

Internet Theology

MIKE GODWIN

CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE

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MIKE GODWIN'S RECENT BOOK, *Cyber Rights: Defending Free Speech in the Digital Age*, could have been the catechism of the new Internet theology. Mr. Godwin is an Internet True Believer (which is probably a BFOQ for staff counsel at the Electronic Frontier Foundation). He is convinced that the Internet will transform democracy and permit individuals to create genuine communities in ways they simply cannot now – if only the rules of private and public law are applied to permit Internet users maximum freedom of expression. In his view, those who would impose or tolerate restrictions on Internet expression simply do not understand the Internet or intentionally distort their descriptions of it. If only everyone understood as Godwin does, they would reject out of hand the idea that

legal restrictions developed to govern speech outside cyberspace should be applied inside.

Cyber Rights is, however, less a catechism and more a self-written gospel, for the book is largely Godwin's highly personal account of his first-hand and front-line participation in many of the early cases addressing speech and speech-related issues on the Internet. We learn of Godwin's daily habits, his likes and dislikes, and relive with him his emotions when meeting with other lawyers or hearing his arguments deployed in actual cases. And at times, the book reads like an extended electronic mail message, filled with that medium's peculiar combination of hyperbole and ad hominem. The ad hominem directed at those who disagree with his positions is especially regrettable,¹ for it is also clear from the book that Godwin genuinely

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¹ See, e.g., p. 91 (court's decision was "legal blunder"; "otherwise intelligent lawyers" who agreed were thinking "uncritically"); p. 97 ("This fact is obvious to anyone who reflects"); p. 98 (purportedly knowledgeable "legal pundits" simply guilty of "dithering" in the face of facts); p. 100 (those who believe libel law has a place on the Internet have "the most fragile or immature ego"); p. 163 ("over

wants to educate and persuade his readers to his view of the Internet and its promise.

Nevertheless, those interested in the issue of expression on the Internet should take note of *Cyber Rights*. Godwin and the Electronic Frontier Foundation are leading advocates for speech rights on the Internet, and *Cyber Rights* vigorously rehearses both the most familiar themes about how the Internet will transform expression and social relationships and the basic legal arguments used by these advocates. These themes – of transformation and salvation by Internet – have penetrated so far that, at a recent conference at the Northwestern University School of Law on the First Amendment and economic power, almost every one of the speakers referred to the Internet as a phenomenon that would alter most or all of their factual or legal conclusions about the First Amendment.² What *Cyber Rights* offers to do – to describe how the Internet works and to apply existing legal doctrine to cyberspace – is needed and is needed now.

First, *Cyber Rights*' descriptive argument. The Internet is the City on the Hill, different from both traditional telecommunications (which permits "one to one" communications) and broadcast ("one to many") in that the dominant interaction is "many to many." Because publishing one's own material on the Internet is relatively inexpensive, Internet users (dubbed "Netizens") widely participate in various interactive fora or, at a minimum, both create content for the Internet and sample the information others have published. Through such participation, Internet users establish "virtual communities," genuine communities of interest and support not terribly

evident in other spheres of life in the late twentieth century.

Second, the normative contentions. Because the Internet is deeply and widely participatory, legal regulation of expression should be sparing and First Amendment protections should be especially stringent. Godwin writes that defamation law has little or no place on the Internet (chapter 4), that efforts to limit the use of encryption (and other privacy-enhancing techniques) should be rebuffed (chapter 6), that copyright law is being misused to retard the open communication of information (chapter 7), and that attempts to regulate indecency on the Internet are wrong-headed and unconstitutional (chapters 8-10).

