforts to curtail abortions, created a poster featuring what the ACLA described as the "Dirty Dozen," a group of doctors who performed abortions. The posters offered "a $ 5,000 [r]eward for information leading to arrest, conviction and revocation of license to practice medicine" of the doctors in question, and listed their home addresses and, in some instances, their phone numbers. Versions of the poster were distributed at anti-abortion rallies and later on television. In 1996, an expanded list of abortion providers, now dubbed the "Nuremberg files," was posted on the Internet with the assistance of an anti-abortion activist named Neil Horsley. The Internet version of the list designated doctors and clinic workers who had been attacked by anti-abortion terrorists in two ways: the names of people who had been murdered were crossed out; the names of people who had been wounded were printed in grey. (For a version of the Nuremberg Files web site, click here. **WARNING:** This material is very graphic in nature and may be disturbing to many readers. It is presented in order to provide a complete view of the facts of the case).

The doctors named and described on the list feared for their lives. In particular, some testified that they feared that, by publicizing their addresses and descriptions, the ACLA had increased the ease with which terrorists could locate and attack them -- and that, by publicizing the names of doctors who had already been killed, the ACLA was encouraging those attacks.

Some of the doctors sought recourse in the courts. They sued the ACLA, twelve individual anti-abortion activists and an affiliated organization, contending that their actions violated the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. §248, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18

U.S.C. §1962. In an effort to avoid a First-Amendment challenge to the suit, the trial judge instructed the jury that defendants could be liable only if their statements were "true threats." The jury, concluding that the ACLA had indeed made such true threats, awarded the plaintiffs $107 million in actual and punitive damages. The trial court then enjoined the defendants from making or distributing the posters, the webpage or anything similar.

This past March, a panel of the Court of Appeals for the Ninth Circuit overturned the verdict, ruling that it violated the First Amendment. Judge Kozinski began his opinion by likening the anti-abortion movement to other "political movements in American history," such as the Patriots in the American Revolution, abolitionism, the labor movement, the anti-war movement in the 1960s, the animal-rights movement, and the environmental movement. All, he argued, have had their "violent fringes," which have lent to the language of their non-violent members "a tinge of menace." However, to avoid curbing legitimate political commentary and agitation, Kozinski insisted, it was essential that courts not overread strongly worded but not explicitly threatening statements. Specifically, he held that:

Defendants can only be held liable if they "authorized, ratified, or directly threatened" violence. If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.

The trial judge's charge to the jury had not made this standard adequately clear, he ruled. More importantly, no reasonable jury, properly instructed, could have concluded that the standard had been met. Accordingly, the trial judge was instructed to dissolve the injunction and enter judgment for the defendants on all counts.

In the course of his opinion, Kozinski offered the following reflections on the fact that the defendants' speech had occurred in public discourse -- including the Internet:

In considering whether context could import a violent meaning to ACLA's non-violent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications. Although the First Amendment does not protect all forms of public speech, such as statements inciting violence or an imminent panic, the public nature of the speech bears heavily upon whether it could be interpreted as a threat. As we held in McCalden v. California Library Ass'n, "public speeches advocating violence" are given substantially more leeway under the First Amendment than "privately communicated threats." There are two reasons for this distinction: First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's

position. Second, and more importantly, speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment.

## 2. Intellectual Property

The First Amendment forbids Congress to make any law "abridging the freedom of speech." The copyright statute plainly interferes with certain kinds of speech: it prevents people from "publicly performing" or "reproducing" copyrighted material without permission. In other words, several ways in which people might be inclined to "speak" have been declared by Congress illegal. Does this imply that the copyright statute as a whole – or, less radically, some specific applications of it – should be deemed unconstitutional?

Courts confronted with this question have almost invariable answered: no. Two justifications are commonly offered in support of the compatibility of copyright and "freedom of speech." First, Article I, Section 8, Clause 8 of the Constitution explicitly authorizes Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," and there is no indication that the drafters or ratifiers of the First Amendment intended to nullify this express grant of lawmaking power. Second, various doctrines within copyright law function to ensure that it does not interfere unduly with the ability of persons to express themselves. Specifically, the principle that only the particular way in which an idea is "expressed" is copyrightable, not the idea itself, ensures that the citizenry will be able to discuss concepts, arguments, facts, etc. without restraint. Even more importantly, the fair use doctrine (discussed in the first module) provides a generous safe harbor to people making reasonable uses of copyrighted material for educational, critical, or scientific purposes. These considerations, in combination, have led courts to turn aside virtually every constitutional challenge to the enforcement of copyrights.

