

Address

How Rights Change: Freedom of Speech in the Digital Era[†]

JACK M BALKIN*

Abstract

Technological change produces new forms of social conflict. The digital revolution is no exception: lowering the costs of distribution and content creation inevitably creates conflicts between ordinary individuals and the information industries. Freedom of speech is a key site for these struggles, as media companies repeatedly attempt to expand intellectual property rights at the expense of individual free expression, while simultaneously invoking freedom of expression to oppose telecommunications regulation. This stunted vision of free speech undermines the creative and participatory possibilities of the digital age; it treats ordinary individuals as passive consumers rather than active producers of their cultural world. We must promote a democratic culture that celebrates interactivity and widespread cultural participation. Earlier free speech theories concerned with democratic deliberation were adapted to the twentieth century world of broadcast media, in which only a relatively few people controlled access to mass communication. Free speech theory must now be dedicated to promoting each individual's ability to participate in the growth and development of culture.

[†] The Julius Stone Institute of Jurisprudence, University of Sydney, The Julius Stone Address 2003, Thursday, 31 July 2003.

* Knight Professor of Constitutional Law and the First Amendment, and Director, The Information Society Project, Yale Law School.

I am honored to participate in a lecture series dedicated to a distinguished figure in 20th Century jurisprudence, Julius Stone. Much of Stone's work was concerned with law in its social context, and my remarks are very much in that spirit. My topic is how freedom of speech changes in the digital age, and, more generally, how disputes about rights respond to changes in economic, social, and technological circumstances.

Technological change, I shall argue, spurs social conflict, which is fought out in law and in the discourse of rights. The new digital technologies change the social conditions of speech. They create new forms of contention between ordinary individuals, who now possess tremendous new opportunities to communicate and create, and the information industries, who want to expand markets and maximise profits from the same technologies. These conflicts will be fought out in debates over the free speech principle. Hence, in light of these changed circumstances, we must pay careful attention to the goals of freedom of speech in the digital age. In my view, the point of free expression is to promote a democratic culture, a culture in which ordinary individuals are free to create, innovate, and participate in the processes of meaning-making that in turn constitute them as individuals.

In studying the Internet, or indeed any profound technological change, we shall immediately get off on the wrong foot if we ask what is genuinely new, for almost every change has some precedent in human history. Rather, the key question is not novelty but salience: what elements of the social world does a new technology make particularly salient that went relatively unnoticed before? What features of human activity or of the human condition does technological change foreground, emphasise or problematise? And what are the consequences for human freedom of making this aspect more important, more pervasive, or more central than it was before? These features of social life may well have always been present, but now they appear to us with a special sense of importance or urgency. This phenomenon is true, I think, of all technological change. Technological change modifies and disrupts social relations. It foregrounds certain elements and aspects of social life, making them more central, more salient, more important than they were before.

The digital revolution has reduced the costs of copying and distributing information drastically, almost to the vanishing point. Indeed, one sends digital information over the Internet by making copies of it. Lowering the costs of copying and distributing material has many important effects: it makes it easier for people to talk to each other; it makes it easier to send things across geographical borders; it makes it possible for new communities of interest to form, and older communities to gain new members.

A second important feature of the digital age is the development of common standards of information exchange. The Internet provides common standards and protocols for moving information from one place to another. Microsoft's operating systems have provided common standards for creation of software. The industrial age greatly benefited from the creation of interchangeable standardised parts; in like fashion, common standards for codifying and transmitting information have

been crucial to the spectacular successes of the digital age. Common standards are important for another reason: They also make it easier to alter information; they facilitate the development of software programs that allow people to modify information coded according to a standard format. So the digital age not only lowers the costs of distribution, but also the costs of content creation, annotation, and modification.

How do these features of the digital age change the social conditions of freedom of speech? Lowering the costs of transmitting, distributing, creating, and modifying information has important democratising and decentralising effects. For it also lowers the costs of forming communities of interest, of interacting with people, of making new things out of old things, of innovating, copying, altering and modifying, of distributing an individual's ideas to large numbers of people.

