MECHANICS

1. CLASS MEETINGS. The course will meet every Tuesday from 6:30 to 8:30 in Room 103. The first class will meet on January 9, and the last class will meet April 30. Pursuant to University regulations, there will be no class January 16 or March 5. The final exam will be Tuesday, May 14, at 6:30.

2. PREREQUISITES. There are no required prerequisites other than the completion of the first year core courses. Those students who have taken courses in Intellectual Property or the First Amendment portion of Constitutional Law will find special insight. No prior online experience is required; however, I expect that substantive online exposure (either before or during the course) will be required to fully understand the course materials.

3. GRADING. The course will be graded on a final exam. The final exam will be 2 hours long and will consist of 2-3 questions, primarily focusing on practical business applications of the material discussed in class. A set of sample questions is included at the end of the reader.

4. PAPERS. Cyberspace law is a wonderful topic to write scholarly or practical papers about and to see those papers published. Although the supply/demand equation is slowly approaching equilibrium, there remains plenty of opportunity for creative, well-written papers to carve out a niche. I am happy to help students seeking to express their ideas within the parameters of my time constraints and University regulations, which restrict me from acting as a formal advisor to more than 3 students. I have included a list of possible topics in the reader, and I have many resources that would help initiate a research project.

5. EMAIL. Any student who has not already done so should obtain an email address through the Computing Center. The course will have its own listserv for intra-class discussions. I encourage all of you to act as "smart agents" for the rest of the students and post appropriate material to the listserv (watch for copyright infringements!). Individual inquiries to the professor should be sent to the professor's email address, not the listserv.

6. PROFESSOR CONTACT INFORMATION.

Eric Schlachter, Esq.
(415) 843-5154 (direct)
(415) 857-0663 (fax)
eschlach@netcom.com (I check this account 2 times per day)
READING MATERIALS

Required: Course reader

THE MATERIALS INDICATED WITH A STAR [*] CONTAIN LANGUAGE OR TEXTUAL DESCRIPTIONS THAT SOME MAY FIND OFFENSIVE. PLEASE CONSULT WITH THE INSTRUCTOR IF YOU ARE CONCERNED OR HAVE ANY QUESTIONS.

1. INTRODUCTION TO CYBERSPACE. (January 9)


Recommended
Cavazos & Morin, Chapter 1.

2. JURISDICTION AND VENUE. (January 23)

U.S. v. Robert Thomas, portions of Brief of Appellant on Appeal from the US District Court for the Western District of Tennessee. P. 45.
Minnesota Office of the Attorney General, Memorandum regarding Internet Jurisdiction (July 1995). P. 68.

Recommended

Scheduled speaker: Thomas Nolan, appellate attorney for Robert Thomas.

3. ACCESS, EDITORIAL CONTROL, AND SYSPOL LIABILITY. (January 30 - February 20)

NetLaw, Chapters 1 and 4.
Publisher Law

Communications Law

Private Property

Public Forums
Recommended: ISA's Amicus Brief in Stratton Oakmont case (June 1995). P. 220.
Firm to Drop Suit Against Prodigy, SAN JOSE MERCURY NEWS, October 25, 1995 at 3C. P. 229.


Recommended
Eric Schlachter, Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions, 16 HASTINGS COMM/ENT 87 (1993) (see http://www.eff.org/pub/Legal/cyberlaw_bbs_free_market.article). [Not included in reader]

Scheduled speaker on February 20: Lisa Gerhauser, General Counsel, Hotwired.

4. SPECIAL ISSUES IN DEFAMATION. (February 27)

Reread Cubby v. CompuServe, Stratton Oakmont v. Prodigy, It's In the Cards v. Fuschetto.
5. Obscenity, Pornography and Child Pornography. (March 12)

NetLaw, Chapter 8.


Recommended
NetLaw, Appendices G and H.
Cavazos & Morin, Chapter 6.

6. Intellectual Property. (March 19 - April 2)

NetLaw, Chapter 3.
Reread Playboy v. Frena, Sega v. MAPHIA, Religious Technology v. Netcom. Also, read U.S. v. LaMacchia (below).


