

POLICING THE INTERNET: *JAKE BAKER* AND BEYOND

March 9, 1995

DANIEL WEITZNER'S OPENING STATEMENT

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DANNY WEITZNER:

Thank you.

I have to confess. I walked into this room, and I thought to myself, what in the world are all of you people doing here. It's perhaps because I've gotten used to over the last couple of years working on issues that are generally somewhat obscure.

I want to say in all seriousness that I -- it is striking and somewhat humbling to walk into the middle of a situation, even though we're being -- we're delicately skirting around the issue that I imagine is really on everyone's mind.

It is humbling to walk into the middle of a situation, clearly charged with a lot of passion on both sides.

For some of those of us up here who spend most of our time writing amicus briefs or giving Congressional testimony at a distance from a lot of these problems, it's -- this feels like a substantial task.

So I hope that what I have to offer can put some perspective on this. I don't pretend to offer the solutions to the passions on all sides of this issue.

What I want to do is to talk really more about the technology. I will, since we're in a law school, talk a little bit about the law, but the fact of the matter is, there ain't much law here. I don't mean in this school, I mean in this issue.

(Laughter)

DANNY WEITZNER:

That's other law schools I know of.

I want to really make two broad points about what I think are important fundamental characteristics of interactive media. When I talk about interactive media, I really mean everything from the Internet to the commercial on-line services such as Prodigy and America On Line and the other local BBS's, local electronic bulletin board systems, that are in use all over the country and all over the world and many of the so called interactive television systems that are gradually being built in communities all over the country.

It's my belief that these media taken together, lumped under the rubric of interactive media, are fundamentally different in two important respects than today's mass media and that those

differences have very important implications for the way that we understand the First Amendment with respect to this medium.

The two characteristics that I want to highlight are first that this medium really is more characterized by abundance than by scarcity. The history of mass media regulation, I won't belabor it, because those of you who are interested in it, know it, and those of you who are not interested in it, don't need to hear it all.

But the history of mass media has always been plagued by the problem of how to allocate scarcity, how to allocate scarcity in order to have some semblance of diversity of information available to the public for political purposes, for cultural purposes and to in some way reflect the values and sentiments and thoughts and feelings of communities.

I think it's safe to say that with respect to mass media, that's been a relative disaster and there are a lot of reasons for that, but I think that it really has not worked very well. You look at what's on television today, what's on the radio today, and more people seem to feel unrepresented by it than represented by it.

In interactive media, there is the possibility of really supplanting scarcity with abundance. Any of you who have used the Internet know that there ain't no such thing as a channel on the Internet. Well, there may be, but it's a whole different kind of thing than a TV channel.

That there really could be an essentially unlimited number of information providers on the Internet and that your participation as an individual user on the Internet makes you essentially as much an information provider as an information user or receiver.

And this has a whole number of implications for the way that we understand how the First Amendment ought to respond to this medium.

Secondly, in addition to the fact that there are no channels, interactive media, I believe, is characterized by substantially lower barriers to entry than the mass media.

On the Internet there is no gate keeper that is the equivalent of a cable company. Certainly there is no gate keeper that is the equivalent of John Malone who really controls the program and controls the information that an enormous proportion of American households have access to over cable systems.

There are no gate keepers on the Internet. This has its downsides, as well, but it is a fact of that interactive media.

Secondly, the cost of being an information provider in interactive media is really, I think, orders of magnitude lower than in mass media.

I've had a somewhat personal experience with this having just started a new organization, which has advocacy goals, which needs to reach people which needs to evangelize and proselytize about ourselves and our issues.

We have attracted some modest amount of attention in really only about two months in a way that I think would be simply impossible without the medium of the Internet. We've done it without having to spend very much money and the expertise that we have had to have is low.

I think that this is important, because it really provides many parts of this society with access to what Foucault might call the technologies of cultural production. People who do not have access to mass media today as producers of content and producers of information can have access to the culture, to the politics and the discourse that is created on the Internet today.

I don't want to be misunderstood as saying that somehow today 250 million people have access to the Internet. Certainly in this country, and obviously only a very small percentage of the world population has access to this medium. That poses very significant policy questions that I think we have to deal with. But the potential of abundance, of the end of scarcity and of low barriers to entry is really there.

The second important characteristic I think of interactive media is the control that it provides to users.

Someone pointed out to me that when people talk about cable TV viewers they're generally described as consumers. They're people who buy things. That's how most mass media think of -- most people who own and operate mass media think of their audience, they are consumers.

Interestingly enough, for whatever reason, people who use the Internet are generally referred to as users. And user generally, with the positive connotation of that term, on the Internet we have much more latitude to use information, to access information, in ways that we as individuals choose to.

Let me give you a few examples, and this is -- I think that this phenomena of user control is quite relevant to some of the discussions going on about the possible regulation of indecency and other controversial content.

In many cases, people who use particular kinds of interactive media today have the ability to control for themselves, and also for their children, if that's relevant, the kind of information that they have available to them.

Just as an example, on America On Line today, if you as a parent subscribe to America On Line and want to give your children access to that service, you can control the parts of that service that your child uses. You could say to your child, you can set up the system in such a way that your child has access to certain discussion groups, to certain kinds of information, to certain information areas, and does not have access to other areas that you consider to be inappropriate.

Another example, which is in development now in the realm of interactive cable television companies like TV Guide are developing what are called electronic program guides. TV Guide's is called TV Guide On Screen.

And as those of you who look at TV Guide or other TV listings know, that the people who put together these listings today, in print, tend to offer descriptions, categorizations of the programming. Not only do they tell you what time the program is on, and what channel, and

who's on the show, and give you a summary, they may put a little "v" or a little "n" or a little "s" or any number of other designations that describe the content of the particular program.

Well, the electronic program guides that are being developed for interactive cable television today, enable the users, the people at the end of the wire, to block out programming based on those designations. There is the potential also, that there could actually be multiple rating systems so that if one person decided that they trust TV Guide to determine which programs are sufficiently controversial, for whatever reason they don't want their kids to watch them, they can block based on the TV Guide rating. If they like their local newspaper's rating better, they can block automatically based on those ratings.

So, in these ways, users of interactive media have an enormous amount of control over their interaction with the medium, as compared to today's mass media.

Let me just, very quickly, talk a little bit about law. Very simply, and I'm sure we'll discuss this more. This means that in interactive media, we are not in the world of *Pacifica* [*FCC v. Pacifica Foundation*, 438 US 726 (1978).] We are not in the world where the Supreme Court decides that the seven dirty words can not be said on the radio, because people need to be shielded from being assaulted by those seven dirty words.

There is not the possibility in interactive media, as there is in radio that you may just spin the radio dial and come upon George Carlin's, "Seven Dirty Words." That doesn't happen in a medium where people really have control over the content they receive.

Secondly, we're not in the world of *Sable* [*Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829 (1989).] *Sable* is the case that established the Constitutional parameters for the regulation of audio tech services, 900 number services.

The Court there, made a factual finding that these services were uniquely intrusive on people's homes, and that parents did not have the ability to control their children's access to this information that might be harmful to their children.

It was that factual finding of lack of control that was important in the Court's decision about those rulings.

So abundance and user control are important characteristics of this new medium and I hope we can talk about them more.

Thank you.

LOWENSTEIN: Catharine MacKinnon?