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Determining *Place* Regulations on the Internet:

Burning the Global Village to Roast the Pig

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## Determining *Place* Regulations in Cyberspace:

### Burning the Global Village to Roast the Pig

Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig. The Internet is a far more speech-enhancing medium than print, the village green, or the mails (*ACLU v. Reno*, 929 F. Supp. 824 (E.D.Pa. 1996)).

### Development of *Place* Regulations

For more than a century the U.S. Supreme Court has permitted government entities (e.g., villages, towns, cities, states, the nation) to impose time, place, and manner regulations on expression as long as those regulations met certain criteria (Gossett, 1986). Traditionally, public forum doctrine has defined the limits of protected expression required for speakers using government-owned spaces based on measurable physical characteristics, and existing U.S. public forum doctrine is grounded in a sense of physical location. In the late 19<sup>th</sup> century, state ownership and control over public spaces such as streets and parks was generally accepted because of the obvious practicality: We cannot all march in the same park on the same morning. In 1897, in the famous Boston Common case, the Court upheld the constitutionality of a Boston ordinance requiring a permit to speak and established the principle that government owned the highways and public parks and, therefore, could regulate their use (*Davis v. Massachusetts*, 167 U.S. 43).

The concept of a limited resource being fairly distributed to all has been widely applied from parade permits to television broadcasting limitations, while the definitions of government-

owned spaces has evolved over time to include three tiers: (1) non-public locations such as prisons, military bases, polling places, a school district's internal mail system, and airport terminals; (2) limited public forums including university meeting facilities, municipal theaters, and school board meeting rooms; and (3) traditional public forums, generally held to be publicly accessible locations such as streets, sidewalks, and parks (*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 [1983]; Tedford & Herbeck [2005], pp. 269-277).

Nonpublic forums have been and continue to be heavily regulated, with states exercising control. Limited public forums tend to be regulated based on the nature of the physical property itself. The history of use of a given physical space helps decide whether citizens may use these physical areas for public speech and determines how and when this activity can be carried out. Usually, the practical considerations of the tangible facility are central: Will this free speech use of this space cause any inconvenience for anyone else?

Traditional public forums include the streets, sidewalks, parks, and other similar public places being held in trust for the public and clearly defined rules control most aspects of free expression acts in publicly accessible areas. Through trial and error, U. S. citizens have established via the courts an evolving agreement with their government, allowing that government to impose logistical time, place and manner restrictions on the free public expression of the people. The government is required to prove that any logistical restrictions applied to public expression rights in a public forum are limited, content-neutral, not over-broad, and leave open ample alternative channels for communication. Restrictions are permissible only when they are within the constitutional power of government, they further an important or substantial government interest, they are unrelated to suppressing the content of the expression, and they restrict no more than is necessary to further the governmental interest (*U.S. v. O'Brien*, 391 U.S.

367 [1968]). Traditional public forum doctrine has centered on time, place and manner restrictions, leading to "compatible use" tests. At the heart of these tests is the question of whether the activity is suitable for the physical location and whether the tangible limits of a given space will work efficiently with a particular activity. The content of the message being communicated by the users must not be considered when making a decision of compatibility. Only the measurable logistical aspects of space use such as scheduling, traffic flow and other content neutral aspects of regulating a place may be weighed when restricting free speech use of a traditional public forum (*Grayned v. City of Rockford*, 408 U.S. 104 [1972]).

#### The Problem of *Place* Regulations on the Internet

Cognizant of these doctrines, persons wishing to express ideas—as well as governments desiring to regulate aspects of communication—are confronted with a myriad of legal concerns when such expression takes place via the Internet. The problem addressed in this study is: To what extent is it possible to define *place* in attempts to regulate Internet expression.

