A Free Speech Charter for the Internet

The John Milton Project for Free Speech
A Project of the National Religious Broadcasters

Craig Parshall
Senior Vice-President & General Counsel
National Religious Broadcasters
Director – John Milton Project for Free Speech

Revised September 20, 2013

Executive Summary

The free speech liberty of citizens who use the Internet is nearing a crisis point. New media companies who function as "gatekeepers" to their web platforms and devices, like Google with its gmail system or web tools, Apple with its iTunes App Store for its iPhone, and Facebook with its social networking site have consistently censored on their sites the speech of Christians and others when they communicate on issues of widespread public concern. A Christian pastor's support of traditional marriage and opposition to same-sex marriage was recently stripped from Google-owned YouTube as "hate speech," according to the message posted by YouTube itself. When Gov. Mike Huckabee posted a pro-Chick-fil-A announcement on his Facebook page during a public debate over the orthodox Christian statements made by the restaurant chain's CEO on the issue of traditional marriage, Facebook took Gov. Huckabee's page down for twelve hours.

Yet, two realities have made a resolution of this problem difficult. First, some courts have held that the First Amendment of the Constitution does not apply to prevent censorship by private companies like Google, Facebook and others. Second, these companies possess private property rights and free enterprise interests in their devices, innovations and corporate decisions—rights and interests acknowledged and supported by the John Milton Project and National Religious Broadcasters.

However, there are two other realities, and in the event of a conflict of values, they should take predominance: First, these Internet-based communication

platforms have gained huge market dominance and influence, making them similar to the telephone networks in our nation. Citizens would never tolerate a telephone company refusing to provide telephone service to a church or synagogue because it disagrees with the theological beliefs of that house of worship. Neither should new media companies with ever-broadening market power arrogate to themselves the right to arbitrarily shut down communications of citizens because they disagree with their religious, political, or social values.

Second, the leaders in these new media giants have often spoken of the values of openness and freedom of information on the Internet and on their web-based platforms. If those statements are made in good faith, and we are willing to believe that they are, then these companies should be willing to establish free speech standards for their citizen users that aspire to the highest levels of expressive liberty, not the lowest. These companies should be willing to afford their citizen users nothing less than the free speech and free exercise of religion rights that are embodied in the First Amendment and as interpreted by the U.S. Supreme Court. We urge these companies to embrace and enact policies and practices that are consistent with those constitutional principles.

If the standards we propose here are voluntarily adopted at this critical time, we believe that a truly free marketplace of ideas will flourish on the Internet, and in turn, generations to come will be the beneficiaries of expressive liberty in our digital age. If not however, then we foresee a tyranny over ideas developing over web-based platforms, and a whole class of citizens of faith and others being shut out of this new electronic town square.

First Principles

Freedom of speech, including religious expression, is an enduring American value. It has been regularly emulated and praised around the world. But First Amendment values cannot function in a vacuum. They require and presuppose not only the liberty to speak, but also access to the available channels of communication so that others may hear.

Internet technology has provided immediate connectivity between people, businesses, and organizations, and now presents users with devices and web systems that have faster and more elegant functionalities. A small number of media technology companies have emerged that now control the development of a handful of spectacularly effective communication devices, applications, and programs that are utilized by every aspect of American citizenry – public, private, commercial, and non-profit – in order to participate meaningfully in both interpersonal and in mass communications.

Unfortunately, at the same time, this free enterprise success story has now created a conflict with the free speech values that this nation holds dear. National Religious Broadcasters (NRB), through its John Milton Project for Free Speech,

has documented in its September 2011 report, titled *True Liberty in a New Media Age*, a dangerous trend: namely, an emerging pattern, practice and policy by some new media "gatekeepers" providing Internet communications platforms, of viewpoint censorship levied against otherwise lawful content, much of it religious, and often Christian and conservative in nature. Since the release of that report, the John Milton Project has documented further acts of viewpoint censorship by new media companies.[1] It must be stressed that we distinguish these new media "gatekeepers" which are basically communications platforms which invite user-generated content to populate those platforms, from websites and blogsites which are content and idea providers and which should have the same kind of free speech editorial freedom that newspaper editors have.

