Campbell Law Review

Volume 36
Issue 1 *Fall 2013*

Article 5

2014

How to Make Lemonade from Lemons: Achieving Better Free Speech Protection Without Altering the Existing Legal Protection for Censorship in Cyberspace

Gil'ad Idisis

How to Make Lemonade from Lemons: Achieving Better Free Speech Protection Without Altering the Existing Legal Protection for Censorship in Cyberspace

GIL'AD IDISIS

INTRODUCTION

The Internet is considered to be one of the most, if not the most, important evolutionary steps in the advancement of freedom of speech in modern history. It has been referred to by at least one United States court as "the most participatory form of mass speech yet developed."[1] The Internet allows anyone, for the small price of owning a computer, smartphone, or tablet, to have full and unlimited access to a platform granting, in theory at least, access to an audience of millions of people around the world. As part of this cyber community, people can freely exchange information and ideas.

This great potential also brought with it great concerns, as the hazards that existed in allowing free speech––such as expression of defamation, hate speech, incitement to violence, and distribution of misinformation and materials that are sensitive to national security—were amplified and multiplied exponentially. With the click of a mouse or a few taps on a keyboard, anyone can "poison the well" and generate grave, virtually irreparable damages.

Congress, already aware of these dangers in the mid-1990s, made various legislative attempts to restrict and control content on the Internet, mostly in relation to protecting minors from harmful content.[2]

1. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

2. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 661, 673 (2004) (holding that the Child Online Protection Act (COPA), which criminalized commercial Internet postings that were harmful to minors without prior age verification, was unconstitutional for being over-extensive in comparison with other, less restrictive options, such as the use of filters). *See also* Reno v. ACLU, 521 U.S. 844, 849, 859 (1997) (striking down the provisions of the Communications Decency Act (CDA) that criminalized the knowing transmission of "obscene or indecent" messages to minors). Justice Stevens, writing for the Court, stated:

In a series of cases, the United States Supreme Court struck down such attempts as violations of the First Amendment.[3] In such cases, the Supreme Court emphasized time and time again that it would examine such legislation with strict scrutiny.[4]

This in turn led Congress to attempt to privatize content-regulation through legislation that allows and motivates the private sector, i.e., Internet service providers (ISPs), to freely regulate Internet content as they see fit.[5] Section 230 of the Communications Decency Act (CDA), entitled "Protection for private blocking and screening of offensive material," provides ISPs with almost full immunity from liability in the decisions they make regarding whether or not to censor user content.[6] Among the underlying policies of section 230(b), Congress listed: to promote the Internet and interactive media, to preserve the free market for the Internet and media services, and to promote the development of technologies for content filtering by the user.[7] While the goal of incentivizing direct content regulation, rather than developing filtering tools to be controlled by the user, is not explicitly mentioned as part of the declared policies, it is clearly an objective. At the very least, it is a welcomed side effect from the broad immunity granted to ISPs by section 230, specifically subsection (c)(2).[8]

This leads to the question of whether the policies listed in section 230 are indeed advanced in the most optimal way and at what cost for free speech.[9] If the answer is no, the policies are not advanced in the most optimal way, this in turn leads to another question: What can be done in order to strike a balance between effective regulation against

---

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

Id. at 874.

3. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. at 661, 673; Reno v. ACLU, 521 U.S. at 849, 859.

4. Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and By Whom Should its Content be Regulated?*, 46 HOUS. L. REV. 61, 78–79 (2009).

5. *See* Communications Decency Act 47 U.S.C. § 230 (2012).

6. *See id.* § 230(c) (providing "protection for 'good samaritan' blocking and screening of offensive material").

7. *Id.* § 230(b).

8. *Id.* § 230(c)(2).

9. *See id.* § 230(b).

harmful content and protection of free speech on the Internet that is threatened by such regulation?

This Article will explain why governmental regulation is the worst possible alternative and why private regulation is the best alternative, if not the only possible way, to ensure effective content regulation. However, unfettered private regulation, absent an array of checks and balances, gives too much power to entities that do not possess sufficient incentives to adequately protect free speech—free speech the public needs to preserve and advance.

While this Article restricts its main theme and its conclusion to the issues regarding privatized content control, it does raise a far broader issue: Whether the existing territorial, institutional legal framework is an effective forum to regulate cyberspace. As described in Part E of this Article, the regular "old world" system is struggling to offer effective remedies that are needed to resolve Internet-based disputes. Such disputes often have characteristics that make them insolvable, which are especially due to the nature of the judicial system. For example, issues are often international in nature or pose a question that is too urgent for a court to effectively solve. Often, there are cost-benefit issues for private users that prevent them from even seeking a remedy to their injury. All of these concerns are embodied in cases of wrongful censorship, but these concerns also exist in nearly every other aspect of cyberspace. As such, the problem of censorship is a remarkable test case to examine such issues and to try to offer a better solution.

As a preliminary note, this Article uses, for the sake of convenience and simplicity, the terms "Internet" and "cyberspace" as a general reference to all publicly open infrastructures and services. However, the scope of this Article is not limited to the "classic" concept of the Internet since forms of social communication and exchange of content have dramatically expanded.[10]

A. The Development of the Internet as a Tool for Free Speech: Early Hope Versus Current Reality

In 1919, Justice Holmes of the Supreme Court wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by

10. For example, features of cellular devices and communications are not traditionally conceived as "Internet activity." The ability to create an application (app) and make it available to users is one example of a form of speech in cyberspace that also needs protection.

> free trade in ideas––that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .[11]

For years, before the Internet gained its power as a tool for communication and exchange of information, this notion of the advancement of speech through the free market of ideas was no more than a utopian idea that had little resemblance to reality.[12] Newspapers, as well as other mediums of mass media, became big business in markets that were oligopolistic in nature. High barriers restricted access to potential competition through promoters of commercial and private speech.[13] High fixed costs drove out competitors or forced them to consolidate in order to survive.[14] As a result, the power to effectively convey information and opinions to large parts of the public was reserved to only a few commercial entities with commercial, self-preserving agendas.[15]

The emergence of the Internet delivered a promise for a true change in this picture. This potential for change became more evident as computers and Internet connectivity became less expensive and more common among private individuals.[16] With the low costs of computers, an individual could not only be a passive listener, but could also be a speaker with a variety of tools to deliver content, information, and opinions to others.[17] A speaker could choose to create a website with minimal or no costs, to express himself in forums, to comment on news articles, and much more. In addition, as opposed to regular forms of media, such as print, that are constrained by governmental licensing demands and accompanying fees, there is no such constraint on Internet

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. *See* Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1955 (1997) ("The Court thus recognizes that an absolute right to free speech is more of a utopian ideal than a practical reality.").

13. Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 248–50 (1974).

14. *See* David Carr, *The Fissures Are Growing For Papers*, N.Y. TIMES (July 8, 2012), http://www.nytimes.com/2012/07/09/business/media/newspapers-are-running-out-of-time-to-adapt-to-digital-future.html?pagewanted=all&_r=0.

15. *See Miami Herald*, 418 U.S. at 250 ("The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.").

