

FREE SPEECH IN AN INTERNET ERA

*Papers from the Free Speech
Discussion Forum*

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INTRODUCTION: FREE SPEECH DISCUSSION FORUM

Clive Walker & Russell L. Weaver***

The fifth Free Speech Discussion Forum was held at the University of Notre Dame's London Law Centre on June 12–13, 2012, and was co-sponsored by the University of Notre Dame's London Law Centre, LexisNexis, the Emory University School of Law, the Windsor University Faculty of Law (Canada), the University of Alabama School of Law, the University of Western Ontario Faculty of Law (Canada), the University of Poitiers Faculty of Law (France), and the University of Louisville's Louis D. Brandeis School of Law. The gathering brought together a combination of scholars and practicing lawyers from the United States, Europe, and Canada. The topics for this year's forum included two issues: "Free Speech in the Internet Era" and "The Meaning of, and Complications for, Media in an Internet Age." The papers printed in this volume reflect the "discussion papers" on which the deliberations were framed.

Some of the chapters dealt directly with issues related to the media in an Internet age. The chapter by professors Russell Weaver, Clive Walker and Geoffrey Bennett poses a poignant contemporary question: *Can Newspapers Survive in an Internet Era?* The chapter notes that, with the advent of the Internet, the fortunes of traditional print newspapers have seriously declined so they may be unable to survive in their current form. In some instances, print newspapers are being replaced by online investigative outlets. The chapter goes on to suggest that a legitimate question remains regarding whether online investigative reporting services can adequately replace traditional newspapers as the "watchdog of democracy." Online publications arguably have significant ad-

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vantages over print publications in terms of speed and sometimes in terms of coverage. Indeed, traditional newspapers have not historically provided sufficient coverage of local issues, but blogs and online news services are capable of providing that coverage since there is effectively limitless space on the internet and much lower process costs. In other words, even though society might be losing the traditional “guardian” or “watchdog of democracy,” it may be acquiring a new and somewhat different type of watchdog. However, questions have been raised regarding whether the new forms of media will be as “reliable” or even as informative as traditional media. Because of the democratic nature of the Internet, allegations can come from a variety of sources, and it can be difficult to discern whether an online publisher is a “journalist” as opposed to a “political activist” or both. Video images can be altered, “old” images can be passed off as “new” ones.

The possibility of technology misuse is raised by Professor Jon L. Mills’ *The New Media in the New World: Are They Behaving Badly or Doing Their Job?* He begins by recognizing that new technologies have facilitated the collection and publication of information. For example, a “smart phone can record an image of an event and send it to a global audience” with “immense and positive” impact. He notes that “images of government abuses turned global opinion in the Arab Spring of 2011 and fostered opinion within those countries.” Nevertheless, he suggests that “the harm fostered and made possible by new technologies cannot be ignored,” and he contends that both the new and the old media should be held accountable when they behave badly. “The challenge is to maintain free speech and to protect the individual right to privacy and to be let alone from intrusion.”

Likewise, because of media convergence, it has become increasingly difficult to categorize and define with precision “media” organizations. Convergence extends to all types of media, including the traditional press, broadcasters, satellite communications, cable communications, and the Internet. So the saying goes, “a screen is a screen,” and the dividing lines between the different types of media is rapidly disappearing. This situation raises profound questions regarding the meaning of the term “the press.” That issue is addressed by Professor William Araiza’s *The Institutional Press, the Internet, and the Paradox of the Press Clause*, which examines the press clause in light of recent technological developments. He notes that court have struggled to define “the press” in an Internet age, and accordingly have encountered difficulties in reaching a coherent, stable understanding of who is entitled to constitutional protection. He goes on to express doubt about whether the term “the press” should be defined by the courts, and instead suggests that the task of defining the press “is best undertaken as a combined effort of legislatures, with their greater re-

sponsiveness and line-drawing flexibility, and courts, reviewing such definitions for compliance with the basic principles underlying the Clause.”

Other chapters in the symposium deal with the question of whether the existence of the Internet should cause us to reconsider our approach to freedom of expression, or to particular types of free speech issues that may arise. Professor Arnold Loewy’s explicitly raises this issue: *Does the Internet Require Rethinking First Amendment Theory?* He notes that each speech technology has historically been accompanied by its own legal approach in the United States, but expresses doubt about whether the Internet requires special rules.

Professor Christina E. Wells’ *The Promise and Peril of Protesting in the Internet Era* discusses some of the issues that may arise with protesting through electronic means. She notes that the “Internet presents opportunities and pitfalls to protestors.” Although the Internet offers protestors significantly enhanced communications possibilities, it also creates opportunities for repressive officials to control protest movements. In any event, these “new forms of protest can potentially destabilize the Court’s existing narrow paradigm involving protestors,” and “the very newness of these forms of protest can frighten regulators causing them to overreact and overregulate.”

