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Cover Page Footnote

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The First Amendment in the Digital Age: Protecting Free Speech (and Other Values)

The Constitutional guarantee of free speech has recently been the subject of a wide variety of challenges and controversies. I will use the term "free speech" as shorthand for the "fourteen little words" of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press." A well-known judge announced a short time ago that, in this new digital age, the First Amendment is "dead." To the contrary, recent controversies bear witness to the fact that the First Amendment is alive and healthy, and its protections are needed more than ever.

Some controversies involving the First Amendment have appeared in the media in recent months. As we consider these news stories, it is important to keep in mind that the First Amendment applies only to government restriction of speech—federal, state, and local—and *not* to non-governmental actors, although the lines between those categories are not always crystal clear. Here are four examples of the recent controversies:

A former celebrity, who promotes herself on her website, sued a blogger who used his website to portray her as

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vacuous and promiscuous. A court issued an order forbidding him to write about her or even to mention her on his website. Here we have a clash between free expression and the right to privacy, one of the "other values" that I will mention.

Some female law students brought a defamation action in federal court against a group of anonymous users, as well as the moderator of a law school message board. A court allowed the women to proceed anonymously but issued subpoenas to force Internet service providers to reveal the identities of the people who made the scurrilous comments. The moderator counterclaimed against the plaintiffs after he allegedly lost a $160,000 job offer because of negative publicity for his role in the affair.

The Council of Europe (not the European Union) moved to ban Internet hate speech and asked the United States to endorse the broad restrictions that are widely accepted outside the U.S. The Justice Department refused, asserting the First Amendment. United States-based Internet service providers were concerned that they could be forced to shut down their interactive components because people may engage in speech that is offensive in Europe. Several members of the European parliament called for an "unlawful hosting" provision that would increase the liability of U.S. companies. That measure did not pass but Yahoo was brought into court in France for allowing Nazi-oriented auction items to appear on its website. Yahoo was held liable but the judgment was not enforced.

The Mayor of Hartford and his supporters conducted a protest outside offices of the *Hartford Courant* objecting to the posting of hate messages on a *Courant* online message board relating to a story about violence following a motor

vehicle incident. They claimed the *Courant* should monitor and delete such messages. They are free to protest all they want and the *Courant* can monitor its website, since the *Courant* is not the government.

All of these recent controversies bring me back to the pronouncement that the Internet has *eliminated* the First Amendment. Here is the dilemma: how can the First Amendment have a moderating effect on a medium that is anything but moderate and, instead, is vast, allowing for instantaneous communication without geographical boundaries, with the click of a mouse, providing an individual with access to a forum that potentially could include millions of users, a medium that simultaneously provides the opportunity to communicate with anonymity, yet requires its users to sacrifice privacy? Is the First Amendment dead, or can it adapt to navigate the Internet highway?

Another question is, how has digital technology changed the free speech landscape? The recent controversies occur in a digital context that you, as citizens of cyberspace, know well. The Internet seems to be a free-wheeling place in which "Anything goes." Well, "It ain't necessarily so." Both phrases are copyrighted song titles, by the way. If I were taped singing these songs (or some creative version of them) and you posted it on YouTube, we might receive a takedown notice, that is, a demand to remove it, from the owners of the music. While we all know that the likelihood of real privacy on the Internet is dubious for users, the "Net" so far is not policed by our government, although it is by many other governments. It is a confusing, distracting, and occasionally unsettling, even disturbing, environment—a cultural democracy in which everyone gets to speak, reasonably or sometimes loudly and rudely, as well as to listen. Identities can be concealed, more or less. One of the classic cartoons appearing in the *New Yorker* in 1993 has a dog sitting in front of a computer saying "On the Internet, no one knows you're a dog." But maybe its identity will have to be disclosed in the future. So much for species anonymity!