The mass media that developed in the 20th Century are asymmetrical — one entity speaking to many persons, and they are unidirectional — the broadcaster sends information to you through the radio or television, but you cannot use the radio or television to talk back. These mass media also serve as bottlenecks and gatekeepers. Suppose you have a good idea. Can you simply decide to put it on TV? No, you must go through a whole set of intermediaries — broadcast companies, producers and so on. The Internet is quite different. It is neither asymmetrical nor unidirectional; lots of people can broadcast and talk back to each other. Equally important, the Internet allows you to route around the intermediaries and gatekeepers of the traditional mass media. You can publish your book on the Web. You can make your own movie or demo tape and distribute it on your website. You can say whatever you want on your own weblog.

Many people assumed that the Internet would displace the mass media and publishing houses as traditional gatekeepers of content and quality. This has not occurred. Traditional mass media have remained quite robust. Rather, the Internet has provided an additional layer of communication that rests atop the mass media, draws from it, and in turn influences it.

Internet speech has two important characteristics: It *routes around* traditional mass media and it *gloms onto* it. To route around means to avoid the gatekeepers and bottlenecks of the mass media, to do an end run around them. To glom on is to appropriate or take something from mass media and make use of it. When people use the word 'appropriate', they often mean taking something for one's exclusive use. But by 'glomming on' I mean non-exclusive appropriation of content. Information goods are particularly suitable for non-exclusive appropriation because they are non-rivalrous: I can have an idea and you can have it too. I can incorporate elements of something I have seen or heard in my work and you can too. When we say that people glom on to the products of the mass media, we mean that people use what they find in the mass media as a platform for annotation and commentary, and that they use what they find as raw materials for innovation and creativity. Routing around and glomming on are the two most important features of the relationship between the Internet and the mass media: People route around the traditional gatekeepers of the mass media, but they also glom onto aspects of

mass media, and use them for their own purposes. Indeed, routing around and glomming on are the two most important features of Internet speech generally.

Let me offer a few examples. The first concerns weblogs, or blogs as they are usually called. Blogs represent a further reduction in the cost of publishing, allowing people to instantaneously publish their thoughts and opinions in journal form. Entire communities of people, called bloggers, now use these weblogs, and they write about everything under the sun, from politics to popular culture, to detailed accounts of their love lives, to what their cat did the other day. They link to each other, respond to each other, and criticise each other. Many bloggers comment on contemporary politics and public issues and on how the mass media are covering them. These bloggers link to and discuss stories that appear in the *New York Times*, the *Washington Post*, and other mainstream journals that run websites. Still other bloggers link to and comment on sources that aren't as well known and they bring these sources to the attention of a wider audience.

Bloggers route around the traditional mass media because people can go directly to the blogger's website. But bloggers also glom on: they appropriate quotations and information from the mass media, and use them to offer their commentary and make their points. Other bloggers quote, build on, and criticise what these bloggers have to say, and in this way ideas spread throughout what is called the blogosphere. Blogs have become a supplementary form of journalism that some mainstream journalists turn to for story ideas. Some bloggers are journalists who post stories that they cannot get published in the mainstream press. Others are simply amateurs who have opinions. But their journalism has a feedback effect on the mainstream media. Sometimes bloggers will keep a story alive for days or even weeks until mainstream journalists pick it up and run with it. Thus, through routing around and glomming onto the mass media, blogs interact with mass media and affect and influence it.

My second example is a website called Television Without Pity,¹ run by a group of (mostly) Canadian television fans. They watch television — mostly American television — and offer play-by-play accounts of what happened on each episode, including large swaths of the actual dialogue, along with their own witty and sarcastic commentary. Here again we have both routing around and glomming on: the people at Television Without Pity reach their audiences directly without going through the mass media as professional television critics do. Indeed, because of the nature of their criticism it's unlikely that they could ever be hired as professional television critics; but they don't depend on traditional media gatekeepers. Television Without Pity involves lots of glomming on, because their critics make considerable use of plots, characters and dialogue to make their points.

