

Hate on the internet and Terms of service

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by David Matas

Introduction

The internet is essentially a set of private businesses. Governments use and abuse the internet, but they do not control it.

Combatting governmental human rights violations runs up against the obstacles of sovereignty at home and sovereign immunity abroad. Private enterprise, in contrast, does not benefit from either sovereignty or sovereign immunity.

Non-democratic governments survive through repression. Asking repressive governments to end human rights violations is, in many cases, in effect, asking them to abdicate and hand themselves over to the authorities for prosecution, something they are understandably loathe to do. Asking private enterprises to respect human rights, while it presents other problems, does not pose that particular problem.

The illusion of the impossibility of combatting hate on the internet exists because of an assumption that the combat must take the form of legal regulation. Legal regulation of a global, borderless phenomenon is inherently difficult.

This assumption though ignores that regulatory means are far from the only or even the best means of combatting hate on the internet. Because the various components of the internet are essentially a set of private businesses, where a few big businesses play an important part, it is possible to be effective in combatting hate on the internet without recourse to legislative remedies at all.

The seeming formidability of challenging hate on the internet suffers from both over aggregation and unnecessary disaggregation. The very notion of the internet is an aggregation of a number of disparate phenomena. By over aggregation, we overstate the problem.

Instead of looking at combatting hate on the internet, we should focus on the specific facets of the internet - hate on websites, website links, chain mails, blogs, list serves, local area networks, spam, social networks, search engines and so on. If we look at the internet this way, the problem becomes more manageable.

The sense of impracticability in combatting hate on the internet comes from the seeming anarchy of the internet. Governments of states, bad as they are, are at least limited in number. When it comes to abuse of the internet, that abuse seems potentially to be open to everyone everywhere. So, how can we reasonably expect to do anything about that?

The answer is that the notion of the internet as all individuals with access to the internet everywhere is mistaken, an illusion, an unnecessary disaggregation. Every person gets access to the internet through an intermediary.

If a person uses e-mail or website, the person is using an internet service provider, an ISP. Every internet service provider gets access to the internet through a connectivity provider. At the pinnacle of the chain of connectivity are a few companies connecting with each other.

If the person uses social media, the person is relying on a social media link. Facebook, Twitter, YouTube and LinkedIn are the best known examples.

Every person, every ISP, who accesses the internet agrees to contractual terms for that access. Violate those terms and the access can be denied.

Terms of service contracts between ISPs and internet users have become standardized. Many ISPs join associations of their peers with common principles. While there are many actors in the internet, it is mistaken to suggest that impacting on incitement to hatred on the internet requires dealing with every single individual on the planet.

Legal regulation is national, territorial. Impacting on the internet through legislation means enacting laws country by country.

Many of the internet businesses are multinational, straddling many borders. When even one of these big companies adopts and applies a no hate policy, the effect can be global.

In the United States, the First Amendment to the constitution, the guarantee of freedom of expression in the Bill of Rights, has inhibited legislators from enacting anti-hate speech laws. The Bill of Rights precedes, by far, the Holocaust and the development of the modern human rights sensibility. The US constitution has embedded in it the right to freedom of expression but not the right to freedom from incitement to hatred and discrimination.

The result is that in the US one human right, freedom of expression, sits in judgment of another human right, the right to freedom from incitement to hatred and discrimination. In principle, there should be no hierarchy of human rights. The US constitution, because it is so old, creates an artificial hierarchy.

Private businesses, even those located in the US, avoid this constitutional hierarchy. The US constitutional guarantee of freedom of speech can limit the scope that legislators have to enact anti-hate legislation. However, the guarantee applies to governments and legislatures only and not to private businesses.

Private businesses can, should, and often do incorporate modern human rights standards into their terms of service. By incorporating both the right to freedom of expression and the right to freedom from incitement to hatred and discrimination in their terms of service, they avoid the peculiar US constitutional problem where the First Amendment is not just first in time, but also first in place.

Standards

Terms of service of internet businesses have a number of features in common. For one, they typically contain prohibitions against hate.

i) Social networks

Facebook, for instance, has as one of its terms of service that "You will not post content that: is hateful ..."¹. YouTube Community Guidelines provide: "we don't permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity)"². LinkedIn has a list of Do's and Don'ts. One of the Don'ts is "Upload, post, e-mail, InMail, transmit or otherwise make available or initiate any content that... is ... discriminatory..."³. The MySpace terms of use agreement under the heading "Content/Activity prohibited" states "prohibited content includes but is not limited to content that in the sole discretion of MySpace: ...promotes or otherwise incites racism, bigotry, hatred or physical harm of any

¹ <<http://www.facebook.com/terms.php>> Term 3, Safety, paragraph 7.