16. Mark J. Perry, *Computers Just Keep Getting Cheaper and Better*, ENCYCLOPEDIA BRITANNICA BLOG (Apr. 7, 2010), http://www.britannica.com/blogs/2010/04/computers-just-keep-getting-cheaper-and-better-and-we-should-eagerly-await-the-days-ahead/.

17. *See* Dickerson, *supra* note 4, at 66. The Internet is a unique invention because it "allow[s] people to both say what they want to say and hear what they want to hear." *Id.*

speech.[18] This new technologically-derived evolution in speech brought the potential to change the old order where the power to reach large parts of the public was reserved only to those who possessed sufficient wealth or political power.[19]

The Internet originated from an experimental project of the Advanced Research Project Agency (ARPA) in 1969, where an inter-network was formed between "computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research."[20] Strictly speaking, and for the sake of accuracy, what is referred to in this Article as "Internet" should be divided into two distinguishable parts. The Internet, by its technical definition, is the infrastructure of cyberspace.[21] The content that exploits the infrastructure is the World Wide Web.[22] As the U.S. District Court for the Southern District of New York in *In re DoubleClick Inc. Privacy Litigation* explained:

> The World Wide Web . . . is often mistakenly referred to as the Internet. However, the two are quite different. The Internet is the physical infrastructure of the online world: the servers, computers, fiber-optic cables and routers through which data is shared online. The Web is data: a vast collection of documents containing text, visual images, audio clips and other information . . . . [23]

However, in common language, the two are the same. Furthermore, with the advancement of technology and the various ways of conveying information through public and semi-public networks,[24] a clear definition of where the physical infrastructure ends and where the world of content begins becomes vague and obsolete. Therefore, use of the word "Internet" today is accurate enough, at least for the purposes of this Article, to describe both the infrastructure and the content that is distributed upon it.

---

18. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1120 (2005) ("The barriers to entry that exist in other mediums of expressions, such as traditional print publication and broadcast media, are drastically reduced in the context of the Internet.").

19. *See id.*

20. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

21. *In re* DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001).

22. *Id.*

23. *Id.*

24. Various ways of conveying information over the Internet include platforms, such as messaging programs, apps used in smartphones, and many more.

"From its inception, the [Internet] was designed to be a decentralized . . . network[]," with no main single source of connectivity or access.[25] This was not only a technological and logistical feature, but was also a social view of the new form of media. "Cyberspace arose out of the academic and research communities and reflects a culture in which axioms of First Amendment jurisprudence became the dominant value."[26] This decentralized view had the full potential to accommodate unprecedented freedom of speech. As John Gilmore said in 1993, "The Net interprets censorship as damage and routes around it."[27] Twenty years later, things have changed.

The most recent and extensive advancement in the potential ability for Internet speakers to deliver content comes from the numerous different social networking websites—websites whose main function is user-created content. Platforms such as Facebook, Twitter, and YouTube provide users the ability to express themselves and make expression the backbone of their services.[28] The content that a user provides to these platforms is the main commodity that they use to make a profit.[29]

The recent blossom in the use of such social networking websites and applications creates the strong feeling that free speech is at a historical peak, at least in the democratic countries of the world. One can criticize the government, society, and even the platform he is using to reach a large number of listeners with the technological accommodation of the website itself. Status updates are being "shared" and tweets are being "re-tweeted," reaching users that are far beyond the close social circle of the speaker.[30] The social networks are thought to have played a critical role in the recent political revolutions of the "Arab

25. *ACLU*, 929 F. Supp. at 831.

26. Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 477 (1997).

27. Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME (Dec. 6, 1993), at 62, 64, *available at* http://www.chemie.fu-berlin.de/outerspace/internet-article.html.

28. *See* FACEBOOK, https://www.facebook.com/ (last visited Sept. 29, 2013); TWITTER, https://twitter.com/ (last visited Sept. 29, 2013); YOUTUBE, http://www.youtube.com/ (last visited Sept. 29, 2013).

29. *See* LJ Rich, *How Can Social Networks Make Money?*, BBC NEWS (Apr. 15, 2011, 7:44 PM), http://news.bbc.co.uk/2/hi/programmes/click_online/9457946.stm.

30. *See* Michael Calia, *The First Tweet, Most Tweeted, Most Followed: The Fun Twitter Facts*, THE AUSTRALIAN (Oct. 4, 2013, 9:26 AM), http://www.theaustralian.com.au/business/world/the-first-tweet-most-tweeted-most-followed-the-fun-twitter-facts/story-e6frg90o-1226732762393; *see generally* FACEBOOK, https://www.facebook.com/ (last visited Sept. 29, 2013).

Spring" in Egypt and in other Arab countries.[31] These revolutions were even dubbed the "Facebook Revolution."[32]

However, the perception of the Internet as an ultimate forum for free speech is far from accurate. Although there is no doubt that the current state of cyberspace offers opportunities to advance ideas, the illusion that such opportunities are exploited to the fullest potential is incorrect. Censorship occurs more often than we like to admit.

For example, Facebook recently suppressed speech when it: censored an image of Gerhard Richter's "Ema" from the Pompidou Center's Facebook page because it displayed nudity;[33] removed a post by the United States Navy Seals that criticized President Obama for denying aid to the SEALs in Benghazi prior to the attack on the U.S. embassy;[34] and removed photos of female Arab protestors because they appeared without a head veil.[35] Facebook is also being accused of arbitrarily censoring posts that it deems "irrelevant," with no further justification or reason required.[36]

Apple censored the application (app) "Drone+," which showed the geographic locations of the United States military drone strikes in Pakistan according to unprivileged information that was published in the media.[37] Apple's reason for censoring the app was that the content

31. Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1379 (2012).

32. *Id.*

33. Abigail R. Esman, *Facebook's Censors Strike Again - Is America To Blame?*, FORBES (Aug. 6, 2012, 9:04 AM), http://www.forbes.com/sites/abigailesman/2012/08/06/facebooks-censors-strike-again-is-america-to-blame/. *See also* Juliette Soulez, *Facebook Censors Pompidou's Gerhard Richter Nude, Fueling Fight Over "Institutional Puritanism,"* BLOUIN ARTINFO (July 31, 2012), http://www.artinfo.com/news/story/816583/facebook-censors-pompidous-gerhard-richter-nude-fueling-fight-over-institutional-puritanism.

34. Rachel Rickard Straus, *Facebook Censors Navy SEALs Who Said Obama Denied Them Backup As Forces Overran Benghazi And Killed U.S. Ambassador*, DAILY MAIL (Oct. 31, 2012, 12:42 PM), http://www.dailymail.co.uk/news/article-2225667/Facebook-censors-Navy-SEALs-said-Obama-denied-backup-forces-overran-Benghazi-killed-U-S-Ambassador.html.

35. *Facebook Censors Arab Women*, ALJAZEERA, http://stream.aljazeera.com/story/facebook-censors-arab-women-0022398 (last visited Nov. 3, 2013).

36. *See, e.g.*, Colleen Taylor, *Is This Censorship? Facebook Stops Users From Posting 'Irrelevant Or Inappropriate' Comments*, TECHCRUNCH, (May 5, 2012), http://techcrunch.com/2012/05/05/facebooks-positive-comment-policy-irrelevant-inappropriate-censorship/.