Finally, as with blogs, Television Without Pity has had interesting feedback effects on the mass media it routes around and gloms onto. Television producers want to know what viewers think about their shows — that's why they have focus groups and do survey research. Several television producers became quite

1 <<http://www.televisionwithoutpity.com>>

interested in Television Without Pity: Here was a group of highly articulate viewers who were telling the world what they thought about these shows, and who had their own audience of fellow viewers that they in turn influenced. The Internet created a way for viewers to talk back to the people who produce television shows, a method that was far more immediate and interactive than traditional forms like fan mail.

My third example is fan fiction: People write stories involving characters in their favorite books, movies, or television shows, carrying existing plot lines further and sometimes constructing entirely new episodes. There is a tremendous amount of fan fiction on the Internet. In particular, there seem to be an enormous number of people who like to write stories about the characters from the television series, *Star Trek*. The number of homosexual romances between Captain Kirk and his Vulcan first officer, Mr. Spock, is probably beyond counting at this point. Of course, fan fiction is not limited to television shows and movies. There are any number of fan fiction stories about Harry Potter, in which Harry Potter has all sorts of adventures, and does things that would probably make JK Rowling's hair stand on end. Once again we see the characteristic features of Internet speech — ordinary people routing around traditional mass media gatekeepers, glomming onto the products of mass media, appropriating elements of what they find, using them as launching pads for innovation and imagination, and turning them to their own creative purposes.

My fourth and final example involves one of the most famous instances of glomming on: The Phantom Edit. You may have heard of the *Star Wars* series of movies, and you may know that Episode I, which is actually the fourth picture in the series, is called *The Phantom Menace*. A *Star Wars* fan got a copy of *The Phantom Menace* in digital format, and reedited it digitally. (As I mentioned previously, common standards for digital distribution also mean that there can be common standards for digital manipulation.) Now this fellow took a particular dislike to one of the movie's characters, Jar Jar Binks, a strange, buffoonish sort of alien with very long ears and nose, who talks in a sort of faux-Caribbean patois. The fan edited all the parts of the movie that featured Jar Jar Binks, digitally altering the screen so that Jar Jar is missing as much as possible. The Phantom Edit showed that if you had a digital copy of the movie, you could essentially remake the movie; you could do your own director's cut. When George Lucas, the director of *The Phantom Menace*, found out about The Phantom Edit, he was not pleased, for obvious reasons. But The Phantom Edit is another way of talking back, if you will, to a form of mass media that was, from its very earliest days, asymmetrical and unidirectional. It is not the passive consumption of a media product by a consumer. Rather, it involves a viewer actively producing something new through digital technologies. It exemplifies what the new digital technologies make possible: ordinary people using these technologies to comment on, annotate, and appropriate mass media products for their own purposes and uses.

Digital technologies foster interactivity; they allow ordinary people to route around traditional media gatekeepers and offer new ways of appropriating and transforming what people find in the mass media. But here is the catch. These same

features of the new technologies that empower ordinary individuals also create a very powerful and serious social conflict. That should not be surprising. We often think of new technology as something that liberates us, if we are optimists, or threatens us, if we are pessimists. Technology produces either utopia or dystopia. But what technology more often does is create social conflict. It empowers us with respect to others and makes us vulnerable to others in new ways. Technology mediates and reconstructs our relationships to other people; it produces and redistributes power and vulnerability.

Technological change never simply empowers or simply endangers people. It changes their relations to others: their social relations, their economic relations, their cultural relations, their relations of power and authority, and so on. Thus, technological change creates new forms of social conflict because it allows human power to be exercised and distributed in new ways. It creates new communities of interest and divides old ones; it pits existing groups (and newly formed communities of interest) against each other in new ways.

The Internet and digital technologies open up a conflict between the expanding information industries, who make money from digital technologies, and the ordinary people, or ‘end users,’ who surf the Internet. The digital revolution is both a social revolution and an economic revolution. Lowering the costs of information production and distribution opens up new markets, allows businesses to reach more people and creates new opportunities for making money. Information and information products become an increasingly important form of wealth in society, and an increasing source of economic power and influence. Unsurprisingly, information industries seek to maximise their control over distribution networks for digital content, and to maximise the value of their investments in intellectual property.