How exactly has digital technology changed the free speech landscape? Here are a few ways. You will think of many more:

> The digital revolution has drastically reduced the costs of copying and distributing information. That makes it easier for people to talk to each other and to send information across geographical boundaries.
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> Actually, there are no boundaries on the Net itself—certainly not national or geographic ones.
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> New communities of interest have formed—thousands, millions of them, and older communities have new members. Groups of all kind exist, some serious and some frivolous—or worse. Visual material can be posted. Many sites—YouTube, Facebook, MySpace and others—allow personal information to be shared with the world. I was reading about a place in the blogosphere that boasts 19,000 ongoing conversation threads. 19,000!
>
> Privacy is a scarce commodity. Users have voluntarily given it up to private interests, commercial transactions, postings, etc., yet it remains a major concern. But our conceptions of privacy have changed with each era from colonial times to the present. That's another story.
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> Anyone with access to a computer can have access to a world of information and a world of conversations. No longer do the traditional media monitor or act as exclusive gatekeepers for information exchanges or conversations. For example, recall the controversy in 1971 when Daniel Ellsberg turned over the Pentagon papers to the *New York Times*. A major United States Supreme Court case resulted. Floyd Abrams, a First Amendment lawyer, speculated recently that today Ellsberg might simply have posted them on the Internet. Who needs an intermediary?

> Even journalists use non-traditional means, such as blogs, to offer additional facts or opinions that do not get published in the print or electronic versions of their publications.
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> Individuals are not limited to one-way communication, as with the mass media, but can interact freely and respond to anything out there.
>
> People can change content of the information published, by invitation in the case of Wikipedia and other such digital resources, and without invitation or permission in other cases. Despite a few missteps, the civility with which Wikipedia has developed is remarkable. This concept of changing content is a critical—and highly controversial one—and at the heart of the creative liberty that needs protection. In many cases, like Wikipedia, changing content is invited.
>
> As Professor Jack Balkin of the Yale Law School has put it, Internet speech has two important features. It *routes around* traditional mass media and it *gloms* (seizes upon or latches) onto it. It avoids the gatekeepers of the mass media and does an *end run*. And it appropriates or takes something from mass media and makes use of it—though the appropriation is non-exclusive—leaving the content for others.

The attention-getting pronouncement regarding the death of the First Amendment does have a rationale behind it. The argument was premised on the observations that we live in an age in which documents are leaked without consequence, blogger-journalists (if I may call them that) are anonymous and judgment-proof, and the mainstream media is in financial peril and is given considerably less respect than before from the public. Attempts to restrict expression

in the current digital media climate are often self-defeating. The result is replication of the words or images a thousand times over. Perhaps the judge was actually suggesting that the First Amendment is subject to being bypassed by current technology.

As we consider how the First Amendment should be interpreted to meet future problems, a few historical points are important to keep in mind because they bear on the present situation.

First, interpretation of the First Amendment by the Supreme Court came slowly. The first time a United States Supreme Court opinion ever supported a claim of freedom under the amendment was in 1919, and that was in a dissenting opinion by Justice Oliver Wendell Holmes joined in by Justice Brandeis in *Abrams v U.S*.

The interpretation of the First Amendment has changed dramatically over the years. In the beginning, it was deemed to affect prior restraint but not later punishment for seditious speech. That is punishing speech that was deemed contrary to the public welfare after the fact. The First Amendment was treated as a political right, not a legal one.

In his recent book, *Freedom for the Thought that We Hate*, a term used by Justice Holmes in his opinion in *U.S. v Schimmer* (1927), the noted journalist, Anthony Lewis, reports that Holmes said in his *Abrams* dissent that "they deliberately wrote a spacious amendment—a 'sweeping command'—and left it to later generations to apply its broad call for freedom to particular situations." Justice William Brennan said in *N.Y. Times v Sullivan*: "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials" (Lewis, 66).

Questions have arisen over the years whether the First Amendment is paramount, overriding all other fundamental values in American society. The answer is clear that other values take precedence in some circumstances, such as the right of criminal

defendants to fair trials, the right to prevent speech inciting immediate violence, and the right of privacy in some circumstances (Lewis, 69). The First Amendment was never interpreted to be absolute. For example, it is common knowledge that you aren't protected if you shout "Fire!" in a crowded theater.

During the last century, the United States Supreme Court presented at least three major theories that support the First Amendment right of expression and press. One was the *marketplace of ideas* theory to elicit truth. Another was to *promote intelligent democratic self-government*. A third was to facilitate *individual self-realization*. In light of the vast changes in technology, it is fair for scholars and commentators—and legislators and judges—to ask whether any or all of these doctrinal support systems still apply. Since views of the First Amendment have changed a great deal over the years, no reason exists why legislatures and courts should not interpret it wisely and reasonably for our age.