² <http://www.youtube.com/t/community_guidelines> fourth bullet under the heading "Don't cross the line".

³ Section 10 B. 8 b.

kind against any group or individual."⁴

ii) Wireless networks

The Boingo acceptable use policy provides that users agree not to use the service "to transmit any information or written, graphic or photographic material... that is... hateful or racially, ethnically or otherwise objectionable."⁵ The T-Mobile HotSpot terms and conditions states that "you agree not to use or attempt to use the Service, the T-Mobile network or website or your Device [for]...Posting, transmitting content that is...hateful..as determined in our sole discretion."⁶

iii) Internet Service Providers

Yahoo! terms of service provide under the heading "Member Conduct" that "you agree to not use the Yahoo! Services to: upload, post, email, transmit or otherwise make available any Content that is ...hateful, or racially, ethnically or otherwise objectionable."⁷ The internet services terms and conditions for MTS Allstream, which is my ISP, provides under the heading "Your responsibilities": "You represent, warrant and covenant to MTS that you shall not:...use the Services to upload, use, transmit, distribute or store:... anything that...is likely to expose a person to hatred or contempt."⁸ The Code of Conduct for MSN and Windows Live provides under the heading prohibited uses "You will not upload, post, transmit, transfer, distribute or facilitate distribution of any content (including text, images,

⁴ Section 8.

⁵ Section 16 b. i.

⁶ Section 5 "Use of Service".

⁷ Section 6 a.

⁸ Section 5

sound, video, data, information of software) or otherwise use the service in a way that...incites, advocates or expresses...hatred, bigotry, racism".

iv) Markets

E-Bay prohibits "offensive material - examples include ethnically or racially offensive material and Nazi memorabilia"⁹. E-Bay has a detailed offensive material policy.

Craigslist terms of use under the heading "conduct" provide "You agree not to post, email, or otherwise make available content: ... that ... is hateful toward an individual or group of individuals on the basis of ... race, ethnicity..."¹⁰

v) Wikis

Wikipedia has as one of its conduct policies, no personal attacks. In answer to the question "What is considered to be a personal attack?", Wikipedia writes: "There is no rule that is objective and not open to interpretation on what constitutes a personal attack as opposed to constructive discussion, but some types of comments are never acceptable: • Racial ... religious ... ethnic ... epithets ... directed against another contributor. Disagreement over what constitutes a religion, race ... or ethnicity is not a legitimate excuse."

vi) Omissions

This prohibition against incitement to hatred is common, but not uniform. It is not, for

⁹ Prohibited and restricted items.

¹⁰ Section 7(c)

instance, found in the Gmail program policies. Nor can I see it in the Twitter Rules and Best Practices. The Huffington Post Community and Commenting Guiding Principles has nothing specific about hate speech.

The terms of service which include a provision prohibiting the use of the service to incite hatred are preferable to those which omit such a provision. Given the fact that such terms of service are widespread, there can be no objection in principle to the inclusion of such a term of service.

1. Recommendation One: All internet businesses accessible to the public should have as part of their terms of service a prohibition on the use of the service to incite hatred.

As one can see, the manner in which the prohibition against hatred is expressed varies considerably. Some formulations are precise. Others are vague. Precision is preferable.

In particular, the prohibition against anything that is hateful, a common formulation, is overbroad. We should be concerned about incitement to hatred. An expression that manifests hate or which the service provider finds disgusting but does not incite to hate should be acceptable.

2. Recommendation Two: Terms of service should be clear and specific, prohibiting incitement to hatred, rather than vague and general, prohibiting content which is hateful.

An objective standard

It is quite common to see in terms of service a provision that the determination whether something meets the standard set out is to be made "at the sole discretion" of the service provider. Enforcement of the standard then is subjective. There is no claim of objectivity.

The contract rather leaves it to the service provider to determine whether the term of service has been violated.

For instance the Facebook Platform Policies states "We take enforcement action against you and any or all of your applications if we determine in our sole judgment that you or your application violates Facebook Platform Terms and Policies."¹¹ Yahoo! Terms of Service provide that "all terminations, limitations of access and suspensions for cause shall be made in Yahoo!'s sole discretion..."¹² Craigslist also use the phrase "in its sole discretion"¹³.

Ideally, enforcement should be objective. What should be prohibited is something which objectively incites to hate, not something which in the unchallengeable, subjective view of the service provider amounts to hate.

The exercise of the sole discretion criterion can go too far as well as not far enough. We have seen in Canada complaints against material for incitement to hatred which was later found not objectionable. The very process caused problems. Even worse would have been a subjective finding that that the material amounted to incitement to hatred when objectively it was not.

