

Revisiting Free Speech Paradigm
- From Hyde Park Corner to the Internet

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Introduction

Rapid development of computer networks is considered to have a fundamental impact on the structure of a modern society. The most striking representative of the networks is the Internet. Under that development the current system of info-media law is now facing two problems: to maximize the usefulness of network communication and to minimize its negative impact.

Each theme of today's symposium seems to contain such two closely interrelated problems. As regarding free speech, the theme of this session, it is also facing these problems of how to deal with unprecedented possibilities of "more speech" and speech harm generated by such networks. With referring to the cases of Japan, I would like to say that free speech activities on the networks come to challenge the traditional free speech paradigm.

1. How to deal with the Internet

Statics show that the number of host computers connected to the Internet is 730 thousand at the time of January 1997 in Japan. That number has been

almost tripled in past few years and is the second largest together with that of Germany although only one-fourteenth of that of the U.S.. It means that Japanese society has 6 host computers per 1000 people.

The number of subscribers to major online service is 5.7 million and the number of service providers is about 2,700, according to the statistics at the time of June 1996. It shows that 1 out of 25 people subscribes to the online service.

All these numbers suggest that computer networks in Japan have come up to the "critical mass" for the general use in everyday life. Computer networks like the Internet become increasingly spread into schools and even into homes as well as universities, corporations and governmental bodies.

Computer network as a tool of speech brought us both positive and negative products. Here I would like to focus on two major and actual legal issues of network communication. One of them is the defamation or privacy invasion issue. When law would deal with the issues of this newly emerged computer mediated communication, its unique quality must be taken into account. Unlike the communication in print or by broadcast, it is quite difficult to trace who in fact posts a certain message in the computer network. And such electronic message will be instantly disseminated worldwide.

People seem to post defamatory or privacy invasive message with somewhat relative easiness in the network compared with other means of communication.

These problematic characteristics of network communication, such as the anonymity, the quick dissemination worldwide and the easy posting would work in a same way when we deal with the other issue, an sexual communication in the network. Under Criminal Law in Japan, to "distribute", "sale" and

"display openly" an obscene material is prohibited generally, regardless of its medium.

Therefore, an obscene message distributed or sold on World Wide Web in the Internet is undoubtedly regulated in Japan. It is sure that there is the difficulty in interpreting the scope of openness in the "display openly" provision, since messages are stored in the computer and are not "displayed" unless being accessed. Nevertheless, according to the established legal standard reaffirmed in the dial-a-porn case in Japan, such service is deemed to be "open" when unspecified or many people can gain an access to the messages.

Besides an obscenity, the category of sexual expression which is not obscene but harmful to minors like the "indecent" concept in the United States must be treated carefully, since its restriction would have a serious impact on adult access.

On the first stage of the development of the computer communication, there was a notion that legal sanctions are not applied to cyberspace, since it is different from "the real world". At the present time when computer network is spread widely to our life, such notion has lost its persuasiveness. But still various important problems in implementing an existing law remain to be solved. For example, we need to find some more elaborated way to deal with an anonymity in the network communication, an over-inclusive investigation in search of illegal digital message in a server, trying to find out the balance with the constitutional requirement of a secrecy of correspondence.

2. Recent experiences

On a civil suit for damages for defamatory messages posted on the electronic forum, Tokyo District Court has recently ruled in favor of a plaintiff (see Appendix 1). It was a first ruling to hold not only the user who posted messages but also the system operator and online service provider liable for such messages. Defendants have appealed, but the ruling gives relatively careful consideration of the unique characteristics of network communications and set up a standard for the responsibility of the system operator or service provider. The court says that it is not appropriate that the system operator should have "an heavy obligation" to observe constantly the content of a message, to search actively for a problematic message, to examine a problem of all messages. The system operator is "obliged to take a necessary action" only when the system operator "know specifically" a defamatory message is posted.

This standard sounds quite reasonable apparently. However, under this standard a system operator has to bear a difficult burden to decide whether each message is defamatory or not. Then a system operator will be in a dilemma: the more the system operator faithfully involved, the more likely the system operator will be held liable. Therefore in order not to be held liable, a system operator might take the easier way to be restrictive and quick to eliminate any problematic messages.

One of the most debated areas of network communications which are called for the regulation is a sexual expression. But because of strong constitutional concerns about the over-inclusive regulation will chill online speech, at least for now it seems unlikely for

Japanese government to amend the current law or introduce a new legislation in order to regulate the online communication in the near future.

For example, Ministry of International Trade and Industry (MITI) basically takes a modest posture towards the regulation of the network communication. Rather MITI supports the self-restraint by network service providers from a viewpoint of promoting the growth and development of this new, online service industry. One of its involvement is the "General

Ethical Guideline for Running Online Service" prepared by Electronic Network Consortium (ENC), which is run by the MITI's auxiliary organization, the New Media Development Association (see Appendix 2).

Besides the Guideline, ENC launched "Initiative to promote the provision and the

dissemination of Internet blocking capabilities", to enable the Internet users to block inappropriate information for them. As in the United States, the function of filtering software in which each user can set its own blocking standard is highly expected in Japan to be a substitute for the regulation.