What are the major problems of free speech in the digital age? First, the Internet is in some ways the newest version of the Wild West. There is a lack of externally imposed discipline and management of the Internet. Without self-restraint, it can be a risk to the unwary and the innocent in terms of sorting out what is true and what is false, what is safe and what is dangerous to children and others, what is beneficial or neutral and what is devastatingly damaging, such as hate speech or injurious falsehoods. It also presents a risk in terms of privacy concerns. The nature of privacy has changed; but then, it has never been static historically in our society. Once private information goes on the Internet, it cannot be effectively retrieved and may be read or viewed—and archived—by millions of people around the globe.

Legal scholars argue that the first problem involves the question of whether we should continue to interpret the First Amendment as liberally as we do, in a way that tends toward absolutism rather than in conditional terms. The issue is whether the value promoted by free expression should be compromised more or less by being balanced against other values, such as protecting vulnerable people

against discrimination and abuse and protecting individual privacy. This is a complex issue. It involves whether anonymous expression should be allowed on the Internet, whether hate speech should be monitored and curtailed, whether Internet providers should modulate expression that offends or violates proscriptions of other countries, whether the organized and the unorganized "press" should be restricted in any way from promoting expression that society or part of it sees as undesirable or destructive. To what extent should screening and filtering be allowed?

A related question is: Does a liberal tolerance of hate speech or extremist speech, such as terrorist recruiting propaganda or incitement to religious hatred, via mass distribution platforms like the Internet continue to make sense? In view of the fact that the UK and other European countries outlaw much of this type of speech, should we reconsider? In other words, should the value of free expression be balanced and weighed against other societal values? Or, by allowing such speech, do we offer those individuals an opportunity to "blow off steam" and vent, but not act, on their prejudices and malicious thought? Further, by allowing such postings, can society monitor the thoughts of subcultures to defend against and to enter into dialogue with them?

Should the traditional press continue to be the favored information gathering and distribution agent or should the concept of the "press" be broadened to include on an equal basis the wide range of Internet gatherers and communicators, such as the bloggers? What about the rights of all journalists of whatever types to protect their sources? There is considerable controversy surrounding bloggers versus the traditional press, especially because the press considers itself bound by ethical standards and sees bloggers as virtually unrestrained about what they say in terms of truth or falsehood.

Is there a right to privacy and anonymity on the Internet? Should there be an "open" Internet and Net neutrality where free access to communications and ideas of disseminators is the rule rather than the exception?

Another major problem—and the one I will focus on—is the relentless effort by profit-driven enterprises in the information industry (both producers and providers) in its broadest sense, to privatize information, ideas, and so-called "intellectual property," and control the Internet for their own advantage. I will focus on the loss of freedom that would result—and is now resulting—from the expansion of protections for property rights in information, ideas, and intellectual products. In this environment, corporate producers and providers constantly seek to rein in individual freedom through technology and through legal protections, such as copyright, that they are able to get passed by Congress, to reduce citizens' participation in this cultural democracy of the future to consumer choices that ensure their profits.

Legal scholars in the First Amendment field express their concern about the extent to which the vast global providers of Internet service and those who promote their products of intellectual property in cyberspace should be able through law or technology or both to limit and restrict citizens' use and dissemination of the products of expression that the providers wish to restrict. The day of the exclusive provider of information being the mass media putting out information in a one-way direction to listeners or viewers is gone. The Internet allows for another layer of communication to exist on top of the mass media. This is potentially an open space in which there is no gatekeeper, one in which individuals are free to distribute their information and their views as freely as the mass media.

This conflict between economic and social use of technology is a very complicated issue and there is a risk of oversimplification. Technological change has produced new types of social conflict. As Jack Balkin expressed it, the lowering of costs of distribution and content creation causes a conflict in interests between what I have called the information industry (those whose business is to produce and distribute information, including news, music, literary, and artistic products, and service providers and others) and ordinary individuals or "end users" who surf the Internet and explore the

information there. The digital revolution affects economics as well as social relationships. According to Balkin,

> Lowering the costs of information production and distribution opens up new markets, allows businesses to reach more people and creates new opportunities for making money. Information and information products become an increasingly important form of wealth in society and an increasing source of economic power and influence. . . . Information industries seek to maximize their control over distribution networks for digital content, and to maximize the value of their investments in intellectual property.