#### What Kind of Public *Place* is the Internet?

One could argue that the Internet has splintered American public forum doctrine. Since 2002, twenty five states have passed or are considering passing Internet censorship laws (ACLU 2006). This perceived need for new rules related to free expression in public places is not surprising, given the elastic and anonymous nature of the Web as an evolving communication medium, the widespread availability of Internet access in American society, and the deeply-rooted perception that genuinely free expression can exist online, despite a variety of efforts both governmental and private to control this vibrant and slippery communication system. Discussions of public forums often involve concepts of physical place, including spatial tactics, spatial neutrality and spatial tailoring (Zick, 2006). These terms all describe aspects of the

tangible use of a definite geographical area. However, these traditional vocabularies of physical place fail to describe the Internet.

By Supreme Court definition, the Internet is an international network of interconnected computers and is "a unique and wholly new medium of worldwide human communication" (*Reno v. ACLU*, 521 U.S. 844 [1997]). The Supreme Court in *Reno* further stated that the Internet is not a physical or tangible entity and used terms such as decentralized, global, international, instantaneous, self maintaining, redundant, and resilient to describe its organization. Two spatial concepts which do translate to the online communication environment are *lived space*, encompassing the tangible, ever-present, and constant world of real machines, phone lines, and assorted hardware connecting the Internet as a physical mechanism and *measured space*, the invented, timed, and artificially mapped vocabulary system we have created to discuss the "places" we principally go on the World Wide Web (Weinberger 2003).

A clear distinction should be made between the Internet and the World Wide Web. Although these terms sometimes appear interchangeable, the two entities are unique from each other in important ways. The Internet is a larger, international hardware network of interconnected computers. It is the older system, a global cooperative made up of physical connections and relationships which predate the Web. In contrast, the Web is made up of nonspatial ever-shifting navigational software including web sites, browsers, and uploaded files. The Internet is more closely tied to physical place since it is composed of machines and their tangible connections. The Web is less directly related to geographical location since it is made up purely of software and data. When considering place restrictions online, laws can affect either the lived spaces of hardware or the measured spaces of software. Physically removing a

computer from a library building is a separate form of place restriction, different from filtering a list of words from a library search engine.

#### The Internet as a Different Kind of Public Forum

Until the end of the 20<sup>th</sup> century, legal jurisdiction in the tangible world was determined by physical location. However, the physical location of any given Web server on the Internet is irrelevant to the messages being communicated. In fact, data sent via the Internet does not technically exist in any one given place at any given time, since all data is sent via packet sequencing. This involves data being broken into pieces at the source, with pieces sent independently and out of order, arriving at the destination randomly and being re-sequenced by the receiver. The data does not stay in one place, nor can it be identified by either its source nor its destination. Some Web observers have argued that the Internet cannot even be discussed as a typically Euclidean “space,” since space in this sense means each thing is in one place, and has identifiable relations by coordinates to all other things and to the borders that define regions within the volume (Call, 1998).

This decentralization of moving data is a major strength of the Internet, allowing online communication to become “immediate, anonymous, inexpensive and seemingly borderless” (Franda, 2001). However, this very trait of being free of place also creates complex and ongoing global jurisdictional Internet issues, with the difference between laws for the slower-paced, relatively public tangible world versus Web transactions creating questions of responsibility which have not yet been answered. For example, in July 2006, U.S. House Speaker J. Dennis Hastert proposed a bill to limit online gambling in order to protect children. However, Antigua and Barbada have already licensed 30 online gambling firms and immediately filed a challenge against U.S. restrictions on online gambling with the World Trade Organization. The Costa

Rican Association of Electronic Gambling Businesses responded to the proposed U.S. legislation: “We are not illegal, nor are we casinos. We are a technological service” (Puzzanghera, 2006). Further complicating online jurisdictional questions is the global accessibility of everything online, unintentional or not. Cultures not as open to change as many Western democracies claim to be will have different reactions to online content. *Place* as a philosophical model may limit perspectives internally.

Monologism (ordered and predictable communication) is the basis for many social systems of communication while dialogism (unique and unpredictable communication) is the core of Internet communication, particularly of Web transactions (Holt, 2004). This dichotomy of order versus chaos adds to the richness of Internet life but also contributes to misinterpretation, censorship, and conflict over both intention and meaning online.

