Cyberidentities

D'Haenens, Leen

Published by University of Ottawa Press

D'Haenens, Leen.
Cyberidentities: Canadian and European Presence in Cyberspace.
Ottawa: University of Ottawa Press, 1999.
Project MUSE., https://muse.jhu.edu/.

INTERNET AND PUBLIC ORDER

by Stylianos GARIPIS

Although in the post-modern era deregulation has become the rule in Western jurisdictions, attempts at regulating the Internet reality demonstrate a reverse orientation. Should we consider such attempts as contradicting the current trend? Or should we view them as the expression of a general bewilderment due to the fact that humanity is standing on the threshold of virtuality? Anyway, if we accept, as we should, that the use of the Internet is related with the existence of several constitutional rights and liberties (right of expression, communication, publication, advertisement and so on) we then need a legitimate regulatory institution in this field. Should this regulatory institution be found at a national or international level? The answer to this crucial question is strongly related to the impact of Internet use on public order. If certain uses – or abuses – are not compatible with the national public order, are the national institutions competent to limit these uses? Then, of course we should answer the following question: can the notion of national public order justify restrictions de facto imposed to citizens of other countries?

According to a technical definition, "the Internet is a collection of packet-switched computer networks, glued together by a set of software protocols. These protocols allow the networks and the computers attached to them to communicate and (using a common address system) to find other computers attached to the Internet." (Smith, 1996: 1) According to an utilitarian definition, the Internet is a means to transfer information between millions of computers and their users in different countries around the world. This aim is achieved through several Internet applications such as the World Wide Web, which has made on-line content (real-time or downloadable) accessible to the average user and has facilitated the tasks of exploring and obtaining information on the Internet or through Usenet, which is a system of discussion groups to which anyone can post a public message.

If we combine these two approaches we could conclude that the Internet is a network with roots in over 160 countries but without physical boundaries, center, direction, owner, established structure, or administration, where everyone has the ability not only to access information by hopping from one site to another around the world using one set of Internet-compliant software, but also to create one's own information. It is in this virtual universe that the rights and freedoms of users seek to be exercised. Due to the nature of the Internet these freedoms and rights concern principally expression through speech rather than expression through conduct. Unlike other kinds of expression, expression via the Internet is pure speech involving no kind of conduct whatsoever. This is why any restriction can be justified only based on content of expression, rather than, for example, because of the location of the individual or group, or the undesirability of extremist demonstrations. So, before examining how

limits can be legitimately imposed on these rights and freedoms, we should examine, from a comparative point of view, on which grounds they could be restricted.

In the United States, the State of Georgia has enacted a statute prohibiting computer transmission of bomb-making instructions.[1] In Germany, neo-nazis have been allegedly using the Internet in order to keep in touch, to set up databases of targets such as immigrants' addresses, to send out hate material and Holocaust denial material, and to organize activities (Oppenheim, 1995: 112). This is why bavarian prosecutors, while trying to keep users from reading neo-nazi propaganda on the Internet have notified America Online Inc. that it may be charged with inciting racial hatred. For years the Chinese government has been prohibiting Internet use for anything other than academic pursuits, with national authorities seeking to block access to "objectionable" material.

What we could conclude from these selected examples is that expression through the Internet is being restricted by many jurisdictions for reasons of public order. Without entering into problematic issues such as whether the Internet facilitates communication between terrorists or on the contrary their localization by the police or other national authorities, we could simply state that the Internet can facilitate many offenses against public order (Gerard & Willems, 1997: 140-1) and that any attack on public order that can be committed through information dissemination can be committed via the Internet.

The threat to public order is therefore one of the most significant issues created by the appearance of the Internet. However, in order to combat this threat one has to confront the libertarian foundation of western societies, where expression is considered to be free. Thus, in 1995, a Michigan court, based on First Amendment protections[2] dismissed a criminal case against a student charged with transmitting threatening communications (a combination of postings to a newsgroup and private E-mail communications fantasizing about kidnapping and torturing a fellow student) in interstate commerce in the US.

