

Essay: Will the First Amendment survive the information age?

March 12 2016, by Anders Gyllenhaal

As Apple tries to fend off government demands for access to iPhone content, the company is leaning on free speech arguments as a key part of its defense in a California courtroom.

On the other end of the country, 10 separate lawsuits have piled up this year against net neutrality rules, with both sides claiming First Amendment rights in this long-running dispute over Internet service.

This is Sunshine Week in the U.S., when news organizations put a spotlight on the public's right to know and size up the state of government openness and access to public records.

This year, we should add a more sweeping question to the list: How will the First Amendment navigate the dramatic changes in information technology?

Complicated disputes are popping up in both predictable and surprising places.

Cases moving through the courts range from whether Facebook "likes" and Twitter posts are protected speech (both are for the moment) to what individual First Amendment rights should be granted to businesses (they're steadily expanding).

The mere definition of [free speech](#) is getting clouded: Are video games a kind of speech? What about computer-driven content like searches and

automated stories? Put another way, can iPhone's Siri claim First Amendment rights if she somehow offends or libels you?

Free speech standards shaped over the past half-century are colliding with modern privacy concerns. Protests at a series of campuses the past year pitted press rights against the demand for "safe places" where students can avoid conflicting views. There's growing support for "right to be forgotten" laws that allow people to erase pieces of their past or otherwise rewrite digital history.

When a humorist quickly gathered 50 signatures calling for repeal of the First Amendment as a joke a few months ago at Yale, nobody should have been laughing.

FIVE KEY QUESTIONS

The First Amendment has survived plenty of change in 225 years. Speech, press and expression rights have been expanded and hardened as they've adapted to waves of technology, including the telegraph, print, radio and television.

Those who follow the topic most closely, though, say the information age started a whole new era. Here are key questions likely to shape the future of the First Amendment:

How will the Internet alter free speech practices? There's still a lot of unsettled law about how speech and expression play out in a Facebook world.

Scholars say rules taking shape will generally extend existing standards to the Internet. The challenge will be figuring out when speech is altered by the Internet's speed and reach, and how to handle all the new content types at a time when anyone can be a publisher.

"The Internet amplifies everything," said Thomas Healy, a Seton Hall law professor and author of the book "The Great Dissent," about Oliver Wendell Holmes' free speech evolution. "It amplifies expression. It makes it more powerful, more dangerous, more offensive. Those things have to be taken into consideration."

Early court decisions hold that data-driven communications, such as computer-assembled news and Google searches, are indeed protected forms of speech. So is computer code itself, which is the basis of the First Amendment argument that Apple is making for refusing to crack open the iPhone of one of the San Bernardino mass shooters.

Who's advocating for the public's interest? We should watch which players and what forces are trying to influence the rules as a changing of the media guard takes place.

The newspaper and broadcast companies that championed speech and press rulings of the 20th century don't have the power or financial strength they once did. The dominant technology companies have not shown that same kind of stewardship of the First Amendment.

John E. Finn, the Wesleyan government professor who taught the Great Courses series on the First Amendment, was speaking for his peers when he said, "I worry about the lack of well-funded institutions advocating for openness."

Who controls how information moves? Just as important as who creates content will be who distributes it, which is why the net neutrality rules approved by the Federal Communications Commission last year and now under appeal drew comment from a who's who of tech companies, from Netflix and Google to Comcast and Verizon.

Current rules require service levels and rates to be the same for all.

Internet providers say that curbs their business options, while content creators say reversing this would give the Internet's utilities too much power over the marketplace and lead, for instance, to download speeds based on your willingness to pay.

While both sides claim First Amendment rights, self-interests show through in their positions. It's also becoming clear how much control already is in the hands of those who provide devices, pipelines and software that determine everything from what you find when you search to whose postings you see on Facebook and LinkedIn.

"The people who develop our technologies," said Cindy Cohn, director of the Electronic Frontier Foundation, which tracks digital rights, "are having a bigger and bigger role in all these things."

What will expanding business rights mean? A series of First Amendment rulings sought by private corporations has freed them from limits in such areas as advertising, ingredient listings and political contributions.

About half of the successful First Amendment appeals to the U.S. Supreme Court today focus on corporate rights—a big change from previous decades, according to a survey of a half-century of court decisions by Harvard law professor John Coates.

Some say that the expansion of any speech rights serves all comers. Others say this shift goes against the intent to protect the rights of citizens against powerful government and corporate interests.

And finally, where do you stand? Here the news is encouraging: The amendment's simple, 45-word summary covering religion, speech, press, petition and assembly is woven into the American civil fabric.

While percentages rise and fall slightly with current events, polls

consistently find overwhelming support and admiration for the First Amendment from a vast majority of the population. Unlike almost any other topic in public life, those sentiments cut across political, ethnic, age and economic lines.

Two-thirds of the world's population lives without religious and press rights, and many countries, from China to Cuba, are using technology to suppress rights. This makes the American model an even greater beacon if we succeed in using technology to extend freedoms.

"We have the gold standard," said Alberto Ibarguen, director of the Miami-based Knight Foundation, which funds media innovation around the world. "It's our responsibility to make sure we maintain that."

The First Amendment did not find its place at the core of our rights without many struggles over two centuries. Sunshine Week is a good time to remember there are fresh battles ahead.

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