

INTERNATIONAL
EDITION

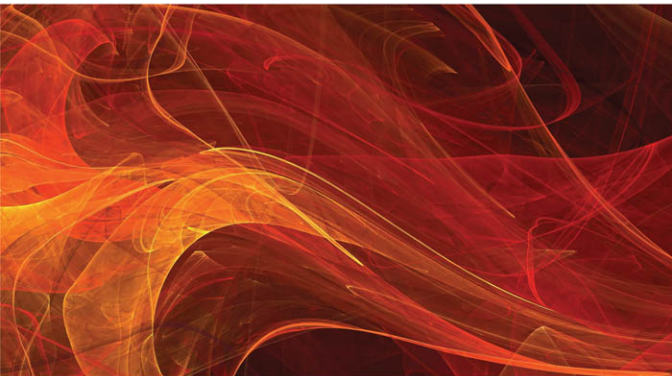


A Gift of Fire

Social, Legal, and Ethical Issues for Computing Technology

FOURTH EDITION

Sara Baase



ALWAYS LEARNING

PEARSON

A GIFT OF FIRE



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73. The Security and Freedom through Encryption Act (SAFE), as amended by the House Intelligence Committee, Sept. 11, 1997.
 74. Judge Marilyn Patel, quoted in Jared Sandberg, "Judge Rules Encryption Software Is Speech in Case on Export Curbs," *Wall Street Journal*, Apr. 18, 1996, p. B7. The case, *Bernstein v. United States*, and others continued for several more years, but in 1999 and 2000 two federal appeals courts ruled that the export restrictions violated freedom of speech. One court praised cryptography as a means of protecting privacy.
 75. "Wiretap Report 2010," www.uscourts.gov/Statistics/WiretapReports/WiretapReport2010.aspx, viewed Mar. 23, 2012. The government reports encryption in wiretaps because a federal law requires it to do so. I could not find data on how often law enforcement agents encounter encryption in seized computer files and whether they can decrypt the files.
 76. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review*, 1890, v. 4, p. 193.
 77. Judith Jarvis Thomson, "The Right to Privacy," in David Schoeman, *Philosophical Dimensions of Privacy: An Anthology*, Cambridge University Press, 1984, pp. 272–289.
 78. The inspiration for the Warren and Brandeis article, not mentioned in it, was that gossip columnists wrote about extravagant parties in Warren's home and newspapers covered his daughter's wedding. The background of the article is described in a biography of Brandeis and summarized in the critical response to the Warren and Brandeis article by William L. Prosser ("Privacy," in Schoeman, *Philosophical Dimensions of Privacy: An Anthology*, pp. 104–155).
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 80. See, for example, Schoeman, *Philosophical Dimensions of Privacy: An Anthology*, p. 15, and Prosser, "Privacy," pp. 104–155.
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 85. Dan Freedman, "Privacy Profile: Mary Gardiner Jones," *Privacy and American Business* 1(4), 1994, pp. 15, 17.
 86. Janlori Goldman, statement to the Senate Judiciary Subcommittee on Technology and the Law, Jan. 27, 1994.
 87. www.privacy.org.
 88. Deirdre Mulligan, statement to U.S. House of Representatives Committee on the Judiciary hearing on "Privacy and Electronic Communications," May 18, 2000, www.cdt.org/testimony/000518mulligan.shtml, viewed May 24, 2007. The quotation in her statement is from Alan F. Westin, *Privacy and Freedom*, Atheneum, 1968.
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102. Sources for this section include: James Bamford, *The Puzzle Palace: A Report on NSA, America's Most Secret Agency*, Houghton Mifflin, 1982; NSA FAQ: www.nsa.gov/about/faqs/about_nsa.shtml, link updated Oct. 22, 2011; Statement for the Record of NSA Director Lt. General Michael V. Hayden, USAF, House Permanent Select Committee on Intelligence, Apr. 12, 2000, www.nsa.gov/public_info/speeches_testimonies/12apr00_dirnsa.shtml, link updated Oct. 22, 2011; James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency, from the Cold War Through the Dawn of a New Century*, Doubleday, 2001; James Bamford, "The Black Box," *Wired*, April 2012, pp.78–85, 122–124 (online at www.wired.com/threatlevel/2012/03/ff_nsadatacenter). Bamford has written extensively about the NSA over several decades. His sources include former long-time NSA employees.
103. NSA FAQ: www.nsa.gov/about/faqs/about_nsa.shtml, link updated Oct. 22, 2011.
104. At Lawrence Livermore National Laboratory.
105. Declaration of Mark Klein, June 8, 2006, www.eff.org/files/filenode/att/SER_klein_decl.pdf, viewed June 19, 2007, link updated Nov. 21, 2011.
106. *Amnesty et al. v. Clapper*.
107. To be completed in 2013 at a cost of \$2 billion, according to Bamford, "The Black Box."
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109. Robert F. Buckhorn Jr., quoted in Dana Canedy, "TV Cameras Seek Criminals in Tampa's Crowds."
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3

