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CENSORSHIP

Charles L. White

Electronic networks such as the Internet provide an easily accessible forum in which people can exchange ideas with others across the United States and around the world. Millions of people use online services to communicate with friends, advertise products and services, gather information, and debate various topics. Problems arise, however, when network users send messages that other users find offensive or annoying. On the virtually unregulated "information superhighway," the permissibility of censorship is unsettled. This section of the Report addresses the ability of online service providers, network users, and government to restrict online speech.

Online service providers necessarily exercise some degree of editorial control over the material transmitted on their networks. For example, Prodigy, once the largest and currently the third largest domestic commercial network,⁶⁰⁷ reserves the right to remove from its bulletin boards material that it finds inappropriate, insulting, offensive, or harmful to other users or the business interests of Prodigy.⁶⁰⁸ America Online recently executed a similar policy when it closed several feminist discussion forums that the online service provider found inappropriate for young girls who might access the forums.⁶⁰⁹ Other electronic networks have censored or censured their subscribers for the posting of messages such as "Jesus is Coming," "Make Money Fast," and "Your Armenian Grandfathers Are Guilty of Genocide."⁶¹⁰ One Internet access provider went so far as to cancel the account of a University of Florida student after he repeatedly posted offensive materials.⁶¹¹

Additionally, network users are taking it upon themselves to remove messages posted by other users. The Phoenix law firm of Canter & Siegel experienced such online vigilantism after it sent advertisements to several bulletin boards on the Usenet computer network.⁶¹² The law firm's use of the network was particularly egregious. It interjected thousands of advertisements into topical forums world-

607. Peter H. Lewis, *No More 'Anything Goes': Cyberspace Gets Censors*, N.Y. Times, June 29, 1994, at A1.

608. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *2-3 (N.Y. Sup. Ct. May 24, 1995); Robert B. Charles, *Computer Libel Questions in 'Stratton v. Prodigy'*, N.Y. L.J., Dec. 13, 1994, at 1, 4.

609. Lewis, *supra* note 607, at A1. America Online's information provider contract gives it "the right to remove . . . any information, statements or other material or content which America Online, in its sole discretion, determines are offensive, in poor taste, or otherwise objectionable. Ellen M. Kirsh, *Agreements-America Online, Inc., in Business and Legal Aspects of the Internet and Online Services* 54, 65, 91 (1995).

610. Lewis, *supra* note 607, at A1.

611. *Id.*

612. See *id.* at A1, D5; Jared Sandberg, *Author Who Used the Internet to Plug Newest Book is 'Silenced' by a Critic*, Wall St. J., Dec. 20, 1994, at B7. Usenet has an

wide,⁶¹³ resulting in regular users being forced to read the same message dozens of times in inappropriate discussion groups. Protest against Canter & Siegel's postings was swift and voluminous. Scores of other users transmitted angry messages, or "flames," to the firm,⁶¹⁴ and the companies through which the firm accessed the Internet canceled the firm's account.⁶¹⁵ When Canter & Siegel continued to post its advertisements, Arnt Gulbrandsen, a network user in Norway, "launched the electronic equivalent of a Patriot missile. . . . [E]ach time the law firm sent out an electronic advertisement, [Mr. Gulbrandsen's] computer automatically sent out a message that caused the network system to intercept and destroy the firm's transmissions."⁶¹⁶

The author of *Netchat*, a book about the Internet, had an experience similar to that of Canter & Siegel. The author posted 150 messages promoting his book on various Usenet bulletin boards.⁶¹⁷ An Internet user who calls himself "Cancelmoose" erased all of these promotional messages from the system using a cancelbot.⁶¹⁸ The Cancelmoose claims he deleted the author's messages because they were "forbidden broadcast advertising" and unrelated to the topics of the bulletin boards on which they were posted.⁶¹⁹ The Cancelmoose's identity is difficult to ascertain because he uses a Finland computer that makes it possible for Internet users to remain anonymous.⁶²⁰

Thus far, the discussion has centered on online censorship by private individuals and entities. Government restrictions on speech occurring in cyberspace, however, are also an important concern due to the increasing amount of communication that takes place electronically.

The scope of permissible government limitations on "cyberspeech" will depend in part on the level of First Amendment scrutiny applied

estimated six million users worldwide and more than 8000 discussion groups. Lewis, *supra* note 607, at D5. People generally access Usenet through the Internet. *Id.*

613. Sandberg, *supra* note 612, at B7.

614. *See id.*; Lewis, *supra* note 607, at D5. The firm demonstrated its lack of remorse by writing a book called "How to Make a Fortune on the Information Superhighway," which urges other businesses and professionals to advertise online as the firm did. *E-mail with . . . Spammers, Inc.*, Summer 1995, at 44, 44. Canter & Siegel also founded Cybersell, a consulting company, to assist businesses with electronic marketing. *Id.*

615. Steve Higgins, *How Two Lawyers are Pushing to Bring Advertising to the Internet*, Investor's Bus. Daily, Nov. 23, 1994, at A4.

