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CyberLaw: Excursing Jurisdiction over Junk E-mail

Suppose you wanted to witness the birth and development of a legal system. You would need a large, complex social system that lies outside of all other legal authorities. Moreover, you would need that system somehow to accelerate the seemingly millennial progress of legal development, so you could witness more than a mere moment of the process. The hypothetical system might seem like a social scientist's fantasy, but it actually exists. It's called the Internet.(1)

"Cyberspace", first coined by William Gibson in the 1984 science fiction novel, *Neuromancer*, is a "culture and society of people who are individually empowered by a digital connection through the use of the Internet."(2) Gibson described cyberspace as a place where people could connect their nervous system to a device that allows them to experience a simulated environment.(3)

Cyberspace has not just grown, it has exploded. Some estimates place its growth at 20 percent a month.(4) Because of its exponential growth, its norms, ethics and values are constantly changing.(5) It is growing at such a rate that the "real world societies" find it difficult to apply formal legal rules to cyberspace. Indeed, applying current law may result in unwanted consequences, such as imposing the standards of the most restrictive American jurisdictions throughout the United States or enforcing rules and policies against citizens of other countries.(6)

In fact, some jurisdictions are attempting to exercise control outside of their boundaries. Minnesota's Attorney General, Hubert Humphrey III, issued a memorandum stating that "Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."(7) This application of local law to cyberspace dissolves when you take into consideration that all information in cyberspace can be downloaded in Minnesota.

Many governments have seen the potential threat to their sovereignty through the use of computers and the Internet.(8) The legislators and law enforcement officials from these nations have attempted to conform the behavior of the Internet community to the laws of their respective physical jurisdictions. This presents a problem in that different countries have widely varying definitions on what constitutes a crime.(9) If attempts are made to regulate cyberspace, many of its current freedoms may cease to exist. One solution to the problem may be self regulation.

There are several organizations attempting to create some sort of "social norm" and conduct of behavior to cyberspace.(10) The Internet Society is a "non-governmental International organization for global cooperation and coordination for the Internet and its internetworking technologies and applications."(11) The Internet Society is made up of the large online service providers (America Online for example), ISP's, hardware and software manufacturers, education and research institutes, and government agencies.

An extremely important aspect of cyberspace is the great potential for interactive communications and the exchange of information. Freedom of speech as guaranteed by the First Amendment of the U.S. Constitution is not an absolute right.(12) Speech is granted varying levels of protection depending upon the medium through which it travels. The major issues involving free speech and cyberspace relate to the specific medium.(13) Some critics point out that cyberspace is unlike any other form of medium and therefore should not be regulated or should be applied by a different standard.(14)

Hard-core advocates of the First Amendment will object to any regulations regarding speech, arguing that the exchange of ideas and the cyberspace culture of the netizens (netiquette) will keep obnoxious posters in line.(15) In fact, the first dispute involving netizens "taking up arms" happened as a result of a junk-posting of a commercial advertisement. Two lawyers from Arizona posted a message advertising their services to thousands of newsgroups on the Internet. This mass posting, which came to be known as "spamming", offended and angered netizens.(16) Spamming is the practice of stuffing an electronic mailbox so that it constantly full. This could produce network problems or even a system crash so it is no wonder Sysops, network administrators and netizens frown upon spam.

The Internet Community retaliated by sending a large number of e-mail messages to the mail boxes of the originators of the spam, thereby filling their mail boxes beyond capacity.(17) The network administrators had to terminate the lawyer's service.(18) Because of spamming, LEXIS COUNSEL CONNECT has been forced to limit members' right to send broadcast e-mail.(19)

Spam, or Unsolicited Commercial E-Mail (UCE), has become a very big problem for many Internet service providers and e-mail users. America Online recently reported that, on any given day, 30 percent of the messages AOL subscribers receive are classified as UCE.(20)

Though the residents of cyberspace spent years of spurning any government involvement in governance of the Internet, some have come to realize that government regulation is needed to curb unwanted solicitations.(21) A focal point of legislating against spam was establishing whether or not it was protected speech. If a law is designed to limit speech based upon content, then the law is "content-based" and has almost no possibility of being found constitutional.(22) An analysis of e-mail would have to focus on its medium because it is "content-neutral." By stripping First Amendment protection from unwanted e-mail, the right of the recipients becomes the focus of the law.