FREEDOM OF SPEECH

3.1 Communications Paradigms

3.2 Controlling Speech

3.3 Posting, Selling, and Leaking Sensitive Material

3.4 Anonymity

3.5 The Global Net: Censorship and Political Freedom

3.6 Net Neutrality Regulations or the Market?

Exercises



3.1 Communications Paradigms

*Congress shall make no law . . . abridging the freedom of speech,
or of the press. . . .*

—First Amendment, U.S. Constitution

As we observed in Chapter 1, the Internet brought us extraordinary opportunities for increasing free expression of ideas, easy and inexpensive communication between people of different countries, and extraordinary opportunities for access to many voices and points of view all over the world. But freedom of speech has always been restricted to some degree in the United States and to a large degree in many other countries. In this chapter, we examine how principles of freedom of speech from earlier media affect the Internet and how the Internet affects them.* We consider pornography on the Internet, attempts to restrict it, and attempts to restrict access by children; advertising and commerce on the Web; spam (mass, unsolicited email); and anonymity as a protection for speakers. Some forms of speech have long been contentious (pornography, for example), and some are new forms that developed with the Internet and other digital technology (spam and video games, for example). When the First Amendment protects some forms of controversial speech (such as violent video games or leaking sensitive documents) from legal restrictions, ethical and social issues are particularly relevant. Throughout this chapter, we describe various incidents and cases and discuss issues they raise. In Section 3.5, we examine how communications and surveillance technologies affect freedom of speech in different countries, especially some that have a long tradition of censorship.

3.1.1 REGULATING COMMUNICATIONS MEDIA

It is by now almost a cliché to say that the Internet lets us all be publishers. We do not need expensive printing presses or complex distribution systems. We need only a computer or a cellphone. Any business, organization, or individual can set up a website. We can “publish” whatever we wish; it is available for anyone who chooses to read it. In 1994, shortly before the Web became widely used, Mike Godwin, then an attorney with the Electronic Frontier Foundation, described the dramatic change that computer communications brought about:

It is a medium far different from the telephone, which is only a one-to-one medium, ill-suited for reaching large numbers of people. It is a medium far different from the newspaper or TV station, which are one-to-many media, ill-suited for feedback from the audience. For the first time in history, we have a many-to-many medium,

* Although some of our discussion is in the context of the U.S. Constitution’s First Amendment, the arguments and principles about the human right of freedom of speech apply globally.

in which you don't have to be rich to have access, and in which you don't have to win the approval of an editor or publisher to speak your mind. Usenet* and the Internet, as part of this new medium, hold the promise of guaranteeing, for the first time in history, that the First Amendment's protection of freedom of the press means as much to each individual as it does to Time Warner, or to Gannett, or to the *New York Times*.¹

Individuals took advantage of that promise. As just one indication, the number of blogs passed 150 million by 2010.² Some are as widely read and as influential as traditional newspapers. However, while computer communications technologies *might* guarantee freedom of speech and of the press for all of us, the guarantee is not certain.

Telephone, movies, radio, television, cable, satellites, and, of course, the Internet did not exist when the Constitution was written. Freedom of the press applied to publishers who printed newspapers and books and to “the lonely pamphleteer” who printed and distributed pamphlets expressing unconventional ideas. One might think the First Amendment should apply to each new communications technology according to its spirit and intention: to protect our freedom to say what we wish. Politically powerful people, however, continually try to restrict speech that threatens them. From the Alien and Sedition Acts of 1798 to regulation of Political Action Committees, such laws have been used against newspaper editors who disagreed with the political party in power and against ad hoc groups of people speaking out on issues. Attempts to restrict freedom of speech and of the press flourish with new technologies. Law professor Eric M. Freedman sums up: “Historical experience—with the printing press, secular dramatic troupes, photographs, movies, rock music, broadcasting, sexually explicit telephone services, video games, and other media—shows that each new medium is viewed at first by governments as uniquely threatening, because it is uniquely influential, and therefore a uniquely appropriate target of censorship.”³

In this section, we introduce the traditional three-part framework for First Amendment protection and government regulation of communications media that developed in the United States in the 20th century. As we will see, modern communications technology and the Internet required that the framework be updated. The three categories are:

- Print media (newspapers, books, magazines, pamphlets)
- Broadcast (television, radio)
- Common carriers (telephone, telegraph, and the postal system)

The first category has the strongest First Amendment protection. Although books have been banned in the United States and people were arrested for publishing information on certain topics such as contraception, the trend has been toward fewer government restraints on the printed word.

* An early (pre-Web) collection of Internet discussion groups.