Freedom of Speech Issues Cheat Sheet

Description. This handout summarizes principles, laws, frameworks and perspectives that can help in navigating freedom of speech issues, especially as they apply to computing technology. All of these are discussed in Chapter 3 of the text, which is excerpted and paraphrased below. Use this handout as you consider the freedom of speech case studies explored in class, and also as you consider current events.

Framework for First Amendment Protection (p. 145)
The First Amendment divides communications media into three broad categories:

- Print media (newspapers, books, magazines, etc)—Strongest First Amendment protection
- Broadcast (TV, radio)—Weaker First Amendment protection, because of a traditional scarcity of broadcast frequencies
- Common carriers (telephone, postal system)—prohibited from controlling content, and must be available to everyone

Free Speech Principles (pp. 147-148)

- First Amendment is a restriction on the power of government, not individuals or private businesses
- Laws that compel people to avoid legal speech are said to have a “chilling effect”; ones with significant chilling effect are unconstitutional
- There’s a tradition of treating advertising as “second class” speech that is subject to more restrictions; however, recent court cases go against this tradition
- When the government pays for an agency, service, or when it owns a communications system, it can choose to restrict speech that would otherwise be constitutionally protected.

What Speech Isn’t Protected? (pp. 150-151)

- Miller v. California Supreme Court Case (1973) established three standards for identifying obscene speech, which is not protected by the First Amendment:
  - It depicts sexual or excretory acts whose depiction is specifically prohibited by state law
  - It depicts these acts in a patently offensive manner, appealing to prurient (i.e. having/encouraging an excessive interest in sexual matters) interest as judged by a reasonable person
  - It has no serious literary, artistic, social, political, or scientific value
- Individuals who have posted materials on the Internet that do not meet the above standards in their own state have been successfully convicted of a crime in another state from which the material was accessed, and in which the material did meet the above standards.

Communications Decency Act (CDA) of 1996 (pp. 151-153)

- Anyone who made available to a minor (under 18) an obscene or indecent communication would be subject to a fine of $100K and two years in prison.
- In 1997, the Supreme Court unanimously ruled that it was unconstitutional on two grounds: it was too vague and broad (“obscene, lewd, lascivious, filthy, or indecent” are not well defined), and it did not use the least restrictive means of accomplishing its goal to protect children (filtering software would accomplish the goal and be less restrictive).

Child Online Protection Act (COPA) of 1998 (pp. 154-155)

- Made it a federal crime for commercial websites to make “harmful” material available to minors as judged by community standards. Sites with “harmful” material would need to get proof of age from visitors. Fines would be $50K and six months in jail.
A permanent injunction against enforcement of COPA was issues in 2007 on the grounds that (a) the “community standards” provision would restrict the entire country to the standards of its most conservative community, (b) requiring adults to provide identification would have a significant “chilling effect”; and (c) less restrictive means—internet filters—could accomplish the goals of COPA.

**Children’s Internet Protection Act (CIPA) of 2000 (pp. 111-112)**
- Requires schools and libraries that obtain certain federal funding to install filtering software on all of its Internet terminals to block child pornography, obscene material, and material “harmful to minors”
- Libraries must disable filtering software if an adult requests that it be disabled for his/her use.
- Avoided problems with CDA and COPA by focusing on establishing conditions for receipt of federal funding, agencies and programs

**SPAM (pp. 160-165)**
- SPAM is “unsolicited bulk e-mail.” Billions of spam messages are received per day worldwide.
- Most arguments to forbid SPAM go against the First Amendment
- Only one argument prohibiting SPAM has been valid in court: SPAM uses recipient company’s property and causes financial loss to the company. This applies to *commercial* SPAM operators that send enough volume to actually cause financial damage.
- SPAM filters can address the problem. Other solutions have been proposed, including a “challenge-response” system (which requires the sender to “click to respond” in order for the e-mail to be delivered to the recipient), and imposing a fee on sending e-mail.
- The federal CAN-SPAM Act (2004) regulates commercial SPAM by requiring certain labeling conventions, opt-out provisions, and methods for generating e-mail lists.

**Emergence of Internet Commerce Challenged Old Regulatory Structures and Special Interests (pp. 166-167)**
- In 1997, publishers of online newsletters and websites about investments were found to be in violation of a regulation requiring government licensing. The regulation was designed to affect people, but was applied to websites and newsletters. This led to the regulation being ruled a violation of the First Amendment.
- In 2005, as a result of the emergence of the web, the Supreme Court ruled that bans on out-of-state shipments were unconstitutional; state laws cannot discriminate against sellers in other states.

**Sensitive Material and the Internet (pp. 167-169)**
- Large companies such as Yahoo have been criticized for censorship when they have made decisions not to sell a legal product. Just because material is legal does not mean that a company, however large, has an obligation to sell it.
- Individuals should exercise responsibility and discretion when creating websites with sensitive information, or when posting sensitive information to websites.

— More to come —