37. Charlie Osborne, *Apple Rejects 'Questionable' US Drone Strike Tracker App*, SMARTPLANET (Sept. 3, 2012, 2:00 AM), http://www.smartplanet.com/blog/smart-takes/apple-rejects-8216questionable-us-drone-strike-tracker-app/28794.

was "excessively crude."[38] Apple censored another app that provided information and news updates about Palestinian protests.[39] It refused to offer for sale an e-book called "Hippie," which depicted the Hippie culture and contained nude photos.[40] It also censored a dictionary app called "Ninjawords," because it contained the ability to look up and find "objectionable" words.[41] In addition, Apple has a habit of censoring words from the titles of apps, books, and songs on iTunes, such as "Vagina," the title of a well-known book by an established author,[42] and "Jailbreak," a name for installing unapproved apps on Apple devices.[43]

YouTube also has taken part in its share of censorship, including censoring the infamous video titled, "The Innocence of Muslims."[44] YouTube was accused of removing for political reasons a satirical pro-Israeli video titled, "We Con the World," which mocked anti-Israel activists based on the song "We Are the World," even though YouTube insisted that it was removed due to a possible copyright infringement.[45] YouTube also removed a documentary about a church associated with Sarah Palin,[46] as well as a music video by an alternative rock band

38. *Id.*

39. *Apple Removes 'Offensive' Intifada Application*, BBC NEWS (June 23, 2011, 8:03 AM), http://www.bbc.co.uk/news/world-middle-east-13890331.

40. Michael Posner, *Nudity, E-books and Censorship: How Apple Became Big Brother*, THE GLOBE AND MAIL (Nov. 22, 2012, 10:43 AM), http://www.theglobeandmail.com/arts/books-and-media/nudity-e-books-and-censorship-how-apple-became-big-brother/article5541912/.

41. Erica Ogg, *Apple Censors a Dictionary App*, CNET (Aug. 5, 2009, 12:01 PM), http://news.cnet.com/8301-13579_3-10303794-37.html.

42. Meredith Bennett-Smith, *Apple iTunes Censors 'Vagina:' Feminist Author's Book Title Allegedly Considered Explicit*, HUFFINGTON POST (Sept. 13, 2012, 4:52 PM), http://www.huffingtonpost.com/2012/09/13/apple-itunes-censors-vagina-penis-references-okay_n_1879197.html.

43. Mario Aguilar, *Apple Censors "Jailbreak" In iTunes*, GIZMODO (May 17, 2012, 9:52 AM), http://gizmodo.com/5911082/apple-censors-jailbreak-in-itunes.

44. Charlie Osborne, *YouTube Censors Controversial Video in the Middle East*, ZDNET (Sept. 13, 2012, 1:09 AM), http://www.zdnet.com/youtube-censors-controversial-video-in-the-middle-east-7000004198/ ("The video has not been removed from YouTube, but access to it has been blocked in Egypt and Libya.").

45. Caroline Glick, *YouTube Silences Latma, Removes We Con the World*, CAROLINEGLICK.COM (June 12, 2010, 6:01 AM), http://www.carolineglick.com/e/2010/06/youtube-silences-latma-removes.php.

46. Bruce Wilson, *YouTube Censors Documentary on Palin's Churches*, HUFFINGTON POST (Sept. 13, 2008, 3:09 PM), http://www.huffingtonpost.com/bruce-wilson/youtube-censors-documenta_b_126202.html.

criticizing Catholicism and the Pope, deeming them both inappropriate.[47]

Google has also been accused of restricting free speech by controlling the content it allows to be published in its sponsored links section.[48] For example, Google removed a political blog writer's sponsored link that promoted a book that he wrote that criticized the Bush Administration about the detainees in Guantánamo Bay and Abu Ghraib.[49] Google removed the sponsored link and informed the writer that "Google policy does not permit the advertisement of websites that contain 'sensitive issues.'"[50]

The purpose of this short and far from exhaustive list of examples is not to take a stand as to whether Facebook, YouTube, Apple, and Google were wrong to exercise censorship in the aforementioned instances. The objective is to demonstrate that the companies exercise an active policy of censorship over diverse forms and subjects of expression. It is unknown whether there is a set of rules that apply in these decisions, the thought process that the decision is based on, and how much weight, if any, is given to the advancement of free speech. A look at the terms of service of different service providers is even more troubling and does not shed any light on these questions.[51] In accordance with the broad legal immunity granted to ISPs by section 230 of the CDA, most service providers' terms of service are either vague in distinguishing the line between permissible and impermissible content, or the terms are overly detailed, encompassing a wide range of impermissible materials and leaving little room for non-conventional speech.[52]

Facebook states, "We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies."[53] The "Facebook community standards" encompass a long and

47. Lesley Savage, *David Bowie's New Religious-Themed Video Causing Controversy*, CBS NEWS (May 9, 2013, 2:59 PM), http://www.cbsnews.com/8301-207_162-57583735/david-bowies-newest-religious-video-causing-controversy/.

48. Nunziato, *supra* note 18, at 1123.

49. *Id.* at 1124.

50. *Id.*

51. *See generally Statement of Rights and Responsibilities*, FACEBOOK (Dec. 11, 2012), https://www.facebook.com/legal/terms; *Terms of Service*, YOUTUBE (June 9, 2010), http://www.youtube.com/static?template=terms; *Internet Services*, APPLE, http://www.apple.com/legal/internet-services/ (last visited Nov. 3, 2013); *Google Terms of Service*, GOOGLE (Mar. 1, 2012), http://www.google.com/intl/en/policies/terms/.

52. *See* 47 U.S.C. § 230(c) (2012).

53. *Statement of Rights and Responsibilities*, FACEBOOK, ¶ 5.2 (Dec. 11, 2012), https://www.facebook.com/legal/terms.

detailed list of types of content that will be removed, including, "promotion or encouragement of self-mutilation, eating disorders or hard drug abuse," "[b]ullying and [h]arassment," "[g]raphic [c]ontent," and "[n]udity and [p]ornography."[54] As seen above, Facebook applies such terms broadly in making a decision to remove content.[55]

Twitter is no different. It "reserve[s] the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you."[56] However, Twitter is more limited in its mandate to censor content, and states that it "will not censor user content, except in limited circumstances."[57] These limited circumstances are well-defined and largely based on criminal offenses or torts, such as impersonation, intellectual property infringement, breach of privacy, threats, and cybersquatting.[58]

YouTube, on the other end of the spectrum, is both overbroad and vague in reserving "the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement, such as, but not limited to, pornography, obscenity, or excessive length."[59] Apple, consistent with its image, has an even broader scope of discretion. It demands that iTunes users not submit materials or apps that are "obscene, objectionable, or in poor taste," and "reserves the right to not post or publish any materials, and to remove or edit any material, at any time in its sole discretion without notice or liability."[60]

The problem is less serious when the censored expressions are more or less within the boundaries of conventional criticism or expression. Public opinion is usually a strong enough counter-balance for deterring service providers from using an "over-happy trigger finger."[61] In the

54. *Facebook Community Standards*, FACEBOOK, http://www.facebook.com/communitystandards (last visited Nov. 3, 2013).

