

Your Speech is As Free As Your ISP Wants it to Be: Intermediaries and Free Speech Online

By Cindy Cohn

Cyberspace has proven to be, as the Supreme Court predicted, "the most participatory form of mass speech yet developed." Yet because nearly all speech online exists at the pleasure of intermediaries like internet service providers and online service providers like Blogger, YouTube or Facebook, protection of those entities has proven critical to ensuring continued free speech online. How have we done? For ordinary garden variety defamation and other state and federal claims, the Communications Decency Act provides broad protection, but that is under some scrutiny and scaling back with cases like Roommates.com. For copyright claims, the DMCA provides a "notice and takedown" regime that changes the balance significantly, resulting in less protections for speech accused of copyright violations. For federal trademark claims, the lack of any protections for intermediaries changes the balance further away from free speech protection. Across all claims it becomes clear that the level of "free speech" that we enjoy online protection is closely correlated to how well we protect intermediaries.