The notion of public order provides many jurisdictions with an obvious reason to seek to suppress freedom of expression. Thus, prior restraint could be permitted where there is a clear and present danger to the public order that cannot retrospectively be remedied and posterior restraint could be permitted if it is shown that a specific harm has been committed. Public order *ab definitio* has as a consequence the prevalence of the public interest over the interests of the individuals. By public order we mean a harmonious society, a situation without social troubles. Although its normative content is defined as an objective or as a motive of a legal system, the concept of public order as such is a principle that prevails within a legal system. This means that we should not accept an instrumentalist approach of public order. Public order should not be

[1] 1995 Georgia Laws 322 (April 12, 1995).
[2] United States v. Baker, 890 F. Supp. 1375 (E.D. Mic. 1995), cited by Perritt (1996).

considered a means to ensure the exercise of rights or freedoms of the collectivity. Certainly, the rights of others can constitute a limit to rights and freedoms, but public order should be considered a distinct kind of restriction.

According to a maximalistic approach, public order is a flexible concept which depends on the facts, the circumstances, the social context, the values, the fundamental institutions, norms and objectives of the collectivity, the needs for stability and public peace. Therefore, it expresses an axiological content, which represents the subjective, changing, evolutive values (Vimbert, 1993: 701). According to a minimalistic approach, public order is the security of persons and goods and the security of the State.[3] National security is the collective and abstract security of the public domain. It should not be confused with government security, especially that of the government of the day. Otherwise, restricting a number of liberties and rights in ways which protect the interests of the governing party rather than the public should be considered as contradictory with the democratic and libertarian tradition. This is why we should draw a distinction between an expression which necessarily endangers public order and an expression that is intrinsically undesirable to a political group. In this sense publication on the Internet of the numbers and location of troops of a national army could be considered a breach of public order but not the expression of a radical political opinion.

If we accept a maximalistic approach of public order in the frame of the Internet issue we face a serious problem. Public order could express either an existing social or an ideal order. However, when talking about social order we should refer to a specific society. Therefore, we need to define the society in which we want to avoid disorder. At this point many could say that the Internet is a "distinct society" which should be ruled by its own principles and values. This is why we could not impose the needs of a specific society to the cybersociety or the so-called "cybernation." According to this point of view, surfing the Internet means entering a different society, where a new kind of mass interaction is taking place.

In order to solve this problem we should answer the following question. "When speaking about legal rules in cyberspace who do we want to protect? Internet users, or the status quo in a given national society?" It is this crucial question that the notion of public order seeks to answer. What we want to protect when imposing public order as a restriction of expression via the Internet is to protect the national societies from the users of the Internet. This is because of the presumption that users of the Internet may a) be incited to crime, b) obtain certain hazardous information, or c) develop an awareness which is not desirable.

a) In 1969, the Supreme Court of the United States held that free speech could not be punished unless it was "an incitement to imminent lawless action.[4]" The consequence derived from such an approach is that expression via the Internet could be restricted when it consists of an incitement to commit a crime or to disturb public order. The role

[3] Constitutional Council Decision 91-294 DC of July 25, 1991, Schengen Convention.
[4] Brandemburg v. Ohio, 395 US 444, 1969.

of the restriction in this case is to enforce public order by preventing users from being exposed to such an incitement. The reasoning here is that the less citizens are incited to disorder the less they are likely to provoke it. The fact is that even if we accept that certain kinds of expression may inspire or incite public disorder, the nexus between the words and subsequent action is far more attenuated on the Internet than in any other case. Many kinds of expression which may be provocative in the physical world are far less threatening when appearing on the Internet.

b) Let us take now the famous example of crazed extremists who exchange nerve-gas recipes via the Internet. If such instructions are available on an Internet newspage which is open to an unspecified number of users, this does not necessarily satisfy the conditions of intention to incite a threat to public order. Such recipes may be considered to serve only informative purposes. Nonetheless, downloading such noxious information could be considered an act leading to an offense. In this sense, we should distinguish between the mere possession/consumption of a specific material and the storage, further transmission or the use of it. Furthermore, we should distinguish between the users who know where to find specific information and the users who do not. For the former what has changed with the Internet is the means of getting the information. For the latter one could argue that search engines have made it easier to fulfill their desires. However, even in the latest case, one could argue that the need to protect users from information found in the Internet is not bigger than the need to protect them from any other kind of published material. Hence, public order considerations are not legitimate when citizens of one jurisdiction are permitted to obtain the same kind of information in other types of printed texts.

c) The third eventuality derives from the State's preoccupation to ensure a "healthy" conscience of its citizens. It is widely known that public order restrictions have been used by totalitarian regimes in order to justify State interference with the citizens' minds. The intrinsic contradiction in such kind of "protection" is that it seeks to regulate the inner world of the citizens despite the fact that the scope of the public order restriction is to regulate the relations between people and the type of interaction between them, in order to ensure a certain level of social harmony. Therefore, even if we accept a maximalistic approach of public order we cannot use it to limit the development of the people's personal world.

