

Freedom of Speech

Legal Analysis of Freedom of Speech

Jesse Russell

Eastern Michigan University

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Introduction

According to the First Amendment of the US Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This ensures that no citizen can be silenced for having a controversial opinion, practicing any religion, peacefully assembling, or expressing criticism of the US Government. The concept of this Amendment is deeply rooted in the fundamental set of ideas this country was founded upon: a set of ideas which guarantees the people’s right to be free from a government that oversteps their power. The First Amendment does not, however, protect all instances of speech as there are multiple caveats to what is defined as protected free speech. This paper will discuss these caveats in detail, as well as determine the Constitutional and statutory legality of Mr. George G. Porno’s (Option #1) business proposals.

The Legality of Hosting a Pornographic Website

George’s first proposal is to host a pornographic website, which will be home to numerous titles featuring explicit content that can be viewed by anyone that has internet access. This proves to be an interesting challenge to the First Amendment, as it asks the question: is obscenity protected under the First Amendment? According to *Roth v. United States* (1957), the Amendment was not intended to protect all forms of speech. The court ruled that obscenity does not serve a “redeeming social purpose,” and therefore is not protected by the Constitution. The case does, however, differentiate between sex and obscenity, with intent to provide a narrow scope of the ability to restrict obscene material and protect the safeguards of the First Amendment. In order to be declared obscene, the material in question must appeal to prurient interest, meaning the material must “excite lustful thoughts.” The official legal standard for declaring obscenity was eventually changed in *Miller v. California* (1973), which developed the three-pronged Miller test. In this test, a form of speech must fit three criteria to be considered obscene: 1) According to local community standards, an average person in that community would view the work as a

whole as appealing to prurient interest; 2) The work depicts sexual activity as defined by State Law; and 3) The work must not have any beneficial literary, artistic, scientific, or political value. Because this type of speech is not protected under the US Constitution, the states have the power to create their own laws regarding obscenity. This doesn't mean the government hasn't tried to pass legislation restricting obscenities, though. The next paragraph will discuss two pieces of federal legislation that were ruled unconstitutional because of this.

How does this standard change when the internet is involved? Because drafting legislation restricting obscenity mostly falls on the states themselves, the internet can introduce a tricky problem for enforcing these laws and statutes. Anyone, anywhere can access pornographic sites, virtually crossing state lines and rendering the states' jurisdiction essentially useless. The federal government attempted to take control of pornographic restrictions, passing the Child Pornography Prevention Act (1996) and the Child Online Protection Act (1998) - which were both ruled as unconstitutional in *Ashcroft v. Free Speech Coalition* (2002) and in *Ashcroft v. ACLU* (2002), respectively.

In George's situation, this probably would be considered obscene, and may be restricted if it were in physical form. According to the legal analysis above, hosting a pornographic site should be entirely legal, so long as there is no child or revenge porn. I recommend proceeding with this business proposal, as it doesn't seem to be breaking any law, and federally restricting consensual adult porn on the internet would be unconstitutional.

The Legality of Unregulated P2P Sharing Website

In George's second business proposal, he wants to host a paid P2P sharing website, in which users pay to use his service and in turn will be able to share content with others unregulated and unmonitored. This includes pornographic material, adult or child. In the age of the internet, it is vital for the ability to speak and share content freely to a public audience and friends/family. Section 230 of the Communications Decency Act (1996) protects this exact idea. According to this section, websites and ISPs cannot be held liable for what the users say and do on their platforms. Without this provision, any interactive computer service would have a strong incentive to monitor and regulate what users are doing

with their services in order to protect those companies from liability. It's because of this specification that websites like Facebook, YouTube, Reddit, and Twitter are able to remain places where people can express whatever they want. It should not be up to those services to play the role of censorship, and the internet must remain a free place. Section 230 was challenged in *M.A. v. Village Voice Media* (2011), which reinforced the protections for computer service providers. M.A. was a minor trafficked through an ad posted on Backpage.com, a site owned by Village Voice Media. The court ruled that Village Voice was not liable, because section 230 applied to this situation.

Due to this ruling, I suggest that George's proposal would be legally protected under section 230. George would not be liable, should any act of sexual exploitation occur on his website. There also doesn't appear to be any legal difference regarding the fact that this is a paid website, and not a free one. I suggest he go through with this proposal.

The Legality of Hosting a Revenge Porn Website

The final business proposal from George G. Porno is to host a website that he expects will have users upload revenge porn of their exes, and others, called "Revenge Porno." This proposal is a tricky legal battleground, because there are multiple laws that would apply in this situation. According Michigan Penal Code § 750.145e, a person shall not distribute any sexually explicit material of a person if that person is a minor, didn't consent, is identifiable, or has a reasonable expectation that the material would remain private. This law makes revenge porn illegal from the perspective of the individual. This code, however, does not apply to George because it explicitly states that Section 230 of the CDA is still applicable in regard to revenge porn. This means that George would probably be protected from hosting the site. This does not mean that he would be protected under all legal circumstances, however. There is a major legal issue with the premise of the website, and the motto calling its users to "get back at lying exes." According to the First Amendment of the Constitution, this constitutes a call to illegal action, which is explicitly unprotected speech. The Constitution is the law of the land, and I therefore would not recommend George go through with this proposal, as it may end up opening his business to severe and cost-heavy litigation.

References

U.S. Const. amend. I

Roth v. United States, 354 U.S. 476 (1957)

Miller v. California, 413 U.S. 15 (1973)

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002)

Communications Decency Act, 47 U.S. Code § 230 (1996)

M.A. ex rel P.K. v. Village Voice Media Holdings, LLC, 809 F. Supp. 2d 1041 (E.D. Mo. 2011)

Michigan Penal Code § 750.145e