#### Behavior on the Internet and Behavior in the “Real World”

Not all observers agree that human behavior on the Internet is inherently any different than human behavior in the real world. Almost ten years ago, a Harvard law school professor presented a famously calm argument (which was immediately and hotly contested) stating that cyberspace is really not much different than any other form of human communication and that existing systems of law should be able to deal with online conflicts fairly well (Goldsmith, 1998). One of the basic points of this argument was that when genuine online criminal behavior occurs, there must be a human being at point A and a human being at point B, and any illegal activity which occurs can actually be identified as transactionally beginning and ending with these humans.

Many experts on both crime and Web protocol agree that existing laws should translate well to online environments. The problems, again, are the international nature of the network and

the anarchic and transient characteristics of law breaking. (Frequently cited examples of successful online laws include the UK's Criminal Justice and Public Order Act of 1994.) The theory that existing law and real life tend to work online about as well as they do in tangible physical space argues for the relative predictability of human behavior both offline and online and emphasizes how the Internet tends to complement rather than displace existing media (Robinson, 2003).

#### Traditional *Place* Restrictions and Online Communication

Public forum place restrictions can drastically affect even a "placeless" entity like the Web in several ways. In 2006, there are three particularly interesting forms of free expression place restrictions related to Internet access:

- Type I: Free expression *place* restrictions enforced by a governmental agency which limit the way an individual may use the Internet in a public setting.

For more than ten years, librarians have been struggling to provide genuinely equitable public Internet access in public libraries. Existing legislation such as the Children's Internet Protection Act (CIPA) forces citizens whose only Internet access is from institutions receiving federal funding (such as public libraries and schools) to connect and communicate through filters controlled by commercial entities without oversight. (Beeson, 1999).

EXAMPLE: The Children's Internet Protection Act (CIPA) requires libraries and schools to install filters on their Internet computers to retain federal funding. The filters remove materials determined by the commercial vendors who produce the filters. There is no organized oversight of the filter content selection process.



### *History of U.S. online speech regulation*

A colorful assortment of acronyms exist to trace the history of attempted U.S. speech regulations online. These include CPPA, CDA, COPA and CIPA.

- CPPA (1996) - The Child Pornography Prevention Act of 1996 criminalized the creation of “virtual child pornography” but was found unconstitutional in *Ashcroft v. Free Speech Coalition* (535 U.S. 234 [2002]) because it abridged freedom of speech “where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.”
- CDA (1996) The Telecommunications Act of 1996, more commonly known as the Communications Decency Act of 1996, provided fines and imprisonment for anyone who “... in interstate or foreign communications knowingly ... uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards ... or knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited...” A special three-judge panel ruled unanimously that the CDA was an unconstitutional violation of the First and Fifth Amendments and that the CDA violated the "least restrictive means" test in *Sable v. California* decision - and enjoined enforcement of the statute.
- COPA (1998) - Child Online Protection Act prohibits the transmission of any material over the Internet deemed “harmful to minors,” if the communication was made for a commercial purpose. The ACLU challenged COPA, the trial court found the law

unconstitutional on First Amendment grounds and Third Circuit Court of Appeals agreed because of reliance on “contemporary community standards” making the law overbroad. Although the Court reversed the Third Circuit’s decision, it did not decide on the constitutionality of COPA, finding only that COPA’s reliance on “community standards” does not by itself make the law unconstitutional, returning the matter to the Third Circuit Court of Appeals for a fuller consideration of the First Amendment issues raised by COPA’s restrictions on Internet speech. All nine justices agreed that the injunction preventing any enforcement of COPA must remain in place while the lower courts further examine COPA’s constitutionality.