In *Rowan v. U.S. Post Office*, the U.S. Supreme Court decided that a mail recipient's property right in their traditional mailbox outweighs a "junk mail" sender's right to send that mail.(23) The Court reasoned that a sender's right to communicate "must stop at the mailbox of an unreceptive addressee."(24) The fundamentals found in *Rowan* serve as a basis for creating legislation limiting spam. The legislation should not seek to regulate obnoxious content but should protect the limited access and mailbox spaces against unwelcome intrusions such as spam.

ISPs have been fighting spam in court and have begun to prevail. These litigated cases have confirmed that Internet service providers are not prohibited by the First Amendment from blocking unsolicited e-mail which places both a burden on the ISP's servers as well as upon their subscribers.(25)

Congress passed the Consumer AntiSlamming Act in 1998 regarding the telecommunications industry's ability to switch an individual's long distance service without the subscriber's knowledge or consent. Included in this act is the Murkowski-Torricelli anti-spam amendment.(26)

The amendment would require marketers to remove e-mail recipients from their mass mailing lists if so requested by the recipient. The only fair way to enact such a law would be to require the recipient to request that their address be removed from the list as the mass mailer of the UCE does have a First Amendment right to send such mail.(27) In *U.S. v. Freeman*, the Eighth Circuit stated that a statute "is fatally vague when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct."(28)

Some people see the need for more strict regulation. One Representative, Chris Smith, Rep. N.J., has introduced legislation banning advertisement e-mail outright unless the recipient has a consensual relationship with the sender because "it violates basic principles of free trade by shifting costs of advertising from the sender to the recipient."⁽²⁹⁾ This bill is known as the Netizens Protection Act (H.R. 1748) and would amend the Communications Act of 1934.⁽³⁰⁾ The amendment would also require that the sender's information be included with the mail message.

Numerous states have begun to create guidelines to control spam. Washington state enacted legislation in 1998 which permits recipients of spam to sue the mass mailers and marketers for monetary damages.⁽³¹⁾ The Washington law prohibits the transmission of e-mail from a computer in Washington or to an e-mail address in Washington that misrepresents information identifying the point of origin or the path of transmission or contains a false or misleading subject line. An individual may sue for \$500 for each violation.⁽³²⁾

Nevada has also enacted legislation directed at deterring spam. The Nevada anti-spam bill (Nevada Senate Bill No. 13) requires that all UCE contain an "opt out" provision which would allow the recipient to request that spammer cease all future mailings to the recipient.⁽³³⁾ The law also requires that the "legal name, complete street address and electronic e-mail address of the person transmitting the electronic mail" be included with the UCE.

Additionally, the legislatures of California, Connecticut, Kentucky, Maryland, Massachusetts, New Jersey, New York, Rhode Island, Virginia, and Wisconsin are currently considering anti-spam legislation.

Although civil actions have now begun to become available to victims of unwanted e-mail, a new law must be carefully written and constitutional in its attempt to limit spam. Perhaps the most dangerous aspect would be to apply a simple set of laws to all online communications. Rather than restricting online communication to the current laws that apply to other media, a legal system must be designed for cyberspace that is appropriate for the technology.

Applying local laws to cyberspace is often difficult, if not impossible because the Internet cuts across geographic and jurisdictional boundaries. By allowing the netizens of cyberspace to resolve their own disputes and conflicts may present additional problems. Some view the manner with which the community reacted to the spamming by the two attorney's in Arizona as a form of "vigilante justice."

In the end, the governments and law enforcement institutions of the physical world may not be able to completely govern cyberspace. But by understanding cyberspace, netizens and netiquette, a framework for cyberlaw should certainly develop.

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