We do not doubt, and we certainly do not wish to subvert, the value of free market principles that have energized the expansion and refinement of Internet communication platforms and devices.[2] For that reason, we call on the major web-based media technology companies to *voluntarily* adopt robust, free speech standards. In that regard we do recognize that courts have ruled in certain cases that new media companies are not "state actors" sufficient to require the application of the First Amendment to their censorship actions.[3]

However, we urge these media technology companies nevertheless to use, as a paradigm, the First Amendment principles laid down by the U.S. Supreme Court where government bodies or "state actors" are involved. Citizens would not tolerate a telephone company refusing to provide telephone service to a church or synagogue because it disagreed with the theological beliefs of that house of worship. Neither should new media companies with ever-broadening market power arrogate to themselves the right to arbitrarily shut down communications of citizens because they disagree with their religious, political, or social values. Leaders of large, successful new media technology companies often articulate the values of Internet "openness" and "freedom." The question then arises: why should these same companies, then, execute on their own platforms a free

---

[1] A Christian pastor's support of traditional marriage and opposition to same-sex marriage was stripped, from Google-owned YouTube as "hate speech," according to the message posted by YouTube. http://www.youtube.com/watch?v=v27k5cM7N4A&fe, accessed 5/10/2012. "YouTube yanks youth ministry's video," OneNewsNow, May 18, 2012. When Gov. Mike Huckabee posted a pro-Chick-fil-A announcement on his Facebook page during a public debate over the traditional marriage statements of the restaurant chain's CEO, Facebook took his page down for twelve hours. Jennifer Riley, "Huckabee's Chick-fil-A Facebook Page Disappears for 12 Hours," Christian Post, July 25, 2012.

[2] Congress has raised questions about the monopoly power of some new media giants, and has held hearings on that subject focusing on Google. On the cover of the June 2012 issue of *Wired* magazine the question is asked: "Is Facebook a Monopoly?" On the other hand, as Justice Scalia has said, writing for the Court: "The mere possession of monopoly power … is not only not unlawful; it is an important element of the free-market system … To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless accompanied by an element of anticompetitive *conduct*." *Verizon Communications, Inc. v. Law Offices of Curtis*, 540 U.S. 398, 407 (2003).

[3] *Green v. AOL*, 318 F. 3d 465 (3rd Cir. 2003) (AOL is not a state actor under the First Amendment). *Langdon v. Google, Inc., Yahoo!, Inc. and Microsoft Corp.*, 474 F. Supp. 2d 622 (2007) (these private companies are not state actors).

speech standard that is substantially lower, and is much more anemic than the First Amendment? We do not believe they should.

The benefits of the approach we are recommending are threefold: first, this body of First Amendment Supreme Court law provides an identifiable and reasonably discernable standard. Second, it reflects the considered, established opinions of a judiciary that is nominated and confirmed through a constitutional and representative process that by design derives its authority from "we the people." Third, the ubiquity and monolithic power of the largest new media companies make them analogous in some ways to certain state actors such as public utilities.

Lastly, this approach reflects the historical distinction between the editorial free speech and free press rights of publishers and content providers on the one hand, and on the other hand the mechanical and engineering functions associated with the printing press. Even if only a handful of printing presses existed throughout the realm, it would still be true to say that the press operators and owners possess a *property right* in their devices, but it *could not be said* that they also have a *free speech* right to demand that an author must change a particular viewpoint as a condition of being printed. The rights of free expression should inhere to the authors and publishers, whether they are professional writers or ordinary citizens, and those rights should not be held hostage either by the printers who control the levers of the printing press or by the digital network operators of new media platforms.[4]

Today, many of the web tools, devices, programs and applications of the new media bear this resemblance to the printing press: they are instruments that facilitate the rapid communication and distribution of ideas to large numbers of people, yet in the end they still depend for their utility and profitability on the expressive content of citizen users who are exercising their free speech interests. To the extent that various new media technologies can be classified essentially as platforms for communication, and thus can be likened to the printing press, they are distinguishable from the editorial functions of content-providers who generate ideas, opinions, and information and who should be the true beneficiaries of the principle of freedom of speech.