- CIPA (2000) - Children's Internet Protection Act (CIPA) was passed as part of a major spending bill (H.R. 4577) on December 15, 2000. This law requires libraries and schools who receive public funding to filter certain material being accessed through the Internet. The law was permanently enjoined by a three-judge panel on May 30, 2002. However, in *U.S. v. American Library Association* CHECK THIS CITE 02-361, the Supreme Court overturned the decision on June 23, 2003 ruling that public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and CIPA is therefore a valid exercise of Congress' spending power

*Is there really a “pornography problem” online?*

The impetus to create laws such as the CPPA, CDA, COPA and CIPA is rooted in a period often described as the Cyber-sex Scare of 1995. Several national magazines including *Time* and *Newsweek*, ran conflicting cover stories in 1995 related to a Carnegie Mellon study on pornography use online. Although the Carnegie Mellon research data was taken wildly out of

context and misquoting occurred at almost every level, public attention was focused on a perceived “pornography problem” online and eventually legislation became a fashionable response to solving the “problem” which still has not been qualitatively proven to exist (Elmer-Dewitt, 1994). Ensuing examinations of the myths about the prevalence of pornographic materials on the Web concluded that the media-induced hysteria over online child pornography was largely unfounded and that incidence of pornographic imagery appearing online probably reflects the incidence of such materials appearing in society as a whole (Hamilton, 1999). In any case, a variety of Internet censorship laws widely proclaimed to protect children from online pornography began to appear in the mid-1990s, culminating in the Court’s ruling that public libraries’ use of Internet filtering software does not violate their patrons’ First Amendment rights, CIPA does not induce libraries to violate the Constitution, and CIPA is therefore a valid exercise of Congress’ spending power. Although civil liberties groups including the American Library Association challenged all of these laws under the First Amendment and the Supreme Court ruled in their favor in every case except CIPA, a dangerous argument was introduced: filtering software acquired an unearned reputation as a viable form of Internet content control.

#### *Restricting Public Internet Access Through Filters*

Filtering schemes are notoriously unreliable as safety nets for actual Internet content and although software is continuously improving, the basic structure of Internet filtering is dependent on a list of forbidden terms. These terms have to be decided upon and entered by human beings at some point, and the layers of misunderstanding, bias and simple error inherent in forbidding the use of words online are myriad. Creating viable filtering software is a growth industry in the U.S. (Rosenberg, 2001) despite the proven failures of these systems to either protect children from sexually related content online or to allow adults the freedom to use the Internet fully.

Many filtering critics argue that government encouragement of content filtering, or legal requirements for content-labeling software, is equivalent to censorship. Third-party attempts to analyze commercial filtering software have detailed the weaknesses of using word lists to restrict Web access. Even the latest versions of content filters routinely block unobjectionable sites while failing to block intended targets, and continue to block sites which contain forbidden religious and political terms. Among the four largest filtering software companies, the most frequently challenged forbidden sites include the Vatican, the National Journal of Sexual Orientation Law, the Heritage Foundation, and the National Organization for Women (Wikipedia, 2006).

TYPE II: Free expression *place* restrictions enforced by public schools which limit the way students may use the Internet in a private setting.

Dialogue on the Internet tests the limits of conventional discourse and some public institutions (particularly high schools) penalize users for expression. Students creating independent web sites on their own time are punished for ideas communicated on such sites even when ideas are unrelated to the school and the sites not physically supported by the school (Beeson, 2004).

EXAMPLE: Eighth-grade student Jessica Schoch was not allowed to attend school or participate in extracurricular activities after school officials discovered a MySpace.com profile she created at home on her own time that parodied a school administrator

( <http://www.aclu.org/freespeech/youth/25381prs20060427.html> ) .

Other recent examples of proposed online place restriction legislation that would effectively require most schools and libraries to render particular Web sites inaccessible to minors include

governmentally-restricted “places” such as peer-to-peer networks, social networks including MySpace and gambling sites which are ostensibly legal in their physical locations.

TYPE III: Free expression *place* restrictions enforced by a governmental agency to censor the entire contents of an Internet-wide presence or provider in a public setting.

In July of 2006, India's Department of Telecommunications instructed Internet service providers to block access to the three largest blogging domains including blogspot.com, typepad.com, and geocities.com. and refused to provide any explanations for the blockade. Other recent cases involving national censorship include Google’s capitulation to the Chinese government's demands to ban certain kinds of content and the U.S. government log requests (which Microsoft and Yahoo provided). A central question to the future continued growth of the Internet globally is whether governments and the private sector come to an agreement on international legal standards for the free flow of information and privacy (Weitzner, 2006.).

