

## Ask CDT: Answers on First Amendment Rights Online

November 23, 2010

Last week, CDT General Counsel and First Amendment expert John Morris took readers' questions for [Ask CDT: First Amendment Rights Online](#) [1]. See readers' questions and John's answers below.

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**Question:** *Free speech online is a compromise, isn't it? I believe CDT was even a party to this compromise. I'm talking about COPPA. COPPA restricts the free speech rights of anyone 12-years of age and under. Now, unless you're reading a different Constitution than I am, I don't see where 12-year-olds have any LESS free expression rights than anyone else. But under COPPA, their rights are restricted. Can CDT defend that age restriction on constitutional grounds?*

**John Morris:** Minors – even those under 13 – absolutely have constitutional rights, but as with other rights, those rights sometimes may need to be balanced against other concerns, such as a parent's right to raise his or her child. The Children's Online Privacy Protection Act (COPPA) restricts the ability of website operators to collect personal information from children 12 and under, and its effect has been that the majority of interactive websites prohibit younger minors from registering for or posting on these sites, thus limiting children's opportunities for free speech online. This restriction on these younger minors' access to speech has never been challenged in court, and it is possible that such a challenge could be successful in at least some contexts.

The decision to cover only children 12-and-under in COPPA was not arbitrary: Congress recognized that a COPPA bill covering older minors would definitely be challenged on First Amendment grounds by civil liberties groups and would probably be struck down. Indeed, CDT testified in 1998 against a higher age limit in COPPA, and more recently [we have advocated](#) [2] against the expansion of COPPA to cover older minors. You can find more of our work on COPPA [here](#) [3].

**Q:** *I am sympathetic to organizations such as yours that "defend" First Amendment Rights online; however, I can't understand why you would disagree with efforts to make the online environment safer for children through laws that ban clearly obscene material.*

*I am no prude, but I also don't relish the thought of my pre-teen son or daughter stumbling into pornographic material while searching for information about how beavers build dams.*

**JM:** The government has tried a number of times to craft a law that restricts minors' access to pornography online, but these attempts have been consistently struck down by the Supreme Court for violating the First Amendment. The problem with these statutes is that it's nearly impossible to implement a law that keeps indecent content away from kids but still permits adults to access it. The First Amendment protects adults' access to pornography and indecent speech, and the government cannot pass a law that would reduce all speech online to what is suitable for a five-year-old. It also wouldn't be appropriate for the government to be the one determining what is and isn't suitable for particular age groups; reasonable minds can disagree about what is appropriate for an eight-year-old or a fifteen-year-old to read, and it's a decision that's best left up to parents and families. The best solution is the increasingly sophisticated filtering software that parents can install on their home computers and use to set limits, according to what they think is best, on what their kids can and cannot see online.

**Q:** *When you come right down to it, there really isn't "free speech" on the Internet is there? ISP's can kick you off for whatever reason they want (and claim a "terms of service" violation; any particular, non-governmental website can boot you, or even rewrite stuff you put on their web page if they don't like it and you can't say a thing about it. Some "Internet free speech," it's a myth, right?*

And

**Q:** *Does YouTube have to take down videos that are violent or sexual, or ones that are negative*

*about someone else, if that person complains?*

**JM:** These two questions really raise two sides of the same coin – the role of private companies (like ISPs and websites, often called “intermediaries”) in online free speech. I don’t think that “Internet free speech” is a myth, but free speech online does face a range of challenges, as the questions suggest.

First, free speech concerns are one of the reasons that we are fighting to achieve a good set of “Internet neutrality” rules, so that ISPs (who provide you access to the Internet from your home) cannot pick and choose what websites you can go to (or what you can say on those sites). Ultimately, we do not think that access providers should be policing what you can say online.

Websites are a harder case, because the operator of (for example) a video sharing site is able to set their own rules for their online community. But, our free speech is reasonably protected because if a site is too restrictive, competitor sites can emerge. This comes back to Internet neutrality, because it is important that those competitor sites be able to offer service without having to strike special deals with access-providing ISPs.