55. *See also* Mark Gibbs, *Bronze Breasts and Facebook Censorship*, NETWORKWORLD (Sept. 26, 2013, 8:51 PM), http://www.networkworld.com/community/blog/bronze-breasts-and-facebook-cenrsorship.

56. *Terms of Service*, TWITTER, ¶ 8 (June 25, 2012), https://twitter.com/tos.

57. *The Twitter Rules*, TWITTER, https://support.twitter.com/articles/18311-the-twitter-rules (last visited Nov. 3, 2013).

58. *See id.*

59. *Terms of Service*, YOUTUBE, ¶ 7(B) (June 9, 2010), https://www.youtube.com/t/terms.

60. *See Terms and Conditions*, ITUNES (Sept. 18, 2013), www.apple.com/legal/internet-services/itunes/us/gifts.html.

61. *See, e.g.*, Erik Wemple, *Facebook Admits Error in Censoring Anti-Obama Message*, WASHINGTON POST (Oct. 31, 2012, 1:00 PM), http://www.washingtonpost.com/

aforementioned examples, the act of censorship was exposed, criticized, and in some cases, the service provider apologized and made amends.[62] The real danger occurs when the most important forms of speech are censored—the speech that actually needs the most stringent protection. This includes the unpopular speech, the eccentric and quirky speech, and the inflammatory speech—the speech that no one fights for or writes about—–the speech that leaves no trace of existence after it has been removed.

Another troubling problem with private censorship is the lack of transparency regarding the selection and the volume of the content that is being censored.[63] There are ample statistics detailing government efforts to censor content on the Internet, and service providers generally are happy to present such data.[64] However, despite vigorous attempts to find statistics on content removal rates made by the private entities themselves (i.e., Facebook, YouTube, and other service providers), such attempts prove unsuccessful, including direct requests made for the purpose of this Article.[65] The absence of transparency and accessibility of data, with the partial exception of Google, is in itself part of the hazard of private censorship and will be elaborated further in Part E of this Article.[66]

---

blogs/erik-wemple/post/facebook-admits-error-in-censoring-anti-obama-message/2012/10/31/d6063c22-235e-11e2-ac85-e669876c6a24_blog.html.

62. *See id.* A Facebook spokesperson acknowledged its mistake and stated, "This was an error and we apologize for any inconvenience it may have caused. They can feel free to repost the image." *Id.*

63. *See* David Badash, *Has Facebook Censorship Gone Too Far?*, THE NEW CIVIL RIGHTS MOVEMENT (Nov. 7, 2011), http://thenewcivilrightsmovement.com/has-facebook-censorship-gone-too-far/politics/2011/11/07/29714 ("Yet what [Facebook] chooses to censor and to not censor apparently is subject to some deeply held secretive algorithm.").

64. Google offers semi-annual data reports revealing government and copyright owners' requests to remove content. It also provides statistics regarding how often Google complies with such requests. *See Transparency Report,* GOOGLE, http://www.google.com/transparencyreport/removals/government/ (last visited Nov. 5, 2013). Beginning around July 2011 to January 2013, various government agencies have requested that roughly 4,000 items be removed every six months. *Id.* Compliance rates by Google have decreased, however, from sixty-three percent as of July 2011 to forty-five percent in January 2013. *Id.*

65. A request made to Google for data regarding video removal rates on YouTube was answered laconically with: "Thanks for contacting Google. I'm afraid we're not able to meet this request at this time." No further explanation was provided. Requests to other service providers went unanswered as well.

66. *See generally* Betsy Isaacson, *55 Charts That Prove Governments Are Increasingly Censoring Your Internet*, HUFFINGTON POST (July 3, 2013, 1:01 PM), http://www.huffingtonpost.com/2013/07/03/government-censor-internet_n_3535322.html ("Since

B. *The Misconception of the Free Market's Ability to Protect Free Speech Rights*

Section 230 is based on interests in accommodating a free Internet market.[67] This is confirmed by Congress's findings that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[68] Furthermore, Congress found that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."[69] In addition, "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[70] Thus, under the "Good Samaritan" protection, service providers are offered double immunity—immunity from liability for publications made through their infrastructure or service, and immunity from liability for removal of content.[71]

Congress's view, reflected in section 230, ignores the major differences between the real world and cyberspace, as well as the central role that cyberspace plays in our daily lives. In many ways, cyberspace replaced the traditional ways that society was accustomed to exchanging information and opinions.[72] Section 230 demonstrates Congress's disregard for these fundamental differences.[73]

The first characteristic of cyberspace that differs from the real world is the absence of "sidewalks" in cyberspace. In the real world, a person can walk out of his front door and start wandering through the streets. Streets are public property and can connect this person to other people's homes, department stores, services, and more. This person can meet other people on the sidewalk as well. People may approach this person to start a conversation. He may hand out pamphlets, hold signs, or speak aloud about something that bothers him. Even if this person is

---

2009, Google has been lauded for publishing 'transparency reports' on government requests to take information offline.").

67. 47 U.S.C. § 230(a)(3) (2012).

68. *Id.*

69. *Id.* § 230(a)(5).

70. *Id.* § 230(b)(2).

71. *Id.* § 230(c).

72. *See* Nick Morgan, *How Digital Technology Has Changed Communication – First of Three Posts*, FORBES (May 21, 2013, 11:54 AM), http://www.forbes.com/sites/nickmorgan/2013/05/21/how-digital-technology-has-changed-communication-first-of-three-posts/.

73. *See* 47 U.S.C. § 230.

walking around aimlessly, he still needs to navigate through the public space if he wants to move from one private sphere to another. This person is free to take different routes as he chooses. In other words, "[t]he constitutional guarantee that citizens have access to public streets, sidewalks, and parks in order to speak and assemble has been and remains of paramount importance to the existence of a free and vibrant democratic culture in this country."[74] In a public forum, speakers can make themselves available and achieve exposure to large audiences at no cost and without any restrictions.[75] For example:

> Public forums provide tangible places in which the promise of the First Amendment can be made real. Free speech and assembly serve important ends of individual liberty of expression, the free exchange of information and opinion on which the institutions of civil society rely, and the promotion of the open debate among political equals upon which a thriving democracy depends.[76]

Cyberspace is entirely different. Although cyberspace may create an illusion that a user has complete freedom and discretion to explore websites and information on the Internet, this is a misconception.[77] In cyberspace, there are only two ways for a user to reach a website: either he knows the exact web address of the website he wants to visit, or he can choose from the links offered by the search engine that he is using.[78] A website that does not fall within one of these two options does not exist for that particular user at that moment. A metaphoric comparison of cyberspace and the real world illustrates the lack of options that a user faces in cyberspace.[79] For example, suppose that cyberspace is a large building made out of infinite rooms, where each room is connected to other rooms through direct doors and passages, but there is no common corridor that one can walk through to directly access the individual rooms. Search engines, such as Google, Bing, and Yahoo, may seem to resemble "corridors." In reality, they are no different than any other "rooms," except for the amount of doors they offer and their claim that they connect to all other rooms.[80] Yet, the search engines are private entities, and as seen above, this claim that they connect to all other

74. Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 151 (1998).