Professor Joseph A. Tomain’s chapter, *Advancing Technology & Aging Democracy*, examines Internet speech through the lenses of intellectual property, privacy, election law, and net neutrality, and concludes “that free speech in the internet era is a topic of broad scope and there is much to resolve.” This essay also raises the question about whether citizens in our aging democracy are able to rise to the challenge to curtail or avoid the speech-threatening developments that technology supplies to those with the power and incentive to expand. Tomain wonders whether “American citizens [will] sleepwalk through these changes before it is too late (or at least significantly more difficult) to reverse.”

A number of the chapters from the symposium deal with specific areas of speech. For example, Professor Indra Spiecker genannt Döhmann’s *The Difference between Online and Offline Communication as a Factor in the Balancing of Interests with Freedom of Speech* notes that free speech principles can sometimes collide with other values affecting opinion and information, such as protection of privacy or data protection, and she suggests that a balancing of interests is often necessary. She notes that the balancing of these interests requires a determination of the intensity in which interests are hindered and rights infringed and in the way protection is necessary. She also notes that both sides of the balancing of interests can be influenced by the means in which freedom of speech is expressed and by the dangers and misuses possible, and that both influences have to be taken into account. She concludes that the Internet produces contradictory effects. It allows for more freedom of informa-

tion, for easy, quick, and inexpensive access to information with little restrictions for time, space and other resources. However, it also changes the impact of communication considerably. Therefore, some of the effects which are almost unnoticed and of little importance in the offline world become major factors in an online environment. As a result, the “internet poses new challenges and new questions. But often, it asks us some of the old questions again. We should not be afraid to find new answers—and to allow for a differentiation between the offline and the online world.”

Professor Eric Barendt’s *Defamation and Net: Anonymity, Meaning and ISPs* deals with the problem of defamation in the context of anonymous postings and the use of pseudonyms on the Internet. He argues that proposals to discourage the use of pseudonyms should be supported in order to avoid making it difficult for defamation claimants “to enforce their reputation rights.” Nevertheless, he believes that “courts are right to curtail actions for what is really only vulgar abuse or offensive childish speech on the Net,” because such speech often involves “hyperbole and exaggerated claims that nobody is likely to take seriously.” He considers such speech as no different from speech published in other formats. However, he argues that it “would be wrong to go further” and “apply a more lenient libel law for the publication of defamatory allegations on the Net.” He argues that anonymous “rumours initiated by blogs can cause enormous financial loss or ruin someone’s social standing.” He concludes that we “should take equally seriously arguments that its exercise may, and sometimes does, cause significant damage to reputation (and other) rights.”

Mr. Paul Tweed’s *Free Speech in the Internet Era: Developments “Online” in Defamation and Privacy Law—Brief Observations*, discusses a variety of topics encountered by practitioners, from superinjunctions, to the WikiLeaks scandal, pending British defamation legislation, and a recent British defamation decision. The chapters focuses on the inevitable conflict between freedom of expression and protection of reputation evident in these areas. He concludes that “legislative changes and the shifting and often inconsistent common law decisions, still leave a totally unsatisfactory situation on any view, whereby the worldwide web remains very much a law unto itself.” He adds his hope for the future: “The next few years will therefore be very interesting indeed, and may no doubt be expected to serve as a yardstick, not only for the future development of regulation for online publication, but also for the harmonisation of privacy and freedom of speech laws and regulation of use of the internet that may establish universal standards for future generations to come.”

Professor Christopher J. Roederer’s chapter, *Now Trending: Loving the Internet Terrorist?*, raises issues related to Internet terrorism. He argues that American society has created this “bogeyman” of the “Internet terrorist” because it “feeds

our unhealthy needs and sustains on our unhealthy fears.” He expresses concern that we have allowed these fears to “undermine the rule of law, weaken our democracy, and diminish our human rights (including our First Amendment rights and freedoms—among others).” In his view, these attitudes have “hurt us morally” and “cost us severely.” He expresses concern about how we can “exercise our First Amendment rights, much less our civic duties, if we cannot talk to or listen to those whose actions appear to be directing many of our domestic and international policy decisions, namely those we suspect of terrorist activities.”

Last in order is Professor Kevin Saunders’ chapter, *Obscenity, Community and the Internet*. His chapter suggests that the United States and Europe have taken into account differences among communities in making determinations regarding what materials may be held to be obscene. However, he notes that these assessments were undertaken prior to the development of the Internet, and he notes that the Internet, “a medium with no firm attachment to any particular geographic location, calls into question the earlier reliance on geographic community and requires an analysis of community in the Internet era.”

In conclusion, the impact of the Internet is having potentially profound impacts on the delivery of mass free speech. Analysis by the contributors to this book does not necessarily result in the demand for fundamental legal change in every corner of the law. However, those who continue to ignore the Internet’s transformative capacity in offering their prescriptions for change, a criticism levied against the recent Leveson Report in the United Kingdom,¹ invite the fate of early redundancy or easy evasion. Thus, the chapters in this book offer an insight into a debate that is ignored by lawyers at their peril.

1. See *An inquiry into the culture, practices and ethics of the press* (2012–13 HC 780). Compare Finkelstein, R., *Report of the independent inquiry into the media and media regulation* (Canberra, 2012).