The second question flips this around and asks whether websites (like a video sharing site) have to take down content that someone does not like. The short answer to this is “no,” an online site cannot be held liable for content posted by users, and does not have to take the content down if someone complains. The rule – found in what is called “Section 230” of the U.S. Communications Act – is a critical element of the free speech framework online. If a video sharing site could be held liable for a video posted by a user, then the site would be much less willing to let users post videos. Without strong protection for online intermediaries as provided by Section 230, it would be much more difficult to exercise your free speech rights online.

**Q:** *Here's a simple question I dare you to answer: Tell us, simply, what CAN you say online? What can't you say online?*

**JM:** There is very little that the government can completely prohibit you from saying online. Legally obscene material, child pornography, and statements that incite violence against a particular person or group at a specific time and place don’t receive First Amendment protection. Beyond that, though, the government’s ability to restrict what you say online is very limited. CDT recently launched a new website, [OnlineArtRights.org](http://OnlineArtRights.org) [4], that deals with these concerns in more detail. Although this site is aimed primarily at artists, it provides a helpful overview of the legal issues in this area. Check out the [Issues](#) [5] for an in-depth discussion of the parameters of First Amendment protections for speech online.

Although the First Amendment limits government censorship, it does not limit most private action. Restrictions on your speech are far more likely to come from website operators and content hosts – these companies have the right to specify (usually in their terms of service) what they will and won’t permit you to post using their services. Terms of service may prohibit users from posting particularly violent or sexual material, negative comments or hate speech, or anything else that the operator of the site chooses, and sites are fully within their rights to take down material that doesn’t comply with their terms. Terms of service are also discussed at our [OnlineArtRights.org site](http://OnlineArtRights.org/site) [4].

**Q:** *Why is the U.S. version of free speech valid for the rest of the world? Or is U.S. style free expression something that [you] keep to yourselves?*

And

**Q:** *Why will you in [the] US tell us in rest of the world what we should be feeling and thinking online? Do you think the first speech rights of US belong for the rest of the world?*

**JM:** CDT views the right to free expression as essential for protecting the ability of individual users to choose for themselves what they say, hear, and access online, without governmental interference. In the U.S., this right to free expression is embodied primarily in the First Amendment. However, the values protected by the First Amendment are not unique to the U.S., and are widely shared in the

international community. Simply put, freedom of expression is a universal human right: the [Universal Declaration of Human Rights](#) [6] preserves the right to “seek, receive and impart information and ideas through any media and regardless of frontiers” as part of the right to freedom of opinion and expression. Regional human rights [agreements](#) [7] have adopted similar language to articulate this right.

Of course, this right is not absolute, either in the U.S. or under international human rights instruments. The scope of this right varies from country to country. However, international human rights norms require that valid restrictions on free expression meet key standards – for example, necessity, proportionality, and efficacy – and should be exceptional and narrowly applied. While there are many open questions around how to interpret these standards in the Internet context, we believe many of the unique aspects of the Internet medium justify robust, global protection of the right to free expression online under universal human rights norms.

**Q:** *How do our 1st Amendment rights square with the current overblown attacks on 'pedophiles' online? We don't want to go down the road of tears that Australia is currently following by censoring its people... ny*

**JM:** Child abuse and child pornography are very serious crimes and CDT has long urged that Congress should increase the resources that law enforcement has to apprehend and prosecute those who abuse children in this way. At the same time, given how the Internet works, there is no “silver bullet” that will stop child pornography – which is why prosecution of the senders and recipients of such content is so important. All criminal laws must also comport with our Constitution – and in the past, anti-child pornography laws (including “web filtering” laws) have violated the rights of innocent speakers.

Over the past few years we have seen what researchers call a “moral panic” about online predators, but the public concerns are misplaced. In 2009, the Internet Safety Technical Task Force completed a [study](#) [8] of safety concerns children face on the Internet and found that while sexual predation on minors by adults is a terrible crime, it was not as prevalent as popular media might suggest. Further, single-minded focus on child sexual predation as the most serious threat to children online can lead to more common risks being ignored. Keeping kids safe online requires educating kids, teachers, parents, and others about a wide range of issues, including cyberbullying and peer-on-peer solicitation, and not just sexual predation.