616. Lewis, *supra* note 607, at D5. A transmission that automatically destroys certain messages is referred to as a "cancelbot." *Id.*

617. Sandberg, *supra* note 612, at B7.

618. *Id.*

619. *Id.*

620. *Id.*

by courts to laws regulating online communications.⁶²¹ The level of scrutiny will in turn depend on the type of communications media to which the courts analogize online networks. Print media, for example, are entitled to maximum First Amendment protection.⁶²² If courts find that electronic networks are most similar to such media, a government regulation restricting online speech will have to be narrowly tailored to serve a compelling state interest in order to pass constitutional muster.⁶²³

Courts will accord greater leniency to government restrictions on cyberspeech if online networks are analogized to broadcast media. Because broadcast frequencies are scarce, the courts provide greater weight to the government's interest in ensuring that limited spectrum space is allocated fairly.⁶²⁴ Thus, courts apply a lower level of First Amendment scrutiny to government restrictions on use of the broadcast medium. If courts conclude that online networks most closely resemble broadcast television, the government may limit online speech to serve "the public interest, convenience, and necessity."⁶²⁵ In addition, categorizing online networks as broadcast media may permit laws requiring online service providers to supply a forum for those criticized on their networks.⁶²⁶

In recent defamation cases, courts have tended to treat online service providers as newspapers or news vendors. In *Cubby, Inc. v. CompuServe Inc.*,⁶²⁷ for example, the court stated that "[a] computerized database is the functional equivalent of a . . . traditional news vendor."⁶²⁸ Similarly, in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,⁶²⁹ the court classified Prodigy as a "publisher" because the online service provider exercised editorial control over the contents of messages posted on its network.⁶³⁰ The court in *Daniel v. Dow Jones & Co.*⁶³¹

621. Online communications are "speech" protected by the First Amendment. See *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2456 (1994).

622. See *Syracuse Peace Council v. Federal Communications Comm'n*, 867 F.2d 654, 682 (D.C. Cir. 1989).

623. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

624. *Turner*, 114 S. Ct. at 2456.

625. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (citation omitted).

626. See *id.*

627. 776 F. Supp. 135 (S.D.N.Y. 1991). But see *It's in the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11, 14-15 (Wis. Ct. App. 1995) (finding that electronic bulletin board communications cannot be classified as "print" or "periodicals").

628. *Cubby*, 776 F. Supp. at 140.

629. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

630. *Id.* at *4. This decision is problematic for online service providers because it increases the scope of their potential liability for defamatory statements transmitted on their networks. See *id.* at *3. Nevertheless, the court's holding benefits the vast majority of online users who want to be free from government regulation of their online activities.

631. 520 N.Y.S.2d 334 (Civ. Ct. 1987).

concluded that an online news retrieval service should "be treated as a 'media' defendant, entitled to the fullest protection of the First Amendment."⁶³² These cases demonstrate that courts may well apply the highest level of First Amendment scrutiny to laws regulating online communications.

The issue of the appropriate level of scrutiny for government restrictions on online speech is not merely academic. On June 14, 1995, the Senate passed legislation⁶³³ that, if enacted, will criminalize the online transmission of materials that are "obscene, lewd, lascivious, filthy, or indecent."⁶³⁴ The bill may affect online service providers in addition to subscribers as it imposes penalties on those who "knowingly permit[] any [telecommunications facility] under [their] control to be used for any [prohibited] purpose."⁶³⁵ The penalties for these offenses include fines of up to \$100,000 and imprisonment for up to two years.⁶³⁶

The bill, criticized as a "violat[ion of] . . . free speech [rights] and [a] threat[to] the growth of computer networks,"⁶³⁷ has generated concern among online subscribers and service providers. Individual users and proprietors of private bulletin boards, as well as owners and operators of large commercial networks, are subject to prosecution under the bill. The bill poses a substantial threat to those who lack the financial resources to defend themselves. Also at risk are those prosecuted in distant jurisdictions through which their network connections happen to travel. If Congress enacts the bill, there is likely to follow shortly a test case in which the primary issue is the level of First Amendment scrutiny appropriate for laws restricting online speech.

632. *Id.* at 340 (citation omitted).

633. The bill, introduced by Senator Jim Exon (D-Neb.) as part of a larger telecommunications deregulation bill, passed by an 84-16 vote. Edmund L. Andrews, *Senate Approves Fines for Internet 'Filth'; Measure Added to Telecommunication Deregulation Bill*, Austin American-Statesman, June 15, 1995, at A1.

634. 47 U.S.C. § 223(a)(1)(A) (1988); S. 314, 104th Cong., 1st Sess. § 2(a)(1)(A) (1995) (amending 47 U.S.C. § 223 (1988)). In addition, on December 6, 1995 a House conference committee voted "to make it illegal for anyone to knowingly display indecent material that can be viewed by a minor, punishable by a \$100,000 fine and up to two years in prison." Jared Sandberg, *On-Line Society Angered by Plan to Curb Content*, Wall St. J. Dec. 8, 1995, at B8.

635. 47 U.S.C. § 223(a)(2) (1994); S. 314, 104th Cong., 1st Sess. § 2(a)(1)(A) (1995).

636. 47 U.S.C. § 223(a) (1994); S. 314, 104th Cong., 1st Sess. § 2(b)(1)-(2) (1995).

637. Andrews, *supra* note 633, at A1.