

Regulating Hate Speech Content for the Internet: the Legal Jurisdiction Puzzle

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ARTICLE 19

There is a strong temptation generally to think of and to treat Internet communications in the same way that newspapers are thought of and treated. Of particular relevance to this Conference is that there is a temptation to hold Internet publishers legally liable for content they publish online whenever a newspaper journalist or editor would be liable for the dissemination of similar material.

In the context of hate speech, here is how it typically works for newspapers: if a newspaper reporter or editor writes or is otherwise responsible for the dissemination of material that has racist content, and if that content is in violation of hate speech laws in the country where the newspaper is circulated, the reporter or editor is typically liable for such dissemination under such laws. That is because, in the typical case, the newspaper does not make it into that country without the journalist's or editor's knowledge, and with their consent. In contrast, where a newspaper has found its way into a country without any such knowledge or consent – for instance, when it has been carried in by a traveler who bought it in a country where the material was perfectly legal – it is generally agreed that it would be entirely inappropriate to hold the journalist or editor liable for violating the former country's laws.

Similarly for the Internet, it is natural to think. However, the fundamental flaw with this reasoning is that, in the typical case, the Internet publisher has no control whatsoever over “where” content which they upload will eventually be downloaded. Absent sophisticated technology, which most Internet publishers have no access to, uploaded material may be downloaded, and read, anywhere in the world. This is a fact which virtually every Internet communicator is familiar with; indeed, it is one of the facts which make Internet so attractive.

What follows? For those who would treat Internet communications like newspaper publications, Internet communicators should be liable for any racist content they upload, in the event that it is downloaded in a place where the content is illegal under that jurisdiction's hate speech laws. A person uploading racially-charged material in the United States, for example, where it is legal, would be liable in Uzbekistan (or in France), if the material is downloaded there, if in fact that content violates hate speech laws there. This would effectively submit an innocent publisher – that is, a publisher who is fully in compliance with the laws of the country in which he or she is doing the publishing – to liability for that material in any country in the world, even if the laws in such country are in violation of international norms of freedom of expression.

One solution for this dramatic problem is to adopt a rule which stipulates that liability can attach to Internet publication only in the jurisdiction where the material has in fact been uploaded – the so-called upload rule. However, this rule may actually be too permissive, because it would apparently insulate persons from liability for uploading racially-charged material in a jurisdiction where it is legal (perhaps, having specifically sought out that jurisdiction to benefit from its attitude to racist material), even if they have taken great pains to ensure that the material is targeted to a particular jurisdiction where it is illegal. An alternative rule which would avoid this, but which would pose

problems of its own, would attach liability to the place of download, provided that there is a “significant connection” between the jurisdiction of upload, or perhaps the publisher, and the place of download.

Both solutions have their difficulties. But it is at least clear that, from the point of view of freedom of expression, a simple rule which mimics the newspaper rule, according to which liability may attach wherever material is downloaded, is simply unacceptable – particularly in light of the fact that differing jurisdictions have widely differing hate speech laws, and different definitions of hate speech, some of which are dramatically in conflict with freedom of expression.

Accordingly, ARTICLE 19 recommends the following:

1. THAT a simple download rule, according to which a person is liable for content wherever it is downloaded, provided that the material is illegal in the country of download, SHOULD BE REJECTED AS TOO RESTRICTIVE OF FREEDOM OF EXPRESSION.
2. In light of the potential for widespread liability for the publication on the Internet of speech which some, but not other, jurisdictions treat as illegal hate speech, THAT THE DEFINITION OF HATE SPEECH SHOULD BE NARROWLY DRAWN TO ENSURE COMPLIANCE WITH INTERNATIONAL STANDARDS.