Very recently, some of the ways in which copyright law has been modified and then applied to activity on the Internet has prompted a growing number of scholars and litigants to suggest that the conventional methods for reconciling copyright law and the First Amendment need to be reexamined. Two developments present the issue especially sharply:

(1) For reasons we explored in the second module, last summer a federal court in New York ruled that posting on a website a link to another website from which a web surfer can download a software program designed to break an encryption system constitutes "trafficking" in anti-circumvention technology in violation of the Digital Millennium Copyright Act. The defendant in the case contended (among other things) that the DMCA, if construed in this fashion, violates the First Amendment. Judge Kaplan rejected this contention, reasoning that a combination of the Copyright Clause and an generous understanding of the "Necessary and Proper" clause of the Constitution provided

constitutional support for the DMCA:

In enacting the DMCA, Congress found that the restriction of technologies for the circumvention of technological means of protecting copyrighted works "facilitate[s] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education" by "mak[ing] digital networks safe places to disseminate and exploit copyrighted materials." That view can not be dismissed as unreasonable. Section 1201(a)(2) of the DMCA therefore is a proper exercise of Congress' power under the Necessary and Proper Clause.

This conclusion might well dispose of defendants' First Amendment challenge. Given Congress' justifiable view that the DMCA is instrumental in carrying out the objective of the Copyright Clause, there arguably is no First Amendment objection to prohibiting the dissemination of means for circumventing technological methods for controlling access to copyrighted works. But the Court need not rest on this alone.

In determining the constitutionality of governmental restriction on speech, courts traditionally have balanced the public interest in the restriction against the public interest in the kind of speech at issue. This approach seeks to determine, in light of the goals of the First Amendment, how much protection the speech at issue merits. It then examines the underlying rationale for the challenged regulation and assesses how best to accommodate the relative weights of the interests in free speech interest and the regulation.

As Justice Brandeis wrote, freedom of speech is important both as a means to achieve a democratic society and as an end in itself. Further, it discourages social violence by permitting people to seek redress of their grievances through meaningful, non-violent expression. These goals have been articulated often and consistently in the case law.

The computer code at issue in this case does little to serve these goals. Although this Court has assumed that DeCSS has at least some expressive content, the expressive aspect appears to be minimal when compared to its functional component. Computer code primarily is a set of instructions which, when read by the computer, cause it to function in a particular way, in this case, to render intelligible a data file on a DVD. It arguably "is best treated as a virtual machine . . . ."

On the other side of this balance lie the interests served by the DMCA. Copyright protection exists to "encourage individual effort by personal gain" and thereby "advance public welfare" through the "promot[ion of] the Progress of Science and useful Arts." The DMCA plainly was designed with these goals in mind. It is a tool to protect copyright in the digital age. It responds to the risks of technological circumvention of access controlling mechanisms designed to protect copyrighted works distributed in digital form. It is designed to further precisely the goals articulated above, goals of unquestionably high social value.

This is quite clear in the specific context of this case. Plaintiffs are eight major motion picture studios which together are largely responsible for the development of the

American film industry. Their products reach hundreds of millions of viewers internationally and doubtless are responsible for a substantial portion of the revenue in the international film industry each year. To doubt the contribution of plaintiffs to the progress of the arts would be absurd. DVDs are the newest way to distribute motion pictures to the home market, and their popularity is growing rapidly. The security of DVD technology is central to the continued distribution of motion pictures in this format. The dissemination and use of circumvention technologies such as DeCSS would permit anyone to make flawless copies of DVDs at little expense. Without effective limits on these
technologies, copyright protection in the contents of DVDs would become meaningless and the continued marketing of DVDs impractical. This obviously would discourage artistic progress and undermine the goals of copyright.

The balance between these two interests is clear. Executable computer code of the type at issue in this case does little to further traditional First Amendment interests. The DMCA, in contrast, fits squarely within the goals of copyright, both generally and as applied to DeCSS. In consequence, the balance of interests in this case falls decidedly on the side of plaintiffs and the DMCA.

One of the axes of debate in the ongoing appeal of the lower-court ruling concerns this issue. For a challenge to Judge Kaplan's discussion of the First-Amendment, see the amicus brief submitted to the Second Circuit by a group of law professors.

(2) Some scholars believe that the ambit of the fair use doctrine should and will shrink on the Internet. Why? Because, in their view, the principal purpose of the doctrine is to enable people to use copyrighted materials in ways that are socially valuable but that are likely, in the absence of a special legal privilege, to be blocked by transaction costs. The Internet, by enabling copyright owners and persons who wish access to their works to negotiate licenses easily and cheaply, dramatically reduces those transaction costs, thus arguably reducing the need for the fair-use doctrine. Recall that one of the justifications conventionally offered to explain the compatibility of copyright law and the First Amendment is the safety valve afforded critical commentary and educational activity by the fair use doctrine. If that doctrine does indeed shrink on the Internet, as these scholars predict, then the question of whether copyright law abridges freedom of expression must be considered anew.

## SELF-TEST QUESTIONS

| S.NO | Question | Option (a) | Option (b) |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**Answers: 1-(),2-(), 3-(),4-(),5-()**