Ministry of Posts and Telecommunications (MPT) also assumes an attitude toward self-restraint. Still MPT is in charge of the broadcasting administration and it has a concern about a dissemination of information by the means of telecommunication. As one of these activities MPT's study group which published a policy report named "Flow of Information on the Internet" in December 1996. Recently the Telecom Service Association (TSA), the organization of telecommunication carriers prepared "Guidelines on the 'semi-open communications' services for Internet Service Providers (draft)".

Here the 'semi-open communications' services are described as services "such as Web Sites and BBS, that are characteristic of telecommunications to the unspecified many persons." The National Police Agency shows its concern on a sexual expression on the network and conducts a study group on this matter. But it has not made any concrete regulatory plan published yet so far. Nonetheless the police is now actively investigating the online communication which is considered to be obscene.

For the time being, in Japan, we are likely to deal with online speech harm problem mainly by the means of self-restraint.

3. Challenging Traditional Idea of Free Speech?

Then what implications today's network communication represented by Internet speech will have for the traditional idea of free speech? The premise of traditional theory of free speech is that the both the power and harm of expression are relatively limited, like the speech at the corner of Hyde Park.

However, as I mentioned above, the advent of the Internet increasingly calls such a premise into question. The basic philosophy of free speech is applied to the Internet communication, to be sure, but the extent of the guarantee of the freedom might not be automatically same as speech on the traditional media. Here two line of argument will be possible. One is that the freedom of the Internet speech should be well guaranteed because the Internet provides everybody the most powerful and easily accessible tool of worldwide self-expression.

Another is that this freedom should be regulated very because of that power.

We know this line of argument conflicts squarely with the traditional idea that an expression should not be regulated only because it is too influential. However, we also acknowledge that this traditional idea might be somewhat romantic, which is based on the premise of the relatively limited power of old communication technologies.

My notion is that freedom of speech has been tolerated on the traditional media, perhaps or probably because it has not exercised too strong power.

In search of the solution of the difficult problem, to what extent free speech and the regulation are required on the Internet, we need to look at the whole world of media/communication where we have various kinds of media and channels of expression. An approach to the solution must not be rigid nor linear. We need to know, first, that the Internet is just as a part of such whole world and the second, the legal measure is only a part of the various measures against speech harm of the Internet.

First, when we seek to strike a balance between free speech and other constitutional values on the Internet, legal systems of other communication media have to be taken into account. Even if a certain harmful but not illegal idea is restricted on the Internet, still the idea can prevail on other means of communication so long as it is not banned totally in the whole world of media/communication. I understand that this is a risky notion and I am not quite confident in this idea.

However, I am sure that this idea is worth for consideration on the way to find the final solution.

Secondly, the legal measure against speech harm is not isolated from the social control system in general

and rather it should be observed as a part of that total system. The rigid legal framework does not always work well and might suffocate the freedom.

Freedom of expression is a naive and sensitive freedom, which is quite vulnerable to the governmental suppression. In the realm of freedom of expression, a system of self-control can sometimes play quite an effective role to draw a line between freedom and the regulation. The self-control system can provide us some flexible ways of balancing the benefits and disadvantages of new technologies.

In the case of the Internet as well, we should figure out the suitable balance between the legal regulation and the self-restraint.

Conclusion : "Technologie macht frei"

It is impressive that the new technologies are playing a significant role in the development of legal system and also in the field of free speech theory.

Only with the conventional methods of traditional political or normative pressures, it would have taken much more time for people and the governments worldwide to be aware of the value of free speech to this extent today.

The profound impacts of technological innovation changed that picture.

I would like to note here that communication technologies have a twofold implication. One is that communication technologies are inevitable for the economic developments and the developing countries have no choice other than introducing new technologies regardless of their "by-products".

The other is that communication technologies have a global character which ignores national boundaries as is typically exemplified by the Internet.

It is unquestioned that the Internet is "technologies of freedom" (Itiel de Sola Pool), although the problem is that technologies like the Internet might not be given the widest range of that freedom for themselves.

As any other communication medium, it is just impossible to remove such harm from computer networks completely. As any means of traffic communication, we consider its disadvantage must be borne to some extent if we can gain largest profit from it. I think what is needed in discussing a issue of free speech in the computer network and also a larger issue of the free speech paradigm for the 21st century is such a practical and utilitarian approach together with enthusiasm and a dream for new communication technology.

Appendix 1

From: Asahi Evening News, May 27, 1997

Tokyo woman wins first PC network libel suit

The nation's largest PC network operator, Nifty Corp., is held responsible for defamatory messages on the Net.

The Tokyo District Court on Monday ruled in favor of a woman who filed a libel suit against Nifty Corp., the nation's biggest PC network operator, the system operator of an electronic conference room and a male user of Nifty services, on the grounds she was slandered on the network. It was the nation's first ruling to hold a PC network operator and a network user

responsible for defamatory messages on the network.