But the very technology that allows businesses to distribute their technology and make money out of it also allows other people to copy it and change it. The same technologies that lower costs of distribution and content production also make it easier for end users to copy, distribute, manipulate, and appropriate information. The same digital technologies that allow George Lucas to make *The Phantom Menace* allow a *Star Wars* fan to make ‘The Phantom Edit,’ and to copy and distribute it to other people easily and costlessly.

This is the central conflict of the digital age: On the one hand, we have a set of technologies that open up new possibilities for communication, creativity, and innovation, decentralising control over information and democratising access to audiences. On the other hand, we witness the increasing importance of information as a commodity to be bought and sold, and the expansion of new markets for the sale and development of intellectual property and media products. These two effects, caused by the same technological advances, rapidly come into conflict with each other. The very same technologies that create new possibilities for general democratic cultural participation clash with the desire to exploit new markets and accumulate wealth.

Like many social conflicts, this one is fought out in law, and, in particular, through the meaning of the free speech principle. The conflict arises in several different locations in legal doctrine. Here I will mention only two. The first is intellectual property; the second is telecommunications policy.

As intellectual property became an increasingly important source of wealth in the 20th Century, businesses pushed courts and legislatures to expand the boundaries of intellectual property law in two directions, horizontally and vertically. Media corporations have sought to expand intellectual property rights horizontally by including protection for derivative works, sequels, characters, plots, and so on, and vertically, by increasing the length of intellectual property protections like copyright terms.

Media companies, however, have not limited themselves to legal devices. They have also turned to technology to protect their intellectual property interests. A central example is digital rights management schemes, technological devices that prevent copying of and control access to digital content. In the United States, the *Digital Millennium Copyright Act* 1998² created a new species of legal rights, sometimes called ‘paracopyright,’ that make it unlawful to circumvent these technological devices or distribute circumvention devices to others. Although digital rights management is often justified as a means of preventing unauthorised copying, it actually goes much further. It is part of a general strategy of control over access to digital content, including digital content that has been purchased by the end user. Digital rights management schemes, for example, can make digital content unreadable after a certain number of uses; they can control the geographical places where content can be viewed, they can require that content be viewed in a particular order, they can keep viewers from skipping through commercials and so on. Paracopyright creates legal rights against consumers and others who wish to modify or route around these forms of technological control.

Matters have come to a head as copying and modification of digital content have become widespread, and media companies have sought in increasingly aggressive ways to protect their existing rights and expand them further. The problem is that some of these legal and technological strategies are seriously curtailing freedom of expression. Not surprisingly, media companies have generally resisted the idea that freedom of speech limits the continued expansion of their intellectual property rights. Nevertheless, at the same time media corporations have avidly pushed for constitutional limits on telecommunications regulation on the ground that these regulations violate their free speech rights. We might call this combination the ‘capitalist theory’ of freedom of speech.

From a free speech standpoint, there is something odd about this agenda. It seems to expand free speech rights in telecommunications law, while contracting them in intellectual property. But in fact there is a deeper unity here. The capitalist theory does not really promote the values of freedom of expression so much as it employs concepts of speech and property selectively to promote the economic

2 S17 USC 1201 (1998).

interests of the most powerful economic entities that characterise the digital age — the media corporations that produce and sell media products and other informational goods. Promoting freedom of speech as an anti-regulatory device in telecommunications law while denying it any force as a corrective to the growth of intellectual property rights is a theory of freedom of expression tailor-made for the information industries and the protection of their investments in capital.

This is hardly the only possible way to think about what freedom of speech might mean in the digital age. Indeed, this approach largely undermines the participatory promise of the digital revolution. To a considerable extent, it seeks to reassert an earlier conception of the end user as essentially a passive recipient of the media goods produced by media companies. The point of controlling distribution networks and rigidly controlling intellectual property rights is to promote consumption rather than production and individual creativity, to arrange matters so that the end-user is placed in a sort of consumerist utopia, continuously being offered a series of opportunities to consume or buy, which are seamlessly melded with other forms of communication. In this vision's most perfect form, communication and consumption would become one.

