

# **Law of Internet Speech**

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# Law of Internet Speech

*Third Edition*

**Madeleine Schachter**

**Joel Kurtzberg**

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*for David, Mark, and Emily Stagliano*  
—*Madeleine Schachter*

*for Holly and Julia Kurtzberg*  
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# Preface

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Free speech has long been recognized as critical to a free society. First Amendment jurisprudence evinces a clear and strident commitment to promoting unencumbered discourse, while seeking to accommodate other interests that vie for protection. Thus, under certain circumstances, one may be held liable for false and defamatory speech. Likewise, privacy interests sometimes yield to free expression. Similarly, the proprietary interests in expressive content may affect unbridled reproduction.

Recent technological advances have made both the acquisition and the dissemination of information possible in unprecedented fashion. Access to information is now readily available virtually instantaneously, on a global basis. The distribution of content, both by the originator and by others, similarly transcends geographic boundaries and covers topics of unprecedented scope.

Are emerging technologies to be governed by a separate framework, imposed through newly-devised judicial constructs and legislative mandate? Are cyberspace<sup>1</sup> communications to be evaluated by applying existing principles, adapted to accommodate qualitative differences of speed and expanse? Under what circumstances, and under what rationales, do on-line communications warrant different treatment from that afforded to more “traditional” content dissemination?

The materials included in this book intermingle discussion of the inter-disciplinary jurisprudence on “traditional” media cases with the emerging jurisprudence on Internet media in order to promote foundational and contextual analysis. The authors—Madeleine Schachter, an in-house attorney at Hachette Book Group USA, Inc., and Joel Kurtzberg, a partner at Cahill Gordon & Reindel LLP—are both Adjunct Professors at the Fordham University School of Law, where they co-teach courses on Internet Law and Internet Regulation. The materials included in this book are intended to serve as an intellectual catalyst to provoke discussion and thought; excerpts of and citations to countervailing viewpoints are included, as are concurring and dissenting judicial opinions. But to the extent views are inferred, nothing herein should be construed as necessarily expressing the views of anyone other than the authors or as constituting legal advice in any way.

This third edition of *Law of Internet Speech* updates and contextualizes recent developments in Internet law. The book explores the application of analytical models of First Amendment jurisprudence to Internet communications and examines the regulation of

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1. The term “cyberspace” has been used in this book as it is colloquially, to refer to computer communications generally; the term “Internet” is broader than the “World Wide Web,” *see infra* at 19. “Traditional media” often refers to such media as print and broadcast; of course, the ubiquitous use of the Internet as a means of communication belies any inference that it, too, has not become a conventional and customary vehicle for speech.

Internet content in such contexts as incitement, speech that promotes or facilitates criminal acts, true threats, matters relating to national security, obscenity, indecency, and child pornography. The third edition also examines claims of on-line defamation, including an analysis of ISP immunities under section 230 of the Communications Decency Act and claims involving anonymous communications. A section on privacy interests explores the application of common law privacy torts to digital media, the implications of data mining and on-line profiling, and regulatory and statutory approaches to privacy protections. The book also addresses proprietary interests in content, including copyright infringement and trademark claims, disputes relating to domain names, and the Digital Millennium Copyright Act. Application of these concepts is further explored in the context of linking, framing, and metatagging. A glossary of Internet terms is also included to assist the reader.

In light of the extraordinary fluidity and growth of on-line communications, materials included in the second edition of this work already have been supplemented and are further expanded in this third edition of the work, and no doubt will deserve updating even before the book goes to press in late-2007. Exhaustively reviewing of all aspects of the law of Internet speech simply is not feasible because of the fluidity of developments and the field's inherently inter-disciplinary nature. This edition includes materials that are noteworthy for their analyses, because courts have referred to or relied on them, or in light of the media attention they have garnered, notwithstanding that they may have been modified by subsequent developments, technological advances, or proceedings. (Occasionally, matters that have received increased attention because of appellate or other developments are included in this edition even if they preceded publication of an earlier edition.) The work therefore is intended to serve as a foundation for survey courses on Internet speech and may be supplemented as appropriate by other materials or by links and cites to sources of legal developments.

Citations for supporting authorities and citations within case excerpts are included to facilitate extended research.<sup>2</sup> Such references are also designed to assist in assessing the source of particular propositions. For instance, whether the statement is attributable to a Supreme Court decision, to a dissenting opinion, to a newspaper article, to an individual's web-site, or to a settlement agreement has implications for its relative credence and precedential value. Sourcing is especially important in the field of Internet speech law, which continues to develop rapidly, has been the subject of only relatively recent methodological study, and sometimes encompasses review even of disputes that settled at an early stage of the proceedings. Attribution of a statement also helps temporally contextualize it, fostering an understanding as to whether the court or commentator likely was specifically cognizant of how the proposition applies to on-line communications.

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2. Footnotes, headings, and citations to case records have been selectively omitted, and other stylistic modifications have been made to court decisions, statutes, and secondary sources to promote consistency and facilitate review. Footnotes within cases, to the extent they have been included herein, correspond to the footnote numbers in published reports.