The court ordered them to pay a total of 500,000 yen in damages for slanderous material sent on the network against the woman, a 36-year-old translator in Tokyo. The woman had filed a 10-million-yen libel suit against the three parties.

According to the ruling, in September 1990 the woman joined a "feminist conference room," one of the "rooms" of a "Contemporary Philosophy Forum" provided on the network.

Under a pseudonym, she exchanged opinions with other participants of the program.

A male member from Yamaguchi Prefecture, one of the defendants in the suit, was upset about a comment she made on the network.

He then found her real name and began sending slanderous comments against her on the network in November 1993, using her real name.

For example, he sent a message that read: "Her personality is distorted and she is bound to be divorced."

Judge Hideho Sonobe said in his ruling that messages exchanged on the network were of a public nature, and that the messages leveled against her were slanderous enough to hurt her social reputation.

The judge also said that the system operator, a Nifty employee who was monitoring electronic conference rooms, was held responsible for the slanderous messages against individuals because they should have been erased.

The system operator, who was obligated to take necessary action against inappropriate acts, had let slanderous messages go unchecked for a month, the judge also said.

Nifty neglected to fulfill its responsibility to supervise the system operator, the ruling said. Nifty is the nation's biggest PC network operator, with about 2.35 million members. The company was established about 10 years ago.

The judge recognized six messages as defamatory. The plaintiff had claimed in her suit that the defendant had sent 28 defamatory messages on the Net.

The ruling has invited mixed reactions from network users and experts on PC network communications.

Kiyoko Ishii, editor of On Line Journal, a publication issued on the network, said that she herself had been a target of slanderous comments on the network.

But she felt mixed emotions about the latest ruling. "One of the good things about PC communications is the fact that even minority kinds of opinions can be freely and honestly exchanged," she said.

"It is good if users can enjoy these exchanges as verbal games.

"But if the users abuse their freedom, a legal dispute like the latest trial will follow. If excessive restrictions on PC network communications are imposed, it will be extremely regrettable."

According to Nifty Corp., when users send slanderous or vulgar messages on the Internet or when they engage in sales promotion, it sends e-mail messages to those who sent such messages, asking them to stop.

If such requests are ignored, the network operator either removes the improper messages or suspends membership for a period of time.

Takashi Yamakawa, head of Nifty's Planning Division, said: "Such requests are made from time to time, but the suspension of membership or removal of messages are rarely done because such things would leave bad feelings among us.

"The balance of guaranteeing the free exchanges of views and the removing of improper messages is a delicate problem."

According to Nifty, it has about 650 teleconference forums dealing with various topics. And each of these forums has up to 20 "conference rooms."

Each forum has its own rules and users sign up only after agreeing to comply with them.

Appendix 2

General Ethical Guideline for Running Online Services

February 16, 1996

Electronic Network Consortium

Purposes:

This guideline is prepared for the healthy growth and development of online services to domestic online service providers and sponsors (hereafter called online service providers) regardless of management principles, company size, or management styles so that libel, defamation, or problems with public order, morals, and ethics will not occur.

Basic Principles

Online service providers should observe the following basic principles, recognizing the large potential of the network society for bringing tremendous innovations to the general society. The wise utilization of the network society can contribute to the future development of the general society and welfare.

1. In the online society, observe freedom of speech, protect human rights, and abide by the Constitution of Japan.
2. In the online society, observe laws, the customs of society, and public order and morals.
3. Protect all people from suffering damage concerning the following items;
 - o Such intellectual rights as copyrights, patents, and trademarks.
 - o Honor and reputation.
 - o Personal rights such as the rights of a portrait and the rights of privacy.
4. Promote good manners in the online network society.
5. Foster the spirit of tolerance in the online network society.

Guideline for Running Online Services

In order to achieve the above-mentioned objectives, online service providers should comply with the following guideline:

1. Preparation of Membership Clauses

An online service provider, regardless of the differences in contract styles, should prepare clauses (hereafter called the membership clauses) to describe the duties, prohibitions, and sanctions to be taken.

1-1. An online service provider should make efforts to ensure that members comply with the membership clauses. If there is change to the clauses the provider should notify their members by means of a notice on a bulletin board or other methods.

1-2. In the membership clauses, the following should be clearly stated:
duties to observe as a member and forbidden conducts and counter-measures in case prohibitions are violated.

2. Setup of a Help Desk and Completion of a Management System An online service provider should set up a help desk to take care of requests from members and complete the management system.

2-1. An online service provider should set up and publicly announce a help desk to take care of requests from members. The member requests forwarded to the help desk should be taken care of as quickly as possible.

2-2. An online service provider should prepare internal producers for dealing with different cases and making sure that the same action should be done by all employees.

3. Complete Implementation of Development Activities

An online service provider should try hard to implement rules and manners for their members so that the online network society can develop in a healthy manner. Also, difficult-to-understand portions of membership clauses should contain concrete examples and detailed explanations.

4. Complete Maintenance of Various Computer Systems and Clear Counter-measures for Possible Service Troubles

An online service provider, to prevent possible online network-related troubles, should maintain various computer systems and try hard to define and publicize countermeasures for possible service troubles.