The same technologies that create these opportunities to expand business also create opportunities for the users, ordinary people, to copy, change, and build on them as well as to read, view, or listen to them. Those technologies make it easier for users to copy, change, manipulate, and appropriate the information, and then distribute the new product to other people. For example, the same digital technologies that enabled George Lucas to make *The Phantom Menace* enabled a *Star Wars* fan to make *The Phantom Edit* and send it out via the Internet. (*The Phantom Edit* was a re-editing of the "Phantom Menace," the fourth picture in the series, eliminating what many fans considered an annoying character with the name of Jar Jar Binks. The movie was essentially remade.)

On the one hand, we have technologies that open up worlds of possibility for communication, creativity, and innovation, decentralizing control over information and democratizing access to audiences. On the other hand, we have the increasing importance of information as a commodity to be bought and sold and new markets for intellectual property and media products. We have a clash between, on the one hand, new possibilities for widespread access, creative modification, and cultural participation, and, on the other, the desire to exploit new markets and create wealth. The

information industries want it both ways. They want full and unencumbered access to the opportunities created by the technologies, but they also want to limit access on the part of end users. It seems reasonable to me that there should be a way to prevent widespread illegal downloading of music and other intellectual products (especially for commercial purposes)—that is, piracy—but to allow not only lawful downloading of such products but also the creative building upon such products, as was the case with music especially in past times.

This struggle is waged through legal means within the framework of free expression. The boundaries of intellectual property have been pushed out with greatly expanding protection for intellectual property rights in terms of what can be legally protected and the length of time during which it may be protected. The information industry asserts that its free speech rights preclude or limit telecommunications policy that restricts its use. On the other hand, the industry resists the idea that the free speech of others limits the continued expansion of its intellectual property rights. Balkin calls this a "capitalist theory of freedom of speech." What it really does is borrow from ideas of speech and property selectively to promote the economic interests of the media corporations that produce and sell media products and informational goods. An increasing privatization of the public space of the Internet is the result. We cannot deny, of course, the reality of economic interests in this new era. We understand that they are pervasive and affect in many ways—some seen and some unseen—the information that we obtain access to through the Internet.

Freedom of speech often serves as the battleground where these conflicts are waged. Media companies have consistently fought to expand intellectual property rights, at the expense of individual free expression, for use and reuse of the information (a basic element of creativity and innovation), while at the same time invoking the First Amendment to resist telecommunications regulation. This self-contradictory strategy undermines the participatory possibilities of the digital age. The ultimate goal of the information industries is to

privatize digital space, reduce choices, and treat participants as passive consumers rather than active producers. Some scholars argue for a broad view of protection for democratic cultural participation, in which intellectual property rights will be carefully monitored and limited and telecommunications regulation will protect the interests of the end user. Cyberspace will be open and live up to its potential for democratic participation by individuals.

You may be interested to hear about several cases involving intellectual property law, reported by Kembrew McLeod, a professor and the author of *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property*, that demonstrate the impact of the expanding law of intellectual property. The state action involved here is that the government, when it issues a patent, precludes everyone else—by operation of law—from using the intellectual property without paying up or getting the owner's permission. One example involves a Woody Guthrie song and the other, the "Happy Birthday" song.

It seems that Francis Collins, a former head of the Human Genome Project, at a post-press party for scientists sang a reworking of a song by Woody Guthrie, "This Land is My Land." In brief, Guthrie originally created the song in celebration of communal property and freely borrowed the melody, consistent with the open borrowing tradition of folk music culture. That is democratic participation at its best. Collins used his adaptation in an ironic way to make his point that he believed genetic information should be freely accessible, not privately owned and patented by a handful of corporations (such as the Celera Genomics' privately-owned draft). Collins sang: "This draft is your draft, / This draft is my draft, / And it's a free draft, / No charge to see draft." The problem is that "This Land is My Land," written over sixty years ago, is private property owned by the publishing company that owns the late Guthrie's music. The result is that, in the twenty-first century, the company can earn money from a song about communal property, which itself was based on a tune that is over a century old. We won't be able to hear Collins's mutated

version "This Gene is Your Gene" anytime soon. (The patenting of genes is another controversial story!)