#### *Controlling public access through national censorship*

Americans continue to view place access in other countries as a direct index of freedom (Zick, 2006). Jurisdiction online is currently based on the physical place the server resides, so even if the content is illegal in some countries, no laws can be enforced on the server itself. Internet Service Providers cannot be required to censor content, because they are not the equivalent of publishers in the physical world. Publishers actually do know everything they publish while ISPs cannot. Large scale national censorship online appears to be quite difficult to enforce. Aside from the practical problem which arise (banning can stimulate demand for information which did not exist before) the old difficulties of propaganda-driven communication tend to emerge: restricting expression only makes expression a scapegoat for deeper social

problems while critical viewing skills predictably atrophy under a censorial regime (Newey, 1999).

Another encouraging variable that would seem to rule out extensive censorship of the Web on a national basis is the nature and size of the technological community supporting the Internet (Margolis, 2000). The people who both technically create and practically support day-to-day cyberlife have created an expectation of openness, freedom, and even anarchy which is difficult to suppress within such a large and physically dislocated communication system. Aside from literally turning off the electricity to an entire physical location, most governments have been unable to effectively eliminate communication online—so far.

Traditionally, political protest has been an active testing ground for establishing current place restriction laws. Online political action continues to morph from relatively static traditional party sites to evolving open source spaces which sponsor activities, broadcasts and publications often unseen and unapproved by the candidates involved. The differing Internet activities between large, old well-established organizations and young, relatively evolving groups is most clear when examining how “mobilization” occurs, both in the tangible physical world, and online. Traditional physical place restrictions still occur as part of social transactions such as permanent campaigns, but also as a form of political oppression, both through removal of access and via intentional governmental censorship.

### Conclusion

The debate over how to regulate public speech is not new. The debate over how to regulate public speech in a continuously shifting, always available global public forum is new.

A survey of how American courts have historically established new free speech interpretations based on evolving technology suggests that the context of the message and not the technological characteristics should be the central criteria in deciding First Amendment protection. (Harvard Law Review Association, 1994). Broadcasting cases are especially helpful in this area, even though television broadcasting has been controlled using technology-based rationales such as scarcity and pervasiveness, which may not be applicable in the case of Internet. Still, arguments for evaluating the Web specifically in terms of other existing consumer media stress the important differences in the way people use each medium: TV is passive while the Internet can be interactive.

The Internet is often described as a common enterprise community, with the organization of the Web in particular shifting the point of focus to the reader, highlighting a sense of perceived anonymity. This commonality suggests that self regulation is arguably the most effective form of control in the online environment. Relying on the marketplace to provide filtering *only for those who desire such restrictions* is the only viable way to maintain the openness of the Internet. Responsibility for censorship can only succeed at a personal level, rather than being imposed from governmental agencies. In *Cohen v California* (1971), the Court stated clearly that “Unwelcome views and ideas cannot be totally banned from the public dialogue” and discussions of harm versus offensiveness must always consider the chilling effect of online censorship (403. U.S. 15).

Online communication blurs the geographical boundaries which defined traditional jurisdictions and moves editorial control to the users. Speed and ease of dissemination add problems not faced by traditional paper or broadcast mediums. Online communication also conceivably smudges some divisions between speech and conduct (sometimes considered “non-

speech”). Posting files, sending emails and responding in online discussions are acts. Writing a blog and designing a web page are perhaps more purely speech alone. Should any of these activities should be censored?

*Cohen* (1971) provides some succinct guidelines when considering place restrictions online: Is the audience captive? Is the message likely to cause a breach of the peace? Can the state ever forbid the use of certain words, even in “the public good”? While filtering may be encouraged in the privacy of a home, should filtering without oversight be enforced by law in public settings such as libraries? “The only “conduct” which the State sought to punish is the fact of communication.” “Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.”

“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”



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