75. *Id.* at 161.

76. *Id.* at 160.

77. *See id.* at 173.

78. *See id.* at 185–86.

79. *See id.* at 187–88.

80. *See id.* at 207–08.

rooms is not entirely accurate.[81] The assumption that competition is a strong enough incentive for private actors in cyberspace to create better-balanced content regulation regimes should be carefully reexamined since the availability of content on the Internet is protected only by goodwill and commercial interests.[82]

The classic capitalistic view that is transposed to cyberspace maintains that by minimizing government involvement in the market, it will further competition in the "free-speech enabling" market, allowing the consumer-user to choose the platforms, websites, and search engines that least restrict user content.[83] Additionally, even if the mainstream service providers prefer to offer a more "consensual" product, other service providers will recognize the demand for a different product and will provide it. One professor noted:

> It does not matter whether online discussion groups or even entire networks of such groups are internally autocratic, since individuals can always choose "their own more congenial online homes." . . . It is the ease of exit and the abundance of alternatives—in essence consumer choice in conditions approaching perfect competition—that bring to fruition the liberal ideals of liberty and consent.[84]

However, this view has some inherent flaws. First, the free market notion holds a fundamental dissonance to the idea of freedom of speech.[85] "[T]he free market system necessarily fails because the values embodied in the First Amendment are not meant to reflect an aggregate of existing private preferences, but instead are meant to incorporate a set of collective values, which an unregulated market will not necessarily recognize."[86]

Second, the reality is that cyberspace has become more commercialized and more centralized over the years. This trend of increased commercialization and centralization of the Internet was accurately predicted by Professor Neil Weinstock Netanel:

---

81. *See id.* at 208.

82. Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 270 (2000).

83. *Id.* at 287–91.

84. Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 404–05 (2000) (quoting David R. Johnson & David G. Post, *The New "Civic Virtue" of the Internet*, *in* THE EMERGING INTERNET 23 (1998 Annual Review of the Institute for Information Studies) (C. Firestone, ed. 1998)).

85. *See* Dickerson, *supra* note 4, at 86; *see also* Johnson & Post, *supra* note 84.

86. Dickerson, *supra* note 4, at 86.

> Lone authors and musicians might still post their work on listservs and web sites, and those who know and care to look will still be able to read and hear that work. But the dissemination of most information and expression will more closely resemble today's mass media marketplace than today's infant Internet. Both authors and audiences will return to depend heavily on intermediaries—the cyberspace equivalents of book publishers, film studios, newspapers, television networks, and record producers—to act as gatekeepers selecting which expression to market, to market that expression, and to invest in the production of expensive content. Those intermediaries will determine what content gets communicated to most people.[87]

For example, it is estimated that Apple's iOS has control of approximately 34.3% of the mobile operating systems in the United States,[88] Google has approximately sixty-seven percent of the market share in search engines,[89] and Google's video streaming sites—mainly YouTube—has 152 million unique viewers out of a total of 182 million unique viewers.[90] Additionally, it is estimated that Facebook holds approximately fifty-nine percent of the social network market in the United States.[91] Instead of creating a diversified market, the competition for users has caused the opposite to occur. For instance:

> Emerging Internet technology fuels rule regime centralization by effectively raising cyberspace market entry costs. In a world awash in cheap information, audience attention becomes a scarce and highly sought-after resource. Not surprisingly, then, commercial players compete vociferously to draw Internet users to their portals and web sites, and to keep users there as long as possible. As in the offline world, producers with the financial resources to market their products, exploit synergies with corporate partners and affiliates, and produce high-

87. Netanel, *supra* note 84, at 463–64.

88. *ComScore Reports November 2012 U.S. Mobile Subscriber Market Share*, COMSCORE (Jan. 3, 2013), http://www.comscore.com/Insights/Press_Releases/2013/1/comScore_Reports_November_2012_U.S._Mobile_Subscriber_Market_Share.

89. *ComScore Releases November 2012 U.S. Search Engine Rankings*, COMSCORE (Dec. 12, 2012), http://www.comscore.com/Insights/Press_Releases/2012/12/comScore_Releases_November_2012_U.S._Search_Engine_Rankings.

90. *ComScore Releases November 2012 U.S. Online Video Rankings*, COMSCORE (Dec. 18, 2012), http://www.comscore.com/Insights/Press_Releases/2012/12/comScore_Releases_November_2012_U.S._Online_Video_Rankings.

91. Priit Kallas, *Top 10 Social Networking Sites by Market Share of Visits [November 2012]*, DREAMGROW (Dec. 10, 2012), http://www.dreamgrow.com/top-10-social-networking-sites-by-market-share-of-visits-november-2012/.

> quality, attention-grabbing content will likely succeed in capturing the lion's share of audience attention.[92]

The trend towards centralization is even more worrisome considering the fact that speech, trading views, and opinions on cyberspace do not merely coexist alongside the traditional ways of expression in the real world. Instead, cyberspace speech is beginning to replace traditional forms of expression.[93] This troubling trend of centralization combined with the public's misconception about free speech in cyberspace creates a tangible danger that unpopular and controversial speech will fall between the cracks and disappear without anyone even noticing.[94]

There is no reason to trust that commercial entities will want to, or even know how to, make a balanced, good faith determination of whether content is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," as section 230 suggests.[95] Commercial companies are inherently biased, primarily focusing on maximizing profits, which is generally achieved by reaching the broadest client base and by keeping content as consensual and non-provocative as possible.[96] Thus, the "good faith" restriction offered by section 230 is futile; it is ambiguous and fails to offer any standards for a court to consider in distinguishing conduct that was performed in "good faith" and conduct that was not.[97] For example, is a decision to reject unpopular speech, based purely on commercial interests, considered to be made in good faith? Furthermore, an evidentiary obstacle renders the good faith restriction completely useless because a commercial entity is not required to provide the reasoning for its decision.[98] Therefore, under section 230, conduct cannot be judicially scrutinized based on a lack of good faith.[99] In other words, only "smoking guns" are capable of proving the existence of bad faith, and smoking guns are hard to discover.

As demonstrated by the limited number of cases that have addressed immunity under section 230(c)(2)(A), courts have been

92. Netanel, *supra* note 84, at 441–42.

93. *See id.* at 415–16.

94. *See* Dickerson, *supra* note 4, at 86–87.

95. 47 U.S.C. § 230(c)(2)(A) (2012).

96. *See* Nachbar, *supra* note 82, at 303–05; *see also* Netanel, *supra* note 84, at 441–42.

97. Dickerson, *supra* note 4, at 82 (noting that "the laundry list of adjectives describing the type of content that may be restricted" creates a potential for abuse).

98. *See* 47 U.S.C. § 230(c)(2)(A); *see also* Dickerson, *supra* note 4, at 82–83.