I confess that after reading *Cyber Rights*, I remain agnostic, largely because the normative parts of the book do not seem to take the descriptive part seriously. Godwin's bedrock is that the Internet is revolutionary because it dramatically reduces the costs of publication and communication; therefore everyone may publish information on the Internet. *Cyber Rights*, however, does not rigorously explore the implications of this proposition. Two seem obvious.³ First, because of the lower costs of publication, the amount of information available on the Internet is truly staggering, and much of it is absolutely worthless, because idiosyncratic, cumulative, biased, or just plain wrong. Second, lower costs of publication do not eliminate the costs of acquisition. Information consumers still must incur search costs: for example, the amount of time it takes to review the jumble of web sites returned by almost any query to a search engine. And users also must incur additional consumption

blown" concerns about copyright infringement are just part of general irrational "backlash" against free expression and are attempts to "silenc[e] troubling opinions"); p. 299 ("knowledgeable" people do not worry about children accessing pornography on the Internet).

2 The papers will be published in the *Northwestern University Law Review* (vol. 93, no. 3; Spring 1999). RealAudio of the conference is available at www.law.nwu.edu/html/freesp/index.htm.

3 For a different and much more wide-ranging consideration of the effects that decreased publication costs may have, see Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

costs: for example, the amount of time it takes to download the right web page once they find it. These costs may be lower than the acquisition costs in traditional media – I do not have to travel to the bookstore or engage in personal interviews to obtain the information – but they are costs nonetheless.

Cyber Rights most clearly fails to take account of these information dynamics when discussing libel law. Libel law, according to Godwin, is “outdated,” “favors the powerful,” (p. 75) and has little place on the Internet. “[T]he ease with which Net users can reply to arguably defamatory postings has more or less eliminated any actual ‘need’ for libel lawsuits.” (p. 77) And he takes it as a sign of the health and stability of the Internet that libel suits are rare. In fairness, Godwin’s claim is not that libel on the Internet should be absolutely privileged; he allows that the author of a defamatory statement can be sued (pp. 98-99). Rather, Godwin’s claim is that Internet intermediaries, such as America Online and CompuServe, should be treated for libel purposes like bookstores, simply distributing the words of others. As such, they should not be subject to defamation suits. Godwin believes that the continued absence of defamation suits is both necessary to the Internet’s development and a sign of its expressive health.

Contrary to Godwin, libel suits could both signal and stimulate the Internet’s maturing and becoming useful to more people, especially if plaintiffs prevail against entities other than authors. If Godwin is correct that the lower costs of publication will greatly increase the amount of information published, one would expect that, as the Internet assumes a more central role in disseminating information, mediating institutions will develop to organize and filter the otherwise unmanageable mass of information available there. That is what newspapers and publishing houses (both

of which are subject to libel laws) do today. And these mediating entities would develop marketable brands – along the lines of the *New York Times* and Oxford University Press. Endorsement by, or association with, one of these branded institutions would be a heuristic of reliability: if some author’s posting is found on the website of one of these institutions, those who read it would consider it reliable. Moreover, consumers would pay for these services, either directly by purchasing Internet access or subscriptions from these services or indirectly by frequently visiting their sites, allowing them to sell advertising. That these mediating institutions could be held liable for publishing defamatory falsehoods would increase their credibility with consumers.

In fact, the libel decision that Godwin treats with the most caustic disdain (pp. 88-93) – *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (Sup. Ct. N.Y. 1995) – rests in part on very similar observations. Prodigy had contracted with an individual to host and moderate a discussion forum on financial matters, and Prodigy imposed on the host certain obligations to monitor the content of the participants’ postings. Stratton Oakmont sued Prodigy and the moderator, claiming that it had been libeled in certain postings to the forum. (The author of the postings could not be identified.) The court held that Prodigy could be held liable for the statements because it held itself out as monitoring the content of the messages on the forum.

