Unnecessary legislation

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Guest Columnist

They had not yet been introduced before two bills in the state House of Representatives that would affect blogs caused the South Dakota "blogosphere" to erupt. Positions were quickly staked out on whether the First Amendment was in peril. Yet constitutional analysis isn't necessary. The perennial Pierre adage "if it ain't broke, don't fix it" is enough to reject these or similar measures.

House Bill 1277 would allow someone to name "the online content provider" in a defamation lawsuit in order to obtain information about the identity of who posted the defamatory material. The online content provider would have 30 days to provide any such information "reasonably available and kept in the normal course of business" and is entitled to be dismissed from the lawsuit once it has done so. The provider is not liable solely by virtue of being an online content provider.

House Bill 1278 requires anyone who allows Internet posts to keep a record of Internet Protocol (IP) addresses adequate to identify and locate "otherwise unknown, anonymous or pseudonymous persons who leave or upload content." A specific showing and a court order are necessary to compel production of the information.

The prime sponsors of the bills — Rep. Noel Hamiel and Sen. Nancy Turbak Berry — indicated the aim is to allow people defamed by anonymous or pseudonymous Internet postings to identify the posters. Certainly, there is no legal right to defame someone and while the First Amendment imposes some limits on defamation law, actions for libel or slander do not alone violate the First Amendment. But the flaws in these bills are as much practical as anything.

South Dakota already allows what is known as a "John Doe lawsuit." A lawsuit based on an anonymous Internet posting can name John or Jane Doe as the defendant and the plaintiff can then subpoena the information covered by HB 1277. A new procedure applicable only to online content providers doesn't eliminate any First Amendment issues or the cost of litigating them. Why name a blogger as a defendant in a lawsuit — a matter of public record — when a method already exists to do what HB 1277 seeks? Unless and until someone can show John Doe lawsuits can't or won't work in this context, there is no reason for HB 1277.

While House Bill 1278 arguably makes it more difficult for someone to obtain the information it covers, it is impossible for bloggers to comply. All an IP address really provides is the name and location of the Internet service provider to which the address is assigned. Only the ISP knows what customer had a particular address at any particular time — and even it doesn't know whether dad, mom, son, daughter or grandma were using the computer at the critical time.

Thus, HB 1278 requires IP records "adequate" to accomplish the impossible. Where should a blogger obtain the nonexistent software or services to comply with the law? Even if such methods existed, are bloggers required to neutralize so-called anonymizer products and services that mask or give false IP addresses? If bloggers will automatically be in violation of the law, then the fear they will shut down comments all together is not imaginary.

In practice, these bills or others with the same aim seek only to make unnecessary or impossible fixes to things that aren't broken. That's a matter of common sense, not constitutional law.

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