99. *See* 47 U.S.C. § 230(c)(2)(A); *see also* Dickerson, *supra* note 4, at 81–82.

unwilling to recognize bad faith unless there was clear evidence of an impure motive, such as extortion.[100] Such an impure motive was presented in *Smith v. Trusted Universal Standards In Electronic Transactions, Inc.*[101] There, the plaintiff-user alleged that the service provider would only stop blocking his e-mails if he would purchase a service package from the provider.[102] The U.S. District Court for the District of New Jersey denied the defendant's motion to dismiss a claim based on section 230(c)(2)(A) partly because the defendant "ha[d] not produced anything to show that it in fact acted in good faith."[103] In contrast, in *Levitt v. Yelp!, Inc.* the plaintiff-customer alleged that Yelp removed positive reviews from its website because the plaintiff refused to buy advertisement services from Yelp.[104] The U.S. District Court for the Northern District of California dismissed the claim, stating that the plaintiff "fails to plausibly allege that any of Yelp's conduct amounted to an implied extortionate threat,"[105] and that "[i]nferring an implied extortionate threat from the removal of these positive reviews is particularly inappropriate."[106] The court explained that the mere proximity between the customer's refusal to purchase advertising and the removal of the positive reviews by Yelp did not constitute sufficient evidence to support bad faith.[107] Similarly, in *Holomaxx Technologies v. Yahoo!, Inc.* the U.S. District Court for the Northern District of California also refused to find a showing of bad faith after determining that the plaintiff failed to "identify an objective industry standard that Yahoo! fail[ed] to meet."[108] The court rejected the plaintiff's claim that Yahoo had an obligation to "discuss in detail the particular reasons for blocking" advertisement e-mails as part of the "good faith" prong.[109] Consequently, the requirement under section 230 that commercial

100. *See* Smith v. Trusted Universal Stds. in Elec. Transactions, Inc., No. 09-4567 (RBK/KMW), 2010 U.S. Dist. LEXIS 43360, at *16–20 (D.N.J. May 4, 2010); Levitt v. Yelp! Inc., No. C 10-1321 MHP, 2011 U.S. Dist. LEXIS 99372, at *35 (N.D. Cal. Mar. 22, 2011).

101. *Smith*, 2010 U.S. Dist. LEXIS 43360, at *20–21.

102. *Id.*

103. *Id.* at *21 (noting that "Comcast was not concerned that people were receiving large quantities of emails, or concerned about the content of the emails, but rather was concerned that Plaintiff had not purchased a sufficient level of service").

104. *Levitt*, 2011 U.S. Dist. LEXIS 99372, at *35–36.

105. *Id.* at *36.

106. *Id.* at *38.

107. *Id.* at *36–37.

108. Holomaxx Techs. v. Yahoo!, Inc., No. CV-10-4926-JF, 2011 U.S. Dist. LEXIS 30819, at *13 (N.D. Cal. Mar. 11, 2011).

109. *Id.* at *13–14.

entities act in "good faith" when deciding whether to remove content has led to inconsistent decisions in the courts and further demonstrates Congress's inability to effectively regulate content on the Internet.

C. Is There a Need for Private Censorship, or Censorship at all?

Irrespective of cyber speech regulation, preventing certain forms of ex-ante speech from reaching the public is nothing new.[110] These types of speech may be censored for numerous reasons, including: danger to national security, defamation, invasion of privacy, incitement to violence, intellectual property infringement, and more.[111] The introduction of the Internet into our lives has only reinforced the need for ex-ante prevention against harmful content.[112] However, for a number of reasons, the traditional enforcement mechanisms are ill-equipped to effectively regulate the Internet.

First, the Internet, as an open and inexpensive medium, allows a user to disseminate content with very low costs.[113] In addition to low costs, the fact that "distance is measured in nanoseconds," and dissemination of information to mass audiences is only a click away, means that the number of "speakers" in cyberspace is potentially as large as the number of active users.[114] This also means that many of the "speakers" are not "professionals" or commercial entities with an internal checks-and-balances system. Rather, the speakers are private individuals who, even if they do not possess sinister intentions, are sometimes unaware of the implications of their actions and generally do not obtain legal consultation before they act or "speak." This has the potential to lead to harmful expressions, amplified not only by the large number of speakers in general, but also by the speakers' lack of knowledge on what

110. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) ("Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.").

111. *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (protecting copyrighted works through the extension of existing and future copyrights); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a State may forbid advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (noting "the protection even as to previous restraint is not absolutely unlimited" but is "recognized only in exceptional cases").

112. *See* Dickerson, *supra* note 4, at 67–68.

113. *See id.* at 64–65.

114. Gibbons, *supra* note 26, at 502.

constitutes harmful content, and by the ease of republication of the information.[115]

Second, the Internet, more than any other medium, enables speakers to reach millions of users.[116] The theoretical potential for exposure is almost limitless. A speaker could conceivably reach the total number of people that use the Internet. Furthermore, users who do not actively search for and do not intend to be exposed to harmful expression may nonetheless be involuntarily exposed to such harmful expression.[117]

Third, once the harmful expression is "out in the open," it is difficult to take effective measures to eliminate traces of such harmful expression.[118] Books, newspapers, and magazines can be taken off of the shelves. Television shows or movies can be archived and not shown again. In the above examples, a person who is interested in making a copy must invest certain efforts and resources to actually obtain that copy. However, the Internet is different—making a copy of a file or taking a "screenshot" has virtually no cost and only involves a click of the mouse. Moreover, once one copy exists, it can be redistributed with the same ease.[119]

These are only a few reasons why the traditional enforcement system faces hardships in efficiently controlling Internet content. In addition, legal proceedings take time. Even just one day may be a lifetime in cyberspace time. In cases where the content can indeed cause harm, immediate action is required. However, such action can only be effective if it is taken by one who has authority, without the obstruction created by intermediaries, such as courts.

Private regulation is preferable over government regulation because of the infrastructure available to service providers for monitoring the Internet. Through a combination of technological measures and services to aid users in reporting inappropriate content, service providers can effectively monitor the web, whereas the government must passively wait for complaints to be filed or must create an external array of monitoring. Also, it is difficult to imagine how one government entity can effectively replace the monitoring function of hundreds or thousands of website operators and other service providers. In addition, it is important to consider the negative political implications that would

115. *Id.* at 485–86; Dickerson, *supra* note 4, at 99.
116. Dickerson, *supra* note 4, at 64–65.
117. *See id.* at 74–75.
118. Gibbons, *supra* note 26, at 482.
119. *See id.*

arise if the government appeared to encourage "whistleblowing" based on people speaking their minds on the Internet.