Godwin’s ire arises from his belief that Prodigy was only acting as a bookstore would. It purchased the content for sale to others; it did not review, edit, or publish the content. (Bookstores are not subject to liability for selling defamatory material unless they know or have reason to know of the defamatory content.⁴) I agree with Godwin that Prodigy probably should not have been held liable,

4 See REST. 2D TORTS § 581.

although I think the case is somewhat closer than he does. Prodigy contracted for the creation of certain content, and, had the defamatory statement been made by the moderator, Prodigy would properly have been held liable. But the court's decision does not reflect any evidence that Prodigy held itself out as endorsing the content of postings (other than its moderator's); the only commitment it had made regarding third-party postings was to screen them for indecency. Still, the court cannot be damned for finding otherwise, and Godwin's repeated accusation that the court failed to understand the "precedents" is certainly unjust.⁵ The court saw the case differently: it believed that Prodigy had held itself out to the public as monitoring, and implicitly endorsing, the content posted to the forum. More importantly, as the court notes, it could make sense for Prodigy to provide screening, because the market might reward it. "Presumably, Prodigy's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a 'family-oriented' computer service."

Thus, libel cases might reflect, and even stimulate, the development of mediating institutions that help consumers lower their search costs for information. They reflect this development because they are an indication of the Internet's maturing and becoming more central in information consumption. At the same

time, libel law may also foster the development of these mediating institutions, for their growth is a response to consumer demand. Without defamation damages, the mediating institutions will provide solely what the market demands, and the market may not always demand truthful information. Moreover, libel law may stimulate the development of appropriate mediating institutions by lowering those institutions' cost of making credible claims about the truthfulness of the information they disseminate. In the absence of libel law, it may take a long time for mediating institutions to develop reputations as reliable brokers of truthful information. Because libel law can provide appropriate incentives for intermediaries to endorse only truthful information, consumers will perceive that information republished by these intermediaries is more likely to be truthful.⁶

Unfortunately, however, Congress has preempted the common law of defamation as to at least some entities on the Internet. Although Godwin surprisingly does not mention it, part of the Communications Decency Act of 1996 (now 47 U.S.C. § 230(c)(1)) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Although the statute and legislative history can be read to limit this exemption to Internet service providers that do no more

⁵ Such a charge is reckless, especially given that Godwin purports to be writing in part for non-lawyers. The only decisions that Godwin claims the *Stratton Oakmont* court ignored are *Smith v. California*, 361 U.S. 147 (1959), and *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (the latter of which the *Stratton Oakmont* court does cite three times and does discuss over the course of two paragraphs). The issue decided in *Smith* was simply that a bookstore could not be held strictly liable for violating state obscenity laws. The issue in *Stratton Oakmont*, by contrast, was whether Prodigy's actions in contracting for the creation of content and the monitoring of third-party postings made Prodigy more like a publisher or more like a bookstore. As for *Cubby v. CompuServe*, although the court there applied *Smith* and decided, based on somewhat different facts, that the Internet service provider was not liable, Godwin confesses in the endnotes that the decision of a federal district court is not precedent for a New York state court.

⁶ Libel law's truth-enhancing incentives may influence intermediaries more than authors if, as Godwin suggests, authors on the Internet are frequently judgment proof.

than provide access services (*i.e.*, dumb pipes), at least one court has read this section to insulate as well those Internet intermediaries that endorse and republish the content of others, thus making it harder for them to make credible endorsements.⁷

By failing to account for the costs of acquiring (as opposed to publishing) information, Godwin also likely errs in concluding that libel law is unnecessary for individual users confronted with falsehoods posted by others to news groups, bulletin boards, mailing lists, and similar fora. Godwin suggests that an Internet user who believes he or she has been libeled will quickly respond, and that all recipients of the allegedly defamatory statement will thus receive both sides of the argument. Even setting aside such obvious exceptions as instances where the person libeled is not an Internet user or where the person is libeled in a forum not open to him or her, this contention fails to recognize that it would be extraordinarily costly to monitor all the possible areas of the Internet in which one might be libeled in order to ensure a quick response. Such monitoring would also be wasteful. An effective response must quickly follow the initial statement. A person fearing harm from defamation and having no *post hoc* damages remedy must invest heavily in monitoring content and responding to potential libels. This may be an overinvestment, because many false statements likely will not be damaging in any way, and much of the monitoring costs will be spent examining content containing no false statements at all. Common law defamation

suits, by contrast, allow (in fact they largely require) one to wait and see if any harm actually does come about before liability attaches.