I am referring to an excerpt from the book by Mark Steyn, *America Alone: The End of the World As We Know It*¹⁴ published in Maclean's magazine. A BC Human Rights Tribunal and the Canadian Human Rights Commission found that the excerpt did not expose Muslims to

¹¹ Policies V.

¹² Section 15

¹³ Section 13

¹⁴ New York, NY, Regnery Pub., 2006

hatred or contempt on the basis of their religion¹⁵.

Yet, an earlier Ontario Human Rights Commission statement, after concluding that the Commission did not have jurisdiction to deal with the complaint, nonetheless accused the Maclean's excerpt of the Steyn work of "portraying Muslims as...being a threat to the West" something it did not do¹⁶. This is then a situation where a subjective and objective judgment could have easily diverged.

3. Recommendation three: The phrase "in the sole discretion" of the service provider and variations on it found in terms of service agreement relating to the enforcement of the prohibition against incitement to hatred should be dropped.

An obligation

The terms of service agreements give the provider of the service the power to act against incitement to hatred, but not the obligation to do so. This necessarily follows when the service provider is given the sole discretion to determine whether any material is incitement to hatred.

However, even those terms of service which do not use the sole discretion phrase impose no obligation on the service provider to act. None of the terms of services promises customers that the service will not be used for hate promotion. All the obligation falls on the customer not to use the service for that purpose.

So the obligation is one sided, asymmetrical, enforceable only by the service provider and

¹⁵ Elmasry v. Rogers 2008 BCHRT 378 October 210, 2008,

¹⁶ For an elaboration, see David Matas "Hate jurisdictions of Human Rights Commissions" at the B'nai Brith Canada website.

not the customer. Craigslist is explicit about this stating that it "has the right (but not the obligation) to delete or deactivate your account"¹⁷.

For some internet services, customers pay. Others are free. Even free services should meet community standards. When customers pay, they should have the power to say that this is part of what they want for their payments.

4. Recommendation four: Terms of service should commit both parties not to have the service used for promotion of hatred. The obligation should fall on the service provider and not just the customer, ideally for all services, but especially for paid services.

Typically, service providers give an address and a form for reporting, but that is it. Yahoo! for instance states in its Terms of Service states "Please report any violations of the TOS to our Customer Care group."¹⁸ If you click on "customer care" you are offered a choice of different categories for reporting. Each has a form to fill out online and send to Yahoo!.

Even if there is no obligation to enforce compliance with the acceptable use provisions, there should at least be a commitment to make a reasonable effort to investigate complaints. The Canadian Association of Internet Providers commits its members to make reasonable efforts to investigate legitimate complaints. That commitment should be included in terms of services.

5. Recommendation five: Service providers should commit to making reasonable efforts to investigate legitimate complaints.

¹⁷ Section 13

¹⁸ Section 28

The right to know the complainant

It would seem basic to a respect for human rights that a person should not be asked to answer anonymous accusations. Canadian Privacy Commissioner John Grace, in his testimony before the Standing Committee on Public Accounts on December 12, 1989, stated that one of the rights conferred by the Privacy Act:

"is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless."¹⁹

Yet, there is nothing in the terms of service agreement preventing the pursuit of anonymous complaints. The source of a complaint need not be disclosed to the target of the complaint.

B'nai Brith Canada was the victim of faceless accusers. In February 2004, Shahina Siddiqui filed a complaint against B'nai Brith Canada with the Manitoba Human Rights Commission for sponsoring a presentation in October 2003. The seminar, she claimed, was biased against Muslims.

Shahina Siddiqui herself was not present at the Winnipeg seminar but based her complaint on what she had been told about the seminar. The evidence of the alleged violation came from sources who were never disclosed to B'nai Brith. After five years of Commission investigation, the complaint, in March 2009, was dismissed.

Service providers might be concerned that such disclosure would violate their privacy

¹⁹ Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, Issue No. 20 (12/12/89), at p. 10

policies. These policies do not explicitly deal with this situation. They could, stating that, if you make a complaint, the existence of the complaint will be disclosed to the target of the complaint.

Disclosing the identity of a complainant may, in some circumstances, endanger his or her safety. If that is the case, the identity should not be disclosed. Otherwise, it should be.

6. Recommendation six: Terms of service should require that those who make a complaint be identified to the target of the complaint. There should be an exception where there is a serious possibility that the safety of the complainant will be endangered by disclosure of his or her identity.

Right to know the abuser

Many, if not most internet abusers, act anonymously. They hide behind the anonymity. If a complaint is determined to be well founded, the obligation to protect privacy should disappear. Loss of anonymity could and should be a price to be paid for promoting hate on the internet. The identity of the abuser should be disclosed to the complainant and, if there is a question of violation of legal standards, the law authorities.

7. Recommendation seven: Where a complaint is determined to be well founded, terms of service should indicate that the identity of an abuser will be disclosed to the complainant.

