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Freedom of Speech and the New Media

1   Introduction

The value of free speech is like the value of freedom itself, it is independent of context – not just a legal order we find suitable for a limited number of purposes. We have no problem identifying purposes, however. A huge majority can agree that free speech is necessary for a people building democracy, for a society "*where every citizen who wants to improve the world around them and be heard on important public issues can participate in public life with freedom and the right to act on their sense of public responsibility*", as Steven Clift, founder of E-Democracy in Minnesota, exhaustively puts it.[1]

In such a society, only democratically supervised authorities – national, regional or local – are allowed to use coercion. Legal provisions safeguarding free speech, then, focus on the protection of citizens against authorities using coercion to silence or unduly influence the speech of individuals, organisations or the press. Protection for free speech is protection against the state.

If one citizen tries to limit or suppress the speech of another, this is usually dealt with through criminal law. Threatening behaviour is penalised in most settings, as are unlawful detention, theft or destruction of manuscripts, recordings, technical equipment etc – and basically all other ways of preventing someone from speaking or publishing.

That's the theory. For more than 200 years, it has served Sweden and other democratic societies well. Certainly, speech has been suppressed many times, in many places – and still is – but suppression has never become broadly accepted. Even the most benevolent state must present strong motives, and have its actions critically monitored, to be allowed to disturb the free flow of information.
I will now argue that this model for the protection of speech needs rethinking, or at least supplementing. There are two reasons for this.

One. The Internet has emerged as an important mass medium for which no nation, body or institution is responsible. Some of its qualities – being interactive and multijurisdictional – have caused much legal and political confusion. Special interest-lobbyists, not least the ones working for intellectual property-holders, have been extremely successful at the expense of ordinary citizens. (For an in-depth analysis of how and why this is happening in the US, see Jessica Litman's book Digital Copyright. Prometheus Books 2001.) If the Internet today can be characterised as

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[1]   From: http://www.publicus.net/articles/future.html.

"free", this describes qualities inherent in the technological design rather than a legally defined order. There is virtually nothing given about this technological structure. In fact it is continually redesigned – under pressure from security and business interests.

Two. Yesterday the largest multinational corporations could use their lobbyists, lawyers and media consultants to strongly influence the media. Today they *are* the media. Commercial and technological strategies – they can hardly be separated – of companies like AOL/Time Warner, Microsoft, Intel and Motorola, will affect the very structure and qualities of the arena where citizens are supposed to speak out and do politics.

There is nothing particularly Swedish about these issues. We have, however, a strong press freedom tradition and constitutional free speech guarantees since 1766. Swedes may therefore be particularly sensitive to emerging legal and technological structures that tend to undermine free speech guarantees. So far, though, and this may also stem from tradition, our focus has been on national legislation and protection only from the state. The internationalisation of free speech issues is rarely discussed. Therefore, a number of the references here will be to literature and conditions in the US, where societal, media-related trends often appear some time before they are visible in Europe.

2   The power of money

The problem is as old as society itself: with money comes power. In the information society, the source of power is, to a large extent, the control of information. If a company is big enough somewhere along the chain of production-distribution-sale of media-products, its decisions will undoubtedly affect how reachable – from a practical point of view – some speech will be and how invisible other.

In the US, the possibility of being exposed in major stores depends on whether your magazine or video production is, or looks to be, within the boundaries of "family values" – not explicitly sexy, not politically provocative, etc. Companies like Blockbuster, Wal-Mart, Kmart and most other supermarket chains in the US have, claims Naomi Klein in her book No Logo, "*a policy refusing to carry any material that could threaten their image as a retail destination for the whole family.*" (p. 166)

In Sweden, the dominating media company is Bonniers. It owns not only many newspapers and magazines but also (together with Allers and Egmont, two large competitors) Tidsam, a company with a de-facto monopoly of the distribution of papers and magazines to kiosks, department stores and other important outlets. Tidsam has, not surprisingly, been heavily criticised for favouring the products of its owners over independent papers and magazines, thus refusing the latter access to the market.[2]

Then there is what Klein calls "censorship in synergy". The huge media corporations systematically exploit cultural artefacts (be it Star Wars, Pokemon or Harry Potter) from their introduction to a myriad follow-up products (films, books, computer games, collectors items, T-shirts, etc) carrying the names, logos or symbols. Furthermore, the media giants also own the papers and magazines whose journalists are supposed to report,

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[2]   Johan Ehrenberg, *När ska du ta ditt ansvar?* Aftonbladet 2001-11-15.

critically and independently, on the cultural sphere where Star Wars, Pokemon and Harry Potter appear. Although many editors may try to defend the integrity of their staff, it is naive to think that a major media corporation would, in the long run, allow one company within the group to seriously criticise or otherwise hurt a "product" in which another has invested heavily.