There is nothing wrong in theory with maximising buying opportunities, but it is important to understand that this is not the same thing as a system of freedom of expression. Rather, it is a system of freedom of consumption, where liberty means freedom to choose among media goods. That is a stunted vision of free expression because it undermines the creative and participatory possibilities of digital technologies.

I'd like to offer a different notion of freedom of speech for the digital age: I believe that the point of freedom of speech is to promote a democratic culture. What is a democratic culture? It is a culture in which people can participate actively in the creation of cultural meanings that in turn constitute them. A democratic culture is democratic not in the sense that everyone gets to vote on what is in culture. It is democratic in the sense that everyone gets to participate in the production of culture. People are free to express their individuality through creativity and through participation in the forms of meaning-making that, in turn, constitute them and other people in society.

The last great change in communications technology was the emergence of the broadcast media. But only a relatively small number of people had the power to speak using these technologies. This social organisation of speech created a genuine problem for the system of free expression, because not everyone was able to use the technology equally. People were able to listen, but not to be broadcasters themselves. That problem led to free speech theories that made a virtue out of necessity: They argued that the goal of freedom of speech is providing information necessary for democratic self-governance, and particularly democratic deliberation about public issues. The great philosopher of education, Alexander Meiklejohn, was probably the most famous advocate of this view. Freedom of speech did not exist to promote individual autonomy, he argued. Rather, the purpose of free speech was to promote democratic deliberation about the great

issues of the day. As Meiklejohn famously put it, it is not important that everyone gets to speak but that everything worth saying gets said.³

Democracy-based theories responded to the social conditions of speech produced by the broadcasting technologies created in the 20th Century: a world in which a relatively small number of people controlled radio and television broadcasting, and later cable and satellite broadcasting. Free speech theorists worried that democratic discourse would be skewed and that the information necessary for wise governance would be impaired when the most powerful broadcasting entities were held in a relatively small number of hands. This concern justified public interest regulation of broadcasting, cable, and other mass media.

Because mass media will remain a central feature of culture for the foreseeable future, some structural public interest regulation continues to make sense, particularly as mass media consolidate and exercise their economic power globally. But a conception of free speech based on democratic deliberation is nevertheless incomplete. Focusing as it does on the asymmetries of mass media communication, it does not adequately address the technological changes of the digital age that make it possible for everyone to participate in electronic communication, both as speakers and listeners, both as producers and consumers.

Digital technologies foreground certain features of freedom of speech that were always present but previously remained in the background.

First, speech ranges over the whole of culture, and much of it has only a limited relationship to deliberation about politics and political issues, the central concern of democracy-based theories. Many people do talk about politics, to be sure, but even more people talk about their favorite television show, about their favorite musical group, about what their child did the other day, about art, popular culture, fashion, gossip, mores and customs. One can try to insist that all of this speech really is about politics, but at some point the attempt will become quite strained. It is far better to acknowledge that speech goes well beyond the boundaries of deliberation about public issues.

Second, speech on the Internet is interactive. People talk back to each other, they respond to each other. People are not simply passive consumers of media products sent to them by broadcast media. They are also active interpreters of what they find in culture, and they continually exchange their ideas with others.

Third, speech is appropriative: People build on what other people have done. They glom on not only to products of the mass media but also to each other's work, building new things out of old things. To use the anthropologist's term, they engage in cultural bricolage. This borrowing and bricolage is non-exclusive appropriation — I take and use what I find, but what I take is still there for other people to take and use too.

Wide ranging creativity that goes beyond politics, interactivity and appropriation are all characteristics of speech on the Internet. But they are

3 Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960) at 26.

characteristics of free speech generally; they were true of speech even before there was an Internet. Digital technologies just make these features of free expression more salient.

The 20th Century concern with speech as a mode of democratic deliberation privileges the delivery of information about issues of public concern to the public, who receive this information through the mass media. Far from denying the importance of that conception, I want to insist that it is only a partial conception, inadequate to deal with the features of speech that the new digital technologies bring to the foreground of our concern. The values behind freedom of speech are about production as much as reception, about creativity as much as deliberation, about the work of ordinary individuals as much as the mass media. Freedom of speech is and must be concerned with the ability of ordinary individuals to create, to produce, to interact, to particulate in culture, to engage in non-exclusive appropriation of ideas and expressions, to make something new out of the cultural materials that lay to hand.

