

Free Speech and Content Control in Cyberspace

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom** of speech, or **of the press**; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

First Amendment Guarantees

Freedom of Religion

- right to exercise religion freely

First Amendment Freedom of Expression

- freedom of speech
- **right to a free press**
- right to assemble peaceably
- freedom to petition the government for redress of grievances

Freedom of the Press

... means that communication and expression through various media, especially published materials, is a right that may be exercised freely without censorship or fear of punishment by the government

Unless restricted for other constitutional reasons, anyone can publish anything through any media platform.

Freedom of the Press was considered necessary to the establishment of a strong, independent press, sometimes called "the fourth branch" of the government.

Freedom of the Press allows people to access the information that free speech in public forums creates.

Freedom from government censorship does not equal freedom from consequences.

"The press is meant to serve the governed, not the governors." Justice Hugo Black

U.S. History:
The British censored any publications critical of their government and punished critics of it and its official religion. One of the root causes of the American Revolution.

Remains problematic with governments and "governors" across the globe.

Government Control Over Publishing

Just as it was difficult to control hand flyers in a colony across the ocean, it is difficult today to control speakers across the Internet. The Internet is an extremely powerful tool for both Free Speech and a Free press.

However, has the Internet become a massive tool for propaganda and misinformation by those with the political power or financial resources to overwhelm or drown out opposing views?

Freedom of the Press

While criticism of the government is protected, publishing false information about citizens is not.

Defamation: statements that are false and cause harm, typically to reputation

Elements:

1. Defendant (D) made statement of fact one or more other people
 2. Statement was about the plaintiff (P)
 3. Statement was defamatory and false
 4. Statement injured P's reputation and/or caused economic damages
- Only lies are defamatory. Truth is always a defense.

Additional Defamation Element for "Public Figures"

5. Actual malice

Falsity no longer sufficient when applied to public figures..

P must prove, through a preponderance of the evidence, that D had either

- knowledge of the falsity of the statement falsity or
- statement was made with "reckless disregard" for the truth

Public Figures:

1. "**All purpose**" - presence is ubiquitous (national politician, movie star, professional athlete, or famous blogger, etc.)

2. "**Voluntary, limited purpose**" - thrust themselves into limelight or public discussions (local politicians, experts or professors providing commentary to news outlets or making public presentations at major conferences, etc.)

- "actual malice" required
- jury question.

Protecting Confidential News Sources

Journalists, whether traditional or bloggers, have no constitutional right to protect confidential sources from judges or grand juries.

Qualified Constitutional Right?

To force testimony, government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."

Factors considered by judge:

- information sought relevant?
- compelling interest in obtaining?
- alternative source exist?
- did reporter promise confidentiality?

Journalist can go to jail.

Shield Laws - some states have for journalists and their sources (not free lancers)

Online Consumer Protection in E-Commerce Transactions

Commercial free speech is more limited than free speech for individuals or the press

Current framework:

... analysis driven by consumer protection

But also see expansive free speech rights for corporations

- covered in next lectures
- should Supreme Court analysis be expanded beyond just "consumer protection" to other negative societal ramifications?

I. Development of U.S. E-Commerce Consumer Protection Laws

Computer Fraud and Abuse Act (1986)

- prohibits access to a computer or computer network without the owner's consent
- criminalizes hacking, cyber theft, & destruction of private and classified information
- penalizes theft in property in which a computer was used
- criminalizes threat of damaging another person's computer equipment, stealing computer data, publicly disseminating stolen data, and refusing to repair damage (i.e. ransomware)
- in some instances, victims have right to bring civil actions for injunctive and compensatory relief

Telephone Consumer Protection Act (1991 plus further amendments)

- companies must maintain "do not call" lists
- companies must consult national "do not call registry" on a regular basis and remove any numbers on that list
- robocallers must identify organization that is calling and provide its telephone number and address
- telemarketer robocallers must acquire written consent from consumers prior to robocalling them
- telemarketers must provide automated, interactive **opt out** mechanisms

As of 2017, FCC allows telephone companies to **preemptively block calls** they believe to be fraudulent

Recent legislation proposes additionally forcing phone companies to auto identify originating phone number rather than spoofed numbers (law yet?)

II. Federal Laws Regulating Unsolicited Emails, SPAM, and Spyware

CAN-SPAM Act: Controlling the Assault of Non-Solicited Pornography and Marketing Act (2003)

- applies to commercial advertisers or promotions of commercial products or services
- prohibits emails with false or misleading subject headings
- subject line must be accurate and message clearly identified
- sender must provide postal address and notification of means to opt-out

- opt out requests must be honored within ten days and without charge
- prohibits sale or transfer of a recipient's email address subject to **exemptions** (I.e. legitimate business purposes)
- prohibits avoidance of law through use of third parties
- fines for up to \$40,000 per violation

- **transactional emails are exempt** from most of these restrictions (I.e. email pertains to a consumer transaction, changes in terms of agreements, provides goods or services to which you have clicked agreement, account information, warranties, etc.)

SAFE WEB Act: Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act (2006)

- expanded primary CAN-SPAM Act provisions globally
- FTC allows to share its confidential data with foreign law enforcement agencies

III. Online Retail Consumer Protections

ROSCA: Restore Online Shoppers Confidence Act (2010)

- prohibits data passing by using a third party (with whom the customer clicked no agreement) to process payments who also then sells the customer's personal retail data for any and all purposes
- restricts negative options (customer silence after a free service period is an acceptance for perpetual billing) requiring clear and conspicuous disclosure prior to the consumer submitting billing information

IV. Administrative Protections to Protect Online Consumers

Recent Executive Order:
"Restoring Internet Freedom" by Trump Administration

- repealed the Obama Administration executive order that supported broad net neutrality policy

Reporting to Executive Branch:
Federal Communications Commission (FCC):

- promotes transparency in online communications pursuant to the requirements of its legislative mandates

Federal Trade Commission (FTC):

- responsible for preventing unfair and deceptive business practices online commerce

LawShelf Conclusion

"Over the past thirty years, federal laws have developed a robust suite of online consumer protections that regulate common activities that consumers undertake online." ... but with need for Congress to remain vigilant

Robust? How effective are all of these laws?

Is there a current appropriate balance of interests from the perspectives of:

- consumers?
- small businesses?
- large corporations?