There is also the commercially motivated political suppression of speech. Strategies applied by media companies eager to enter the Chinese market offer clear examples of this. (Klein, pp. 168-174) The commercial logic is quite clear. Why would a businessman like Rupert Murdoch risk a multibillion-dollar satellite communication contract with China by having one of his media companies doing the kind of journalism that is likely to anger Chinese leaders? Klein stresses that most of the damage is done by self-censorship – by editors and producers second-guessing, everywhere and all the time, the wishes of top executives, and in doing so having every reason to steer clear of the commercially and politically controversial. One aggressive strategy applied by many powerful companies is harassment of critics – under the cloak of copyright and trademark protection. The continuous strengthening of intellectual property laws, aimed primarily at regulating the Internet, is, according to law professor Lawrence Lessig, a growing problem from the free speech perspective.[3]

One of his examples is the "notice and take down provision" for web sites of the US 1998 Digital Millennium Copyright Act (DMCA). Increasingly, according to Lessig, companies trying to protect themselves from criticism have used the notice-and-take-down-provision to silence critics. He tells the story of a British pharmaceutical company that got tired of complaints from an animal rights organisation. In August 2001 the company invoked the DMCA in order to force the company providing the Internet connection (the ISP) to shut down the animal-rights site. The ISP stated publicly that "It's very clear [the British company] just wants to shut them up". It had no incentive to resist the claims, however – it could be liable if in fact there was a violation – and thus closed the site. (Lessig also tells the story in Foreign Affairs, November-December-issue 2001, but chooses, both in the magazine article and in the interview, not to name the British pharmaceutical company.)

Sweden has an Electronic Bulletin Boards Liability Act (1998:112) with similar provisions. So far, there has been no report of efforts to use it to silence critics, but as long as an ISP can be made responsible for what customers publish, the risk is obviously there.

3   Free speech and privacy

In "Code and Other Laws of Cyberspace", a book that has attracted much attention, Lessig stresses that the Internet is in many ways more effectively regulated by computer code than by law. Although a number of, to most people, unknown Internet organisations with names like ISOC, ICANN,

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[3]   Personal interview with Lessig 2001-10-26, at Stanford University, California. He expands on the subject, and provides more practical examples, in his latest book: The Future of Ideas, New York: Random House 2001.

IAB, IETF and W3C work – or so they claim – to promote safety, openness and maximised accessibility on the net, there is no democratic structure or "constitution" for the technical development of the Internet. This development, then, takes place very much under pressure from powerful political and commercial actors who feels no responsibility for the promotion of free speech.

The issue of "free speech and Internet code" is immensely complex. It involves exercising power over speech both directly and indirectly. Indirectly in this context relates to identification as deterrent. Citizens are likely to abstain not only from speaking but from seeking/receiving/forwarding controversial information on the net if whatever they do will be registered and possibly monitored by others.

As demonstrated by Hunter, this is a problem not just for citizens with extreme or unusual convictions. Using cookies, online donation forms and political mailing lists, Internet-based campaigns can gather tremendous amounts of information about citizens' political preferences. The creation and sale of detailed voter profiles raises one of several serious questions about the future of political privacy and the democratic process.[4]

4 Filtering

Filtering is but one aspect of the broader problem of "speech regulation through code", highlighted here because it usefully demonstrates how private institutions can suppress speech.

Filtering is automatic blocking of information. It can be done at the PC level, allowing the individual Internet-user to avoid having some particularly nasty (pornographic or otherwise offensive) material downloaded. It can also, however, be done at a higher (server/router) level in a way that leaves the individual with no way of understanding or controlling the functions of the filter.