Accordingly, we believe that the guidelines below strike a practical balance between free enterprise and freedom of speech. Beyond that, we believe these guidelines are also a necessary bulwark against the troubling specter of private media technology companies wielding a private monopoly over ideas when they inappropriately censor public viewpoints.

---

[4] Our analogy that "editorial" content providers like web sites or citizens who post on Facebook, should have free speech protections that transcend the rights of new media "platforms" (Apple, Google or Facebook) when the latter function merely like "printing presses" is limited, however, only to media technology giants that enjoy ubiquity and monolithic market power. A local T-shirt printer who objects to printing a pro-gay message should not be treated the same as Google.

Free Speech Guidelines for Internet Technology Companies

New media companies should permit all manner of content, information, and opinions on their web-based platforms, regardless of the viewpoint expressed, unless that content, information or opinion fits squarely within one of the "traditional," "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[5] Those limited classes of speech recognized by the Supreme Court are listed below.

However well-intentioned the practices and policies of new media companies may be, they should not limit or prohibit expression because a viewpoint or opinion is deemed to constitute "hate speech" or is considered to be "hateful," or is thought to be unacceptable under any similar formulation, as these types of limitations have been rejected by the Supreme Court.[6] On the other hand, new media platforms can establish some rules of civility and decorum regarding the *manner* in which content is communicated – e.g., "no personal attacks or ad-hominem rebukes;" however, those rules should not be used as a pretext for viewpoint censorship. The quotation from a religious or other text or sacred book, or statements of religious belief should never constitute a violation of such rules of civility or decorum and serve as a pretext for censorship; such statements are protected under both the free exercise of religion and free speech principles imbedded in the First Amendment.

We have, however, omitted the categories of defamation and copyright infringement from this list of suitable exceptions for the reasons that: (1) a new media company that errs on the side of *inclusion* rather than exclusion will still have broad immunity from lawsuit liability under Section 230 of the Communications Decency Act; (2) both of these categories require intensive fact-verification which could cause the media technology company to regularly default to a practice of *exclusion* as a matter of expediency, thus censoring content that could be entitled to a "fair use" defense under copyright law, or to various defenses under defamation law; and (3) offended copyright-holders still have an adequate private remedy under copyright law against copyright offenders. Also, new media platforms could require accurate identification of users who post potentially infringing content in order to aid plaintiffs in the event of later lawsuits, and could place warning tags on information posted on a site where a copyright infringement is suspected.

---

[5] *U.S. v. Stevens*, 559 U.S. 460, 468-69 (2010) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

[6] *R. A. V. v. St. Paul.* 505 U.S. 377 (U.S. 1992); *Snyder v. Phelps*, 131 S. Ct. 1207 (U.S. 2011). Similarly, UCLA law professor Eugene Volokh, in his blog, has soundly criticized a proposal for a "hate speech" code for University of California, despite the risk of extremist or bigoted expression that might result from the absence of such a ban. Eugene Volokh, "University of California Jewish Student Campus Climate Fact-Finding Team" Call for Banning "Hate Speech," The Volokh Conspiracy, August 11, 2012.