As we have seen, although the State's preoccupation is to enforce public order by protecting users of the Internet, it cannot impose any kind of restrictions on them in order to avoid the breach of public order, unless determined to eradicate the libertarian and democratic features of its regime. The dilemma of modern democratic states is the following. In order to preserve national public order, a legitimate concern of every regime, they have to protect the national societies from noxious information circulating via the Internet. The legitimate way of achieving this aim is to protect the national societies from the users of the Internet. However, governments cannot impose legitimate restrictions on the Internet users who are nothing more than recipients of Internet information.

The other way is to impose restrictions on those who post the information on the Internet. In this case, national authorities have to face two problems. The first problem is that posting information on the Internet means expressing oneself, a fundamental freedom or right. The second problem is that most of the times national authorities have not the competence to impose such restrictions since the posting of information is taking place in another country. In order to solve the first problem we have to answer a variety of questions. Should the freedom of or right to expression be interpreted to encompass a right to post anonymous or radical political messages across Usenet groups, or even a right to send encrypted messages that are, for all intents and purposes, immune to eavesdropping by law enforcement agents? Or, according to a reverse way of thinking, should we restrict a specific type of expression because it causes greater harm than other types of expression, because there is a clear evidence of a causal link between this kind of expression and a specific harm or because this expression undermines principles which are contrary to the ones contained in the notion of public order?

In every human society there is a tension between the need for public order and the need of citizens to bring to the attention of their fellow citizens matters considered to be important. "The way in which any legal system resolves the tension, and the balance which it strikes between the competing interests, is indicative of the attitude of that society towards the relative value of different sorts of freedom. A society which tolerates a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression, particularly political expression, is likely to be one in which the public, political activities of citizens are regarded as making a useful contribution to the health of a democratic system (...) The job of the lawmakers is to decide when the interests of society in being free of unwanted persuasion or disorder outweighs the interest in free expression of opinions and persuasion." (Feldman, 1993: 782)

Therefore, a balancing approach should be adopted in order to reconcile the interests in freedom of expression and in public order. According to this balancing approach a variety of criteria should be taken into consideration. Thus, the strictness of limitations of the liberties of expression should vary, depending on the specific kind of expression involved. Freedom of political debate is at the very core of the concept of a democratic expression and should, therefore, remain unlimited. As the European Court of Human Rights has argued, speech involving political issues and political figures serves a fundamental role in the function of democratic societies and consequently, any arguments that a restriction of such discussion is necessary in such a society will be harder to sustain.[5] Another criterion could be the fact that when expression through the Internet reaches a variety of potential audiences. "It is surely correct to take into account the character of the audience in determining the likelihood" of a breach of public order (Barendt, 1996: 201). In addition to these we could mention the vital distinction between the right to hold an opinion, which cannot be restricted, and the right to express that opinion, which can be restricted. In this sense, restrictions in the name of public order can be justified when the release of information would cause a

[5] E.C.H.R. Lingens v. Austria, judgment of July 8, 1986, 103, 8, E.H.R.R. 407.

clear and present danger. Anyway, any restriction of freedom of expression must meet the principles of proportionality and necessity.

The second problem is related with the imposition of public order restrictions on the way citizens of another country express themselves. We cannot but consider as a paradox the enforcement of the public order exigencies of the country of access to the foreign citizens of the country where the transmission originates. It is well known that input into network triggers a chain of events which are not confined to the place where the offender happens to be. Thus, one could justify the limitations by the argument that all logging-on points where information is made accessible to users constitute places of commission of offenses against public order. However, according to the existing technology infrastructure the sender of information has no control over countries from which the information can be accessed (Central Computer and Telecommunications Agency, 1996: 143). Anyway, the sender cannot be aware of the public order exigencies of every country around the world. If a kind of expression is considered legal in his country he is not expected to know, or even imagine, that this same expression can provoke public disorder in another country. In consequence, and leaving aside the impracticability of the very notion, there is no legitimacy in attempting to preserve public order in one country by imposing restrictions to the fundamental rights and liberties of the citizens of another country.