D. The Search for a Better Balance Between the Competing Interests

Since private censorship is here to stay, a solution must be found that maintains the benefits of private regulation while minimizing its adverse effects. Academic writers have suggested various approaches and doctrines for applying appropriate public standards.[120] The underlying argument common to all of these approaches is the view that the First Amendment encompasses an affirmative, active duty on the government not only to refrain from interfering with free speech, but also to insure that private actors do not illegitimately interfere with free speech.[121]

A derivative of this approach is the public forum doctrine.[122] This doctrine imposes an affirmative obligation on the government "to dedicate certain publicly-held property for the use and benefit of individuals" to exercise their right of free speech.[123] Additionally, through the state action doctrine, courts can deem a private entity a public forum, and thus, subject it to First Amendment constitutional restraints.[124] One such theory for applying this doctrine is when a private actor fulfills a function that is traditionally within the scope of the responsibility of the state.[125] In accordance with this theory, it was plainly argued that courts should apply First Amendment values to private speech regulation since service providers offer a service with

120. *See* Nunziato, *supra* note 18, at 1143. Under the Net libertarian view, "if there are low barriers to entry in the speech market, then the speech-protective goals of the First Amendment will be perfectly advanced by the aggregation of private forums and private speech decisions within these forums. Affirmative government involvement in the market for speech . . . [is] unnecessary." *Id.* However, "[t]he affirmative conception of the First Amendment requires the government's involvement in the market for free speech to establish conditions allowing each citizen to exercise meaningfully his or her right to freedom of expression, a right that is integral to our system of democratic self-government." *Id.* at 1144.

121. *Id.*; *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–19 (Free Press 1st ed. 1995).

122. Nunziato, *supra* note 18, at 1144.

123. *Id.*

124. Dickerson, *supra* note 4, at 84.

125. *Id.*

public attributes, described as "one great public forum for individuals to express themselves."[126]

Similar arguments were raised and rejected by the courts.[127] A representative example reflecting the attitude of courts regarding attempts to enforce First Amendment duties on Internet service providers can be found in *Langdon v. Google, Inc.*[128] There, the plaintiff filed an action against Google and other search engines after they refused to post his advertisements that promoted websites that criticize China.[129] The plaintiff argued, "[I]nternet search engines are public forums, and that private property opened to the public may be subject to the First Amendment."[130] Furthermore, the plaintiff "compare[d] [I]nternet search engines to malls and/or shopping centers and contend[ed] that Google has dedicated its private property as a public forum."[131] The U.S. District Court for the District of Delaware dismissed the claim with very little discussion, stating:

> Plaintiff has failed to state a claim that Defendants violated his First Amendment right to free speech. Defendants are private, for profit companies, not subject to constitutional free speech guarantees. They are [I]nternet search engines that use the [I]nternet as a medium to conduct business . . . .
>
> Plaintiff's analogy of Defendants' private networks to shopping centers and his position that since they are open to the public they become public forums is not supported by case law. The Supreme Court has consistently held that a private shopping center is not a public forum for speech purposes. The Court has routinely rejected the assumption

126. *See* Nunziato, *supra* note 18, at 1170–71 (noting that service providers "have become essentially immune from scrutiny under the First Amendment").

127. Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 520 (1976) (holding union members do not have First Amendment rights to enter a mall to engage in picketing of a store inside); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 570 (1972) (holding private property does not "lose its private character merely because the public is generally invited to use it"); Nat'l A-1 Adver., Inc. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 167–69 (D.N.H. 2000) (holding that "mere performance" of a public function, by itself, is insufficient to qualify an entity as a state actor); Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 437 (E.D. Pa. 1996) (holding "in the absence of State action, the private online service has the right to prevent unsolicited e-mail solicitations from reaching its subscribers over the Internet").

128. Langdon v. Google, Inc., 474 F. Supp. 2d 622, 626 (D. Del. 2007).

129. *Id.*

130. *Id.* at 631.

131. *Id.*

> that people who want to express their views in a private facility, such as a shopping center, have a constitutional right to do so.[132]

The court gave little weight to the fact that in the analogy, Google is more than a regular shopping mall. Google is a shopping mall in a world where there are no public sidewalks. To be more accurate, Google owns most of the sidewalks, and the sidewalks themselves are the shopping mall.

Additionally, the court was not persuaded by the plaintiff's claim of lack of alternatives, stating, "the Court finds unavailing Plaintiff's argument that he has no reasonable alternative to advertising on Defendants' search engines."[133] The court failed to recognize the realities of the situation and the impact that its decision would have on free speech. First, the court ignored the distinction between the effectiveness of cyberspace and the "real world."[134] Second, it glossed over the fact that private entities control most, if not all alternatives, and there is no similarly effective alternative to what Google offers.[135] The Internet is a resource for exposure that stands high above all other resources in its ability to quickly reach masses of audiences.[136] If a person is allowed to speak in a rally, but is forbidden to use a megaphone, it is hard to say that he has a way of exercising his right of free speech to the fullest extent. Denying an available resource that magnifies free speech and that is unique in its effectiveness is no different than any other restriction on free speech.

While one can criticize the rhetoric of the courts, rejecting First Amendment claims against private ISPs is the only option available for courts without striking parts of section 230.[137] Allowing a First Amendment claim in these instances would render the protection granted by Congress ineffective.[138] The result is that plaintiffs are granted free reign to raise claims wherever they see fit, and private companies are entangled in lengthy court proceedings attempting to determine if users' First Amendment rights were even harmed. This

---

132. *Id.* at 631–32 (citations omitted).

133. *Id.* at 632 (citing Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 443 (E.D. Pa. 1996) (holding that a "private company had numerous alternatives for reaching customers including mail, television, cable, newspaper, magazines, and competing commercial online services")).

134. *See id.*

135. *See id.*

136. *The World in 2013: ICT Facts and Figures*, INT'L TELECOMM. UNION (Feb. 2013), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013.pdf.

137. *See* 47 U.S.C. § 230 (2012).

138. *See id.* § 230(c).

undoubtedly results in a chilling effect on private content regulation, which, as mentioned above, is a positive mechanism when applied with reasonableness and proportionality.[139]

A more direct approach has also been suggested. Instead of courts overriding section 230, Congress "should mandate that [Internet Service Providers] provide access no more narrowly than the First Amendment would permit if the Internet were owned and operated by the government."[140] Whether it is through the courts or Congress itself, the approach suggested would erase the distinction between private service providers and the government.[141] However, this approach ignores the inherent differences between the state and the private market, which in turn creates great difficulties for service providers and for free speech itself.

As mentioned above, an effective and well-balanced private regulation of speech must be incentivized since enabling First Amendment claims against private actors will likely create a chilling effect on their willingness to regulate content.[142] If private actors, or ISPs, abstained from regulating or censoring content when they should have, Congress would have to remove ISPs' immunity in order to avoid the undesirable result of under-regulation. Yet, removal of such immunity would result in increased legal costs for the private market.[143] In turn, freedom of speech would be harmed in at least two possible ways: service providers would try to indemnify themselves ex-ante for the extra costs in order to refrain from losing revenues, and the Internet would be less accessible to users who have fewer financial resources.[144] The extra cost would result in adverse selection, i.e., it would raise market entry barriers so both new and small alternative competitors would be driven out of the market or forced to merge with others, leaving the market even more centralized than it is now.[145]

---

139. *See supra* notes 120–21 and accompanying text.

140. Dickerson, *supra* note 4, at 97.

141. *See id.*

142. *See supra* notes 92–94 and accompanying text.

143. *CDA Section 230 & Immunity for Online Intermediaries*, TECHFREEDOM (July 3, 2013), http://techfreedom.org/post/58448917562/cda-section-230-immunity-for-online-intermediaries.

144. *Id.*

145. *See* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 520 (2001) (noting that imposing liability on private entities in other contexts results in costly ex post adjudication).