We would also urge new media companies to continue to develop, utilize and integrate "safety" procedures and operations for their sites, and they should have the fullest liberty to do so, where the subject of prohibition or limitation does not relate to a particular disagreeable viewpoint, but it deals rather with invasion of privacy and inappropriate sharing of non-consensual private information, or deals with sexually explicit information or images that would be accessible to minors.[7]

Therefore, new media companies should be able to restrict or prohibit only content that, under a good faith, view-point neutral analysis, is determined to qualify under any of these traditional exceptions to the First Amendment:[8]

Obscenity;[9]

The Equivalent of Broadcast Indecency if Accessible to Minors;[10]

Fraud:[11]

Incitement to violence;[12]

Or speech that is integral to criminal or unlawful conduct.[13]

The United States Supreme Court has refused to expand the list of traditional exceptions to free speech under the First Amendment.[14] New media technology companies should follow suit. However, this does not mean that these

---

[7] *U.S. v. American Library Association*, 539 U.S. 194 (2003) (Congress has the authority to require public schools and libraries to install web filtering software under the Children's Internet Protection Act). A U.S. District Court has upheld the Indiana law that restricts access of registered sex offenders from accessing Internet sites that permit usage by minors. *Doe v. Prosecutor, Marion County, Indiana*, case no. 1:12-cv-00062-TWP-MJD (U.S.D.C. Southern District of Indiana, June 22, 2012). See also: the Stored Communication Act, 18 U.S.C. § 2701 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the former providing privacy protection by prohibiting intentional access to electronic information without authorization.

[8] See: *U.S. v. Stevens*, *supra* note 5 above, for a listing of these exceptions.

[9] *Roth v. U.S.*, 354 U.S. 476, 483 (1957). See: *Ashcroft v. ACLU*, 535 U.S. 564 (2002) ("community standards" element of federal statute upheld that outlawed "indecent and patently offensive communications over the Internet if they are deemed "harmful to minors." But see also: *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004) (Congress failed to consider less restrictive means to protect children online, such as blocking or filtering technology, and that was fatal to the law).

[10] *FCC v. Pacifica Found.*, 438 U.S. 726 (U.S. 1978); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (U.S. 2009); *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (U.S. 2012); see also *Ashcroft* cases, *supra* note 9 above, as well as both *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) and *Ginsberg v. New York*, 390 U.S. 629 (1968) (sexually explicit communications, even if falling short of "obscenity," may, consistent with the First Amendment, be restricted where aimed at or accessible to minors).

[11] *Virginia Bd. of Pharmacy v. Citizens Council, Inc.*, 425 U.S. 748, 771 (1976).

[12] *Brandenburg. v. Ohio*, 395 U.S. 444, 447-49 (1969) (*per curiam*). This would also include, of course, true threats of violence as well.

[13] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). This would include any other use of the Internet that is deemed unlawful by, for instance, the regulations established by the Federal Trade Commission or the Federal Communications Commission or other agencies of competent jurisdiction.

[14] *U.S. v. Stevens*, *supra* note 5 above; *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011).

companies may not develop creative standards that impose remedies that fall short of censorship, blocking, or Internet take-downs.[15] In the end, however, those companies should err on the side of free speech. That approach will not only serve their customers and users which in turn will better insure the long-term success of their innovations, it will also serve their industry by fostering a healthy, honest free speech precedent to be followed in the future by their innovational partners and successors.

[15] Such remedies could include "red-flagging" content with an explanation that the new media company considers the viewpoint to be offensive, but will permit it in the interests of free speech. See: Danielle Keats Citron, & Helen Noron, "Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age," 91 Boston University Law Review 1435 (2011). This article provides a helpful discussion. We do not endorse all of the proposals, however, as the authors propose blocking free-speech troublesome categories such as "hate speech," or speech that inflicts several emotional distress which is a category rejected by the Supreme Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), as well as suggesting other categories for blocking that are equally problematic. On the other hand, we do support the editorial, First Amendment rights of websites, and blogsites as an example, as opposed to new media "gatekeepers," to be much more selective about the expression they allow on their sites, much as newspapers can select what letters to the editor they permit.