Filtering-software can operate in different ways, but today it seems unrealistic to achieve precise filtering – blocking what is intended and nothing else – without precise rating (classification) of Internet content. The questions of how to rate and who should do the rating are still unresolved among filtering supporters, but the demand for solutions is strong in both Europe and the US. The EU Commission, to mention just one important actor, has a "Safer Internet Action Plan" with a budget of 25 million euro. As one of three "action lines" it has "*Developing filtering and rating systems, facilitation of international agreement on rating systems.*" (underlined in the original).[5]

The general problem with rating is that even though a system may have been created for the most noble purposes – i.e. protecting children from hardcore-pornography – there is no way of assuring that it won't be used for others. The more precisely communicated Internet-content is classified, the easier it will be for authoritarian states (or ISP's whose

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[4]   Christopher D. Hunter, *Political Privacy and Online Politics: How E-Campaigning   Threatens   Voter   Privacy.* http://firstmonday.org/issues/issue7_2/hunter/index.html.

[5]   http://europa.eu.int/information_society/programmes/iap /index_en.htm

owners care more about lucrative contracts with those states than free speech-principles) to filter unwanted content in servers at jurisdictional borders. It may also, in the US and Europe, be a commercially sound policy for ISP's to block, in the name of "political responsibility" or "decency", Internet-speech that is legal but offensive to a majority of customers.

5   Solutions?

In a perfect world, a sufficient majority of nations would agree on an international free speech-convention for the IT-era, with technical as well as legal provisions, and enforcement mechanisms effectively blocking attempts by both states and private sector-actors to unreasonably limit or influence citizens speech. In that world, media companies that did not safeguard the integrity of its journalists and other content-producers would see its customers turn elsewhere for fair and balanced information. Our world is far from perfect, however.

At present, we seem to have a choice between the devil and the deep blue sea.

EITHER no regulating of any importance is done on the international level to safeguard free speech, which would leave the arena open for governmental agencies, multinational corporations and resourceful special-interest groups to control or block mass media content in their own interest.

OR some kind of regulation is negotiated, where the nature of international politics is likely to cause the agreement to be, not a free-speech guarantee but rather the opposite. No international body will be able to reach consensus about free speech – except concerning trivialities – because in all nations there is some speech which is considered unacceptable. All the representatives in such negotiations will demand exceptions which are necessary in order to get the agreement approved by their parliaments or, in less democratic states, politically dominant forces. How much free speech the world needs will obviously be, at best, a secondary issue. Thus, to successfully negotiate an international free speech-agreement, it would have to contain or at least allow for restrictions on pornography, defamation, hate-speech, instigation to terrorism or other criminal acts, sharing of copyright-protected works, denying of the holocaust, communist propaganda, anti-Christianity, anti-Islam and anti-anything that some influential portion of a people consider sacred.

The devil or the deep blue sea?

I opt for the deep blue sea. My argument for an international free-speech treaty is that it would, after all, make the issues visible to ordinary citizens in many countries. As long as the problems are not discussed publicly, the actors manoeuvring to limit and control speech can fight with far fewer scruples.

Before the Napster/MP3 controversy, citizens of the US did not know they had a copyright problem. Because of the publicity, people opposing the new, strongly control-oriented copyright legislation could suddenly be heard, loud and clear. The more citizens who understand that they are stakeholders in such a conflict, the more likely that a legislative process will result in a balanced and reasonably fair law.

IF free speech is put on the international agenda – within the United Nations or elsewhere – and IF journalists manage to cover the issues, then it is more likely that a treaty will come to include at least some decent provisions. Even a thoroughly bad treaty, however, would put the issues on the table. A treaty would in itself confirm that international decision-making is necessary, and when the practical consequences of a bad treaty became apparent, it would get increasingly difficult for leaders in Europe and North America to avoid responsibility.

I'm sure that most hackers will disagree with me. They seem to instinctively oppose regulation and prefer to fight it out on a technological level, confident that they, in co-operation, will have the upper hand in an arms race against the forces of control. That may be true. Hackers will keep cutting fences in cyberspace, hack access-control systems and circumvent new, yet to be invented, technological defence mechanisms. They will more often than not be able to speak, find and share information – but the 98 per cent or so of Internet-users lacking their skills will not.

And free speech for two per cent is insufficient.