**Q:** *How do traditional libel and slander laws differ online or do they? JH*

**JM:** Libel and slander are forms of defamation, which in the most common contexts involves the publication of a supposedly factual (but false) statement that places someone in a negative light (although libel is what would apply online, because slander generally refers to oral statements that are not in recorded form). As a simple legal matter, the same defamation laws apply to online and offline speech – the same legal standards apply. But of course, online defamation raises some challenges that, while not unique to the online context, are accentuated by it.

For example, in today’s interconnected world, it is much easier for individuals to post defamatory content about someone located in another jurisdiction (like that restaurant you visited last week when you were on a business trip). This raises some difficult jurisdictional issues about where a defamation lawsuit should be brought. On the other hand, there is a growing risk that businesses unhappy with bad online reviews might try to chill those reviews through threats of defamation lawsuits. We will be watching those developments closely to ensure that the rights of Internet users are protected.

**Q:** *What is CDT's position on: the tension, admittedly in dispute both in degree and substance, between the 1st Amendment and the copyright clause. thank you. -robin*

And

**Q:** *Been a long time since I logged into the CDT website, love the design, actually got me to click around. But in doing so I come across a couple blog posts that say CDT is against this new bill*

(COICA) that would stop these pirate sites from stealing intellectual property. It appears to me that you're making this a "free speech" issue? Oh, come on. What am I missing. Here's my question for your expert: how in the world does an intellectual property rights bill run afoul of First Amendment rights?

**JM:** There is, of course, some inherent tension between the First Amendment and copyright law in that the First Amendment protects speaking, and in some context the Copyright Clause enables restrictions on speech. These are certainly not the only parts of the Constitution that are in some tension with each other, but in this case the Supreme Court has made clear that "fair use" is a critical component of copyright law, and one that is key to easing the tension between free speech and copyright.

But just because the Copyright Clause is in the Constitution does not mean that copyright enforcement proposals cannot violate the First Amendment, and the COICA proposal is a clear example of such a bill that goes too far. COICA has a number of problems, as CDT [detailed a few weeks ago](#) [9], including a range of free speech concerns. Two of these problems are that (a) COICA imposes a prior restraint on future speech, and prior restraints are among the most disfavored of speech-burdens under the First Amendment, and (b) COICA restricts the distribution of lawful speech (beyond the content asserted to be copyrighted). On top of these and other free speech concerns is the fact that the COICA restrictions on domain names will not be effective in limiting copyright violations, and they will create a range of technical and security problems. We strongly support the enforcement of copyright, but COICA is not the way to go about it.

**Q:** *Are we going to continually lose privacy rights online and while surfing the Internet? It seems that because of the advancement of technology, we are also losing our rights to privacy. Will we eventually succumb to our privacy being completely open to investigation as the improvement of technology makes it easier to wiretap individuals?*

**JM:** This really is more of a privacy question than a free speech question, so check out our [dialogue on privacy](#) [10] from a few weeks ago, and be sure to check out our weekly [privacy chats](#) [11], held every Tuesday at noon. But, privacy and free speech are certainly linked in some cases. We filed a brief last year raising just this linkage, [urging greater privacy protections](#) [12] in the Google Books settlement based in part on free speech concerns.

- [Free Expression](#)
- [first amendment](#)
- [coppa](#)
- [Children's Online Privacy Protection Act](#)
- [COICA](#)
- [ask CDT](#)

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- [7] <http://www.cdt.org/report/international-free-expression-internet-resources>



[8] link: <http://cyber.law.harvard.edu/research/isttf>

[9] [http://www.cdt.org/files/pdfs/Leahy\\_bill\\_memo.pdf](http://www.cdt.org/files/pdfs/Leahy_bill_memo.pdf)

[10] <http://www.cdt.org/blogs/cdt/ask-cdt-answers-social-media-privacy>

[11] <http://cdt.org/twitterchat>

[12] <http://www.cdt.org/policy/cdt-files-brief-urging-privacy-safeguards-google-books>