Process

Complaints systems are rudimentary. Once a complaint is made, the terms of service agreements are silent on what happens to the complaint. There is more or less nothing in the agreements about process. There should be. Some basic procedural safeguards

should be inserted. Without setting out a complete procedural code, I suggest a few principles.

i) Notification

If someone makes a complaint about violation of the terms of service, it just disappears into a void. There is no obligation to report back on how the complaint was decided, even if it was accepted and action was taken. There should be.

E-bay says "because of our privacy policy, we can't share any specific action we take about the listing." So a person may complain, and E-bay may remove the listing as a result of the complaint. However, the complainant would never know. The complainant would see that the listing is gone. But the complainant would not know whether it was e-Bay or the lister who removed the listing.

An examination of the E-bay privacy policy does not show an explicit reference to the situation. The privacy policy does not say that, should action be taken against you for violation of the terms of service, that action will be kept private.

In any case, there is no obvious justification for such a privacy policy. On the contrary, the terms of service could be easily changed to notify customers that violation of terms of service will not be kept private.

Moreover, not every service provider communication of a remedial action is a violation of privacy, because not every person who violates the terms of service does so in a publicly identifiable way. Some abusers mask their identities. Disclosing the ending of the abuse does not inevitably disclose the identity of the abuser.

8. Recommendation eight: Complainants should be notified of the disposition of their

complaints.

ii) An opportunity to respond

Second, the target of the complaint should be given notice of the existence of the complaint and a reasonable opportunity to make representations before a decision is made. The target should not just be informed out of the blue that the service provider has found there to be a violation of the terms of the service.

There will be complaints so frivolous that they can be dismissed out of hand, without notice to the target of the complaint. However, where the service provider is seriously considering the complaint, where there is a real possibility that the complaint will be accepted, the target of the complaint should be notified with an opportunity for response. The Canadian Association of Internet Providers code of conduct provides: "Prior to taking any action, upon receipt of such complaints CAIP members will:...notify the content provider or abuser of the complaint, with a request for a response within seven days."²⁰

Some abuses are so troubling that service providers should be able to act immediately. The service provider should have the power to take interim remedial measures pending ultimate disposition of the complaint. If the complaint is determined to be ill founded, the interim measures can be lifted.

9. Recommendation nine: The target of a complaint should be notified when a complaint is being considered and given an opportunity to make submissions before the complaint is decided. The service provider should have the power to take interim remedial measures pending disposition of the complaint.

iii) Disclosure

²⁰ Section 7

The service provider, when disposing of a complaint, in addition to disclosing the complainant to the target of the complaint, should be disclosing any material being considered in disposing of the complaint. The target of the complaint should know what the service provider is considering when disposing of the complaint.

10. Recommendation ten: The service provider, when disposing of a complaint, should disclose to the target of the complaint the materials which would be considered in the disposition of the complaint.

iv) Reasons

The disposition of a complaint should be accompanied by reasons. Reasons allow for the development of a body of precedents, a jurisprudence, a set of examples. Reasons provide guidance to others about what to do and not to do. For both the complainant and the target of the complaint, reasons show that what they said in support of their positions was taken seriously.

11. Recommendation eleven: The disposition of a complaint should include reasons.

Remedies

The typical remedies for violation of the terms of service are suspension or termination of the service. Although Google does not refer specifically to hate speech, the service has a wider range of remedies. Google "reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse or remove any or all content from any service."²¹ T-Mobile similarly states "We may, but are not obligated to, in our sole discretion, and without notice, remove, block, filter or restrict by any means any materials or information (including but not limited to emails) that we consider to be actual or potential

²¹ Section 8.3

violations of the restrictions set forth in these T&C's".

12. Recommendation twelve: Service providers should provide as remedies, in addition to suspension of suspension of termination of service for hate speech, the possibilities of flagging, filtering, modifying or refusing the material.

Conclusion

Any legal remedy is content neutral. Whether it is used or abused depends on the precision of the standards and the process in place. With terms of service for internet businesses against hate incitement what we see is vague standards and non-existent procedures. This lack of detail can make it difficult for sound complaints to be accepted and unfounded complaints to be rejected.

Invoking private remedies for hate on the internet sidesteps both the hate/free speech debate and the territorial limits of national jurisdictions. However, if standards remain vague and procedures non-existent we will substitute one set of problems for another. Internet businesses, in order to dispose effectively of complaints of abuse of their businesses by hatemongers, need more precision about both standards and procedures than they have now.

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David Matas is co-chair of the Online Antisemitism Working Group of the Global Forum for Combating Antisemitism. He is a Winnipeg, Manitoba, Canada lawyer and senior honorary counsel to B'nai Brith Canada.