Freedom of speech is not merely the freedom of elites and concentrated economic enterprises to provide media products for passive consumption by docile audiences. Freedom of speech is more than the choice of which media products to consume. It is also expression, creation, production, and interactivity. And freedom of speech in the digital age means giving everyone — not just a small number of people who own dominant modes of mass communication, but ordinary people too — the chance to use these new technologies to participate, to interact, to build, to route around, to glom on, to talk about whatever they want to talk about, whether it be politics, public issues, or popular culture.

Why do I insist that freedom of speech concerns the ability to participate in culture, including in particular popular culture? It is because culture is central to individuality, to being the sort of person that you are. You and I are made out of culture. You talk to people, they talk to you, you anger people, they anger you, you influence people, they influence you, and what gets produced over time is— you! And what that ‘you’ consists in is a moving target. You are always in the process of becoming something other than you already are. Your thoughts are changing, your sense of your values is changing, and they change in large part because you are constantly interacting with people, being influenced by them and influencing them in turn. Participation in culture through the exercise of your freedom of speech is one of the most important and valuable ways through which this cultural transformation of the self occurs. Interactivity and dialogue, the work of routing around and glomming on, are central to living in the culture that you live in, and to becoming the person that you are. For that reason they are also central to the free speech principle.

A democratic culture does not mean that the state holds elections on what culture should be. Rather it means that everyone gets a fair chance to shape and affect the forms of meaning making that shape who they are and everyone else around them. The ‘democratic’ in the expression ‘democratic culture’ does not mean democratic *governance* but democratic *participation*. That participation is important because it allows people to influence each other. But it also has a

performative value: When people make new things out of old things, when they produce, when they are creative, they perform their freedom through their participation in culture.

Meiklejohn argued that it is not important that everyone get to speak, but that everything worth saying was said. A theory of democratic culture, by contrast, argues that what is important is that everyone gets a chance to say it. Freedom arises out of participation in culture, and so the point of a system of freedom of expression is to facilitate this participation. That is why a focus on democratic culture places a greater emphasis than the Meiklejohnian approach on how people appropriate popular culture and make it their own; it values interactivity, creativity and the ability of ordinary people to route around and glom on.

That approach also helps us critique the emerging direction of free speech law. In the United States, at least, I see two disturbing trends in policy debates and court decisions. The first is the increasing assumption that ownership of a distribution network gives the owner a first amendment privilege to control access and the experience of end users. The second is an increasing tendency to see legal protection of intellectual property not as part of a grand bargain that promotes a vibrant public sphere but rather as protection of a property right that owners can use in whatever way they wish and without any thought of how their actions affect the system of freedom of expression.

As I have noted above, this combination of positions in telecommunications policy and intellectual property law promotes the interests of media corporations, who, in their quest for profits, are more likely to treat ordinary individuals as potential consumers of media products, rather than active producers of their cultural world. From that perspective, freedom of expression becomes the freedom to choose which media products to consume. Surely this choice is part of freedom of speech, but it is not everything, or even the most important thing. The new technologies allow individuals, more than ever before, to produce culture rather than passively consume it; they allow people to enact their freedom through cultural participation. But from the standpoint of profit maximisation, this active participation has no independent value except to the extent that it involves the consumption of media goods, in which case it is equivalent to consumption. And to the extent that active cultural participation diverts end users and causes less consumption of media products, interferes with an expansive definition of intellectual property rights, or challenges corporate technologies of control, it is less valuable than passive consumption; indeed it is positively harmful and must be cabined in.

That is too limited a vision of what freedom of speech is, and what a system of free expression is for. The digital age offers the promise of a truly democratic culture of participation and interactivity. Realising that promise is the challenge of our present era. Technological development produces social conflict, which is fought out in politics and in law. That is how rights change. The point, however, is to make sure that they change in the right way.