Godwin also seems to ignore the implications of low-cost publication when discussing the application of copyright law on the Internet (chapter 7). While conceding that in many respects the Internet operates as a “global collection of copying machines” (p. 166), he bemoans the aggressive efforts of copyright owners to combat the unauthorized posting or other use of their copyrighted materials. In particular, Godwin again does not want any obligations imposed on Internet service providers to remove materials, posted by others, that they know or have reason to know have been posted in violation of the copyright laws (p. 187). And Godwin especially thinks that aggressive preliminary injunctions and the impounding of equipment is unwarranted. But if the economic costs of publication and republication are low, then we should be especially interested in vigorous copyright enforcement, including the ability of a copyright owner to have infringing and potentially infringing materials removed quickly. The risk to the value of a copyright is great, even in the short run, because of the “global copying machine” effect of the Internet. On the other hand, the harm to the poster and the user community from temporary, improper removals is low because the costs of republication are themselves low.⁸

Finally, most of the words in *Cyber Rights* are devoted to the question of pornography on the Internet and to the litigation that resulted in the Supreme Court’s decision in *Reno v. ACLU*,


7 In *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), America Online had both endorsed and republished the “Drudge Report,” an issue of which was allegedly defamatory to the plaintiff. The court acknowledged that this would have been sufficient under the common law to subject America Online to liability for Drudge’s defamation, if any there was, but held that section 230(c) immunized America Online’s republication from a libel suit. See also generally *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

8 On October 28, 1998, the new 17 U.S.C. § 512 became effective, which largely exempts Internet service providers from liability under the copyright laws for infringing postings made by others, provided the ISP had no notice of infringement.

117 S. Ct. 2329 (1997), that portions of the Communications Decency Act were unconstitutional. Godwin wants to convince us that an Internet user will not find pornography on the Internet without looking for it (pp. 68-69, 220),⁹ that only a “small fraction of [Internet] content is pornographic” (p. 219), and that efforts to regulate pornography and indecency can only impede free discourse on the Internet.

The nature of the Internet again, however, seems to point in the opposite direction. Information providers on the Internet can earn revenues¹⁰ in one of two ways: (1) by selling the content, which requires investing in technology to exclude viewers on a viewer-by-viewer basis as well as technology to extract payments; or (2) by providing the content for free and selling advertising on their sites, advertising rates being based on the number of viewers (hits) that the content attracts.¹¹ Each of these strategies, and various mixes of them, are already very common on the Internet. This means, of course, that free pornography will be available on the Internet, and Internet pornographers will publish it in ways such that those who are looking for it will find it with-

out significant additional transaction costs. Moreover, providers adopting a strategy of raising money through advertising, or treating free content on the Internet as advertising for their other products, have the incentive to attract the maximum number of hits, which may include adopting strategies that garner “unintended” viewers.

Overall, Godwin seems to be preaching to the choir, rather than making legal arguments to win over converts. Lower publication costs do increase the possibility of publication, but, standing alone, may not justify replacing the legal regimes developed over time to regulate expression – legal regimes which, for the most part, have endured through previous revolutions in the technology of disseminating information. Theology, which calls on faith, and economics, which calls on reason and empiricism, may not be compatible. But the Internet is about a shift in the economics of expression, not a theological revolution in how the First Amendment affects society, and when the project is getting the legal prescriptions right, all of the implications must be taken seriously. 

9 Actually, Godwin carefully says only that a user is unlikely to find “hard core” pornography without looking for it.

10 Godwin assumes, and I agree, that many people will post information on the Internet without seeking any revenue; people have many non-financial motivations for publishing. That does not change the analysis: lower publishing costs should simply encourage more “free” expression than exists otherwise.

11 Some providers that have goods or services in other markets may treat providing content on the Internet as a form of advertising for their other goods. A good example is the *Chicago Tribune's* web site, www.chicagotribune.com, which provides free on-line content as a way to induce readership or the placement of advertising (both in-print and on-line).