"Happy Birthday to You" has a long and complicated history. It is now owned by Time-Warner's publishing division. The melody was published first in 1893 in a book, *Song Stories for Schoolchildren*, by a schoolteacher and her sister. It was substantially similar to many other popular nineteenth-century songs. In the past, lyrics and music were freely borrowed, used, and reworked. The words were ultimately changed to "Happy Birthday To You." They copyrighted it in 1935, and after many lawsuits, it was purchased by Time-Warner's predecessor in 1988. The song has a copyright extended by Congress and won't go into the public domain until 2030. In the mid-1990s, ASCAP was monitoring the use and made the Girl Scouts of America purchase a license to sing it and other songs around the campfire.

Other news stories reveal that a well-known entrepreneur has applied for a trademark giving him exclusive use on clothing and other products of the words "You're fired." Reportedly, a large Internet marketing company has tried to patent a one-click shopping method. These are just a few of the numerous examples of controversial privatizing of expressions and practices that exist in society.

Take this interesting case that has been reported: the "dancing baby" case in *Lenz v Universal*. Universal Music Corporation had sent a takedown notice targeting a twenty-nine second home movie of a toddler dancing in a kitchen to a Prince song, "Let's Go Crazy," which is heard playing in the background. After receiving the takedown, the toddler's mother, Lenz, sued Universal for misrepresentation under the Digital Millennium Copyright Act. Universal moved to dismiss, claiming that it had no obligation to consider whether the use was fair before sending the notice. Although the action was dismissed, the federal court determined that a copyright owner must evaluate first whether the material makes fair use. "Fair use" is a doctrine in copyright law that permits limited use of copyrighted material, especially for scholarship

purposes. The mother got legal help from the Electronic Frontier Foundation.

Wikipedia reportedly has had trouble with SLAPP suits (strategic lawsuits against public participation). Wikipedia was determined, however, to be protected by the Communications Decency Act and not liable for users' comments. This represents an example of protection for a free speech promoter. The California legislature acted to protect the anonymity of speakers' identity in face of SLAPP brought against Internet Service Providers. These protections are especially important for organizations like Wikileaks (a website for leaked documents on government and corporate misconduct).

The Internet and the technology of our digital age offer remarkable opportunities for a renewal and regeneration of a popular participatory culture—democratic participation at a fundamental level—not just in governing (that is, politics as we know it), but in all fields. It is in some ways a "Wild West" full of risks and dangers but it holds opportunities for information sharing, opinion sharing, and a tremendous impact on public affairs that can supplement and in some ways supersede, what the traditional mass media have done and now do. If allowed to be restricted and privatized, the Internet can devolve into a one-way consumer mass media, a kind of "freedom of consumption," a warped view of freedom of expression that undermines the creative and participatory possibilities of digital technologies. If the economic interests are restrained, the Internet can be a powerful constructive force, not only in governing, but in all aspects of human life.

The companies in the information industry, some believe, want to reduce the choice of users to consumer choices. Why should the same companies that demand unrestricted right to publish whatever they wish also demand the right to restrict access and use of those publications by means of unreasonable technological restrictions and through inappropriate expansion of copyright limitations? We all agree, of course, that reasonable protection is needed to protect the creative work of those who work in information industries. But

when it is protected to the extent that it risks turning freedom of expression into freedom of consumption, it undermines the fundamental constitutional principle of free speech as it should be interpreted for our digital age.

The controversy involving expression versus consumption highlights the notion that implicit in the concept of freedom of expression is the concept of freedom of thought, which deserves our concern as well. The term "freedom of thought" was actually used in describing the purposes of the Declaration of Independence. In 1776, Samuel Adams, John's cousin, told an audience: "Driven from every corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country for their last asylum" (Lewis, 183). Professor Zechariah Chafee, Jr., whose writing on freedom of expression influenced Justice Holmes, spoke about two kinds of interests in free speech: "There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth" (Lewis, 184). These are important ideas, as relevant as ever in our time.

In short, the First Amendment is alive but it must be interpreted and applied wisely in the context of our amazing digital age. While protection of political dissent is vital in a free society, as important today as it ever was, the protection must extend much further into every realm of human endeavor: arts, science, and all matters that people wish to think and speak about in human culture. We must be vigilant to preserve this enormous democratic resource and to work for a definition of free expression that recognizes the importance of individual creativity and expression and does not unduly protect intellectual property to the extent that it endangers the enormous creativity associated with free speech.