This is why many jurisdictions have put forward legislation prescribing certain obligations for access providers to the Internet. An on-line service provider could be an academic institution, a government body or a commercial outfit selling Internet access to various users. The justification of such a public policy is that it has been considered that only through this way national authorities can prevent offenses against public order. Making access providers responsible for the content of the Internet information seems to be the only practical means of control since the provider is better situated to prevent or control an initial transmission. The legal prescriptions concerning service providers could be of two categories. The first category is the prescription of the obligation of a service provider to assist the enforcement of public order exigencies. In this sense, according to the new Information and Communication Services Bill in Germany, service providers have a duty to assist in tracking down criminal material on the Internet. According to another category of prescriptions, national jurisdictions go further and accept that on-line service providers are liable for the content of information on the Internet. Nonetheless, in order to accept this kind of liability we should answer a preliminary question. Should the access provider be considered a publisher or a distributor? This question was examined in the Cubby Inc. v. CompuServe Inc. case.[6] The difference is that the distributor does not know and has no reason to know the content of the information. The distributor is a passive recipient for information and cannot be held liable in the absence of actual knowledge. The Court found that "CompuServe has no more control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for

[6] 776 F. Supp. 135 (S.D.N.Y. 1991).

CompuServe to examine every publication it carries for potentially defamatory statement than it would be for any other distributor to do so." On the other hand, the Supreme Court of New York found Prodigy liable as a publisher since it held itself out to the public as a service which controlled the content of its bulletin board postings.[7] The consequence of such a judgment cannot be other that to discourage providers to control the information disseminated through their services in order to reduce their potential liability.

We consider that the responsibility of service providers adopted by several jurisdictions in their effort to protect their public order does not go without serious problems. The first problem is that if we accept a legal obligation of the provider to investigate the entire content of the network for perilous content we are probably facing a contradiction with the principle of inviolability of telecommunications or privacy. If such an infringement in personal communication between users could be accepted in the case of a public authority, it is not so easy to accept it for an individual. The second problem is based on considerations concerning the political and economic dimensions of the question. The obligation of on-line service providers to conduct spot checks, would wipe out smaller providers with insufficient personnel to carry out such checks, and thus market dominance would go to a few major providers. Small providers provide a few local telephone numbers and a single connection into someone else's network and they are nothing more than local resellers of capacity on a large access provider's network. In addition to this, freedom of expression protects small providers themselves as the conduits for expression, by protecting them from any kind of burdens that would make it difficult to keep running on-line systems (Rose, 1995: 7). Last, but not least, control of Internet content exercised by access providers would amount to *a priori* censorship. Any legitimate case for attempting to protect public order through restrictive measures could be made only in highly specific and documented instances. Otherwise there is the danger of discriminatory treatment of specific social groups or political parties. Moreover, permanent restrictions would be very rightfully construed as attempts to curtail freedom of expression.

As is very well known and legitimate, many countries are determined to protect their cultural and political heritage against onslaughts from the outside. This is exactly what is happening with the Internet. The notions of public order and morals, as well as the competence of the national authorities to define them, are the only means of national resistance to the omnipotence of those who control some specific networks. Through the concept of morals, national societies seek to protect their cultural heritage; through the concept of public order, they try to preserve their social and political structure.

In any case, State intervention is compromised by the existence of a global network environment and the decentralized design of the Internet based on the scattered locations of individual network users. In order to respond to these difficulties many authors have proposed the adoption of international legislation. We consider that this proposition cannot solve the problem without creating new ones. Regulation by an

[7] Stratton Oakmont, Inc. v. Prodigy Servs. Co, N.Y. Supreme Court, May 25, 1995.

international body is inconvenient inasmuch as it cannot express any national definition of public order. What is needed for cyberspace would be an international social contract, a contract which respects the diversity of national societies. We consider that it seems utopic to expect an international agreement spelling out those types of expression which could be considered dangerous for national public order, in the light of the social and political diversity between countries around the world. In consequence, what we propose is the adaptation of national regulations concerning the protection of public order for the needs of cyberspace in a frame of international cooperation in order to suppress offenses against national public order.