E. An Offer of Solution

In order to ensure an appropriate balance between the competing interests, the proposed solution must have several features that overcome the faults of the current private regulation regime. In order to do that, we must first recognize what is missing in the current regulation regarding ISPs' conduct.

1. Need for an Ethical Code of Conduct

Journalists, or the "old world" gatekeepers of democracy and advocates of free speech, have had ethical codes of conduct since the early twentieth century that direct, among other things, the balance between advancement of information through free speech with other interests.[146] Although Google has a code of conduct and is renowned for its "[d]on't be evil" mantra, it can hardly be considered a real ethical code.[147] In general, it is an anomaly that these private actors that have at least the same power and social responsibility as journalists do not have an ethical code. Therefore, a clear and coherent set of norms must be created. In order to promote obedience, uniformity, and objectivity, the code must be a product of cooperation between all of the different players, rather than merely coming from within the ISPs themselves.

2. A Non-legal Option for Appealing Censorship Decisions

An ethical code is a powerless solution if there is not an external review system that is available to verify implication of the code in specific instances. In addition, there needs to be a remedial route available for those who were harmed by the removal of content. This route must comply with the needs illustrated above that are derivative from the character of the Internet. In order to be effective, it must be quick and simple. The remedial route also has to be inexpensive, both for the ISP involved, in order to avoid the adverse effects mentioned above, and for the complainant, in order to encourage complaints.[148] For all of those reasons, the procedure must be non-legal, must avoid the use of lawyers, and must be limited only to the decision of whether or

146. *See* Robert J. Sheran & Barbara S. Isaacman, *Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 96–97 (1982).

147. *Code of Conduct*, GOOGLE (Apr. 25, 2012), http://investor.google.com/corporate/code-of-conduct.html.

148. *See supra* notes 144–45 and accompanying text.

not the removed content will be restored. That way, the full monetary immunity granted to ISPs under section 230 may remain.[149]

3. Transparency

As mentioned above, the lack of transparency is an existing problem with the current regime.[150] ISPs have no obligation to provide notice or an explanation for their censorship decisions.[151] Lack of such obligation promotes arbitrariness and bad faith. It also makes it nearly impossible to exercise any scrutiny over the decision. Therefore, with the new regulation, ISPs must be obligated to provide notice to the user, as well as a short explanation or reason for its decision.

4. Removal of National Barriers

As one scholar noted:

> Trying to regulate cyberspace on a country-by-country basis is doomed to fail because it is inefficient and does not account for the inherent nature of the technology. "The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access."[152]

Although a non-legal set of ethical norms would not be able to replace pre-existing local legislation, such a code would help bridge different cultural conceptions of speech and assist in promoting the free exchange of information and opinions. If the dissemination of the ethical norms proves effective, it would provide an opportunity to influence countries with strict legal regimes and to make them consider loosening their legal scrutiny over speech, leaving it to a global form of non-legal regulation.

After exposing the necessary corrections that need to be made to the existing regulation, the question is how these changes should be implemented. The best option for achieving these goals is in a coordinated manner through one source of authority. This idea of establishing an alternative form of governance, a "cyber-governance" if you will, has already been presented in different contexts by academic

149. *See* 47 U.S.C. § 230(c) (2012).

150. *See supra* notes 63–66 and accompanying text.

151. *See supra* notes 54–60 and accompanying text.

152. Gibbons, *supra* note 26, at 502 (quoting Am. Library Ass'n v. Pataki, 969 F. Supp. 160, 170 (S.D.N.Y. 1997)).

scholars.[153] In addition, this suggestion is not just a theoretical idea. It is already implemented in the field of Internet domain names by the Internet Corporation for Assigned Names and Numbers (ICANN), a private, representative body that is responsible for the creation and implementation of domain name rules and their applications in specific disputes.[154] Although ICANN was harshly criticized for flaws in its conception, form of governance, and legitimacy, it proves that the idea of a privatized, global institute that regulates different aspects of the Internet is both realistic and feasible.[155]

The proposed institute could be a private initiative composed of the main players in the field, such as Google and Yahoo, that would be willing to "pick up the glove."[156] Alternatively, it could be introduced and established by an international treaty that would also mandate state legislation that conditions ISPs' immunity from liability, as in section 230, on joining the international body.[157] This organization would provide the ethical code and would also have a dispute resolution section that would deal with individual complaints. Such complaints could be easily filed online, with payment of a symbolic filing fee. The establishment of this organization would also help overcome problems of transparency since all members would be obliged to report their censorship decisions. It would then publish its resolutions and

153. *See* Netanel, *supra* note 84, at 482–83; *see also* Gibbons, *supra* note 26, at 506–07.

154. *Welcome to ICANN!*, ICANN, http://www.icann.org/en/about/welcome (last visited Nov. 4, 2013).

155. *See* John Palfrey, *The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed*, 17 HARV. J.L. & TECH. 409, 410–16 (2004); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 209–17 (2000).

156. Although at first glance it may sound strange that private entities will independently undertake such an obligation, it is not so far-fetched. Many large companies are waging a public relations battle over their public image. *See* Erik Sherman, *Google is Worried About its Public Image when it Wants All Information*, CBS MONEY WATCH (Jan. 15, 2010, 7:47 AM), http://www.cbsnews.com/8301-505124_162-43442322/google-is-worried-about-its-public-image-when-it-wants-all-information/. Facebook and Google are investing numerous resources in assuring users of their good intentions in guarding users' interests. *See Data Use Policy*, FACEBOOK (Dec. 11, 2012), https://www.facebook.com/about/privacy; *Privacy Policy*, GOOGLE (June 24, 2013), http://www.google.com/policies/privacy/. If one of the major players would create such an initiative, it could result in a "snow-ball" effect, where every service provider that is unwilling to join would suffer harm to its reputation.

157. Conditioning immunity upon joining the organization could be imposed only on service providers beyond a specific size in order to prevent over-burdening smaller providers. Such size limit could be determined by a predefined user-number limit or by a predefined market-share limit.

periodical reports, thus creating an incentive for ISPs not to over-regulate. Since it would be a non-governmental, international body, it would also help mitigate the international gaps.

CONCLUSION

The notion that cyberspace is an ultimate promoter of free speech is far from being accurate. In reality, the nature of the free market along with the legislative immunity granted to ISPs by Congress fails to create proper incentives for ISPs to maintain a proper balance between free speech and other interests. As a result, these providers engage in over-regulation of speech. On the other hand, the idea of un-regulated content on the Internet is unrealistic. Different suggestions to correct the current state of the law have been made, but they aim at setting protection of First Amendment rights on the private market, a suggestion that carries with it adverse effects both on the market and on the interest of free speech. Therefore, another solution must be found—a solution that maintains proper protection of free speech while minimizing the adverse effects of restrictions on the prerogative to regulate content.

Such solution is found in the establishment of a non-governmental, representative organization that would create an ethical code of content regulation through the consensus of its members. This organization would effectively and efficiently resolve disputes arising out of censorship acts that are claimed to be contrary to the ethical code. Such a solution would finally bring the Internet in line with what it was meant to be—the most powerful tool for the advancement of free speech and social change ever created so far.