Recommended
Terry Carroll, *Copyright FAQ* (see http://www.cis.ohio-state.edu/hypertext/faq/usenet/Copyright-FAQ/top.html) [not included in reader]
IITF White Paper (September 1995) (see gopher://ntiant1.ntia.doc.gov/00/papers/documents/files/ipnii.txt) [not included in reader]
Cavazos & Morin, Chapter 4.
7. TRADemarks AND DoMaiN NAMES. (April 9)


8. PRIVACY, ANONYMITY AND TRANSACTIONS. (April 16)


Digital Personas

Transactions

Recommended
Cavazos & Morin, Chapter 2 (privacy).
Cavazos & Morin, Chapter 3 (transactions).

9. FOURTH AMENDMENT/ECPA. (April 23)

NetLaw, Chapters 5, 6 and 7.
Affirmed 36 F.3d 457 (5th Cir. 1994). P. 445.

Recommended
NetLaw, Appendix B.

Scheduled speaker: Mike Godwin, Online Counsel, Electronic Frontier Foundation.

10. COMPUTER CRIMES. (April 23)

11. **Other Resources.**

Sample Test Questions. P. 501.
Memo regarding Online Shrinkwrap Contracts (with example) (September 21, 1995). P. 503.
Domain Name Bibliography (November 1995). P. 513.
Internet Usage Policy (example). P. 528.
SECTION 1

INTRODUCTION TO CYBERSPACE
Internet Primer
by Eric Schlachter, Esq.
Cooley Godward Castro Huddleson & Tatum
schlachterc@cooley.com

This guide will introduce you to the basics of the Internet. The Internet is a large and unruly place, foreboding both in its size and complexity. Mastering the concepts in this guide will help you approach the Internet armed with enough information to ask the right questions.

1. WHAT IS THE INTERNET?

This is the most frequently asked question and the one that produces the most confusion. The Internet is an electronic network of computer sites across the globe. It originated as a Defense Department project to interconnect researchers. Once entirely funded by the federal government, it is now funded ad hoc by many entities.

I think it is easier to understand the Internet by focusing on the functions you can perform on this electronic network. The Internet is composed of a number of different information-transmission protocols, varying by type of information transmitted and user interface.

For simplicity, the list below enumerates all the key functions of the Internet:

(a) Email. Email is the most basic Internet function. It allows users to send text messages and attached files to other users. Frequently email is between two parties, but email lists can have thousands of recipients. (For example, David Letterman's Top Ten list is sent to over 27,000 people via email).

(b) USENET newsgroups. USENET is a global bulletin board. Users can post messages, files, and binary pictures for consumption by anyone subscribing to the particular newsgroup. (Binary pictures are "photos" composed of keyboard characters instead of pixels or dots). There are well over 9,000 newsgroups, ranging from the useful (misc.legal) to the sublime (alt.barney.die.die.die; alt.tonya.harding.whack.whack.whack; alt.fan.oj.drive.faster).

(c) IRC (Internet Relay Channel). IRC is a global "chat" function where multiple users can interact in real time and write messages for public consumption. IRC also permits private "chat."

(d) Telnet. Telnet allows a user to access (log in) to a remote computer site as if the user has a direct connection to the computer.

(e) Games. Users can interact with remote systems accessed over the Internet to play games. In Multiple User Dungeons (MUDs), the system operator creates a text-based virtual reality or electronic space where user can interact with each other or pursue a "quest" established by the system operator.

(f) FTP (File Transfer Protocol). FTP is a protocol for transferring files between users. The protocol is powerful but not user-friendly.
(g) **Gopher.** Gopher is another protocol for displaying information and transferring files between users. Unlike FTP, it is menu-driven and seamless between various computer sites. Gopher allows online browsing of text.

(h) **The Web.** Also known as the World Wide Web, and occasionally as W3. The Web is a powerful protocol for displaying and transferring text, files, pictures, sound, and even video in real time. The Web is operated, point and click style, by the mouse. Popular software to access the Web include Mosaic and Netscape.

(i) **Esoteric functions.** "Finger" allows users to find out information about other users. "Whois" is an Internet "white pages" directory. "WAIS," "Archie," "Veronica" and "Jughead" are all ways to search for information and files.

2. **WHAT IS NOT THE INTERNET.**

You will often hear about online services, such as Prodigy, CompuServe, America OnLine (AOL), GEnie, Delphi, eWorld, and, soon to come, AT&T's Interchange and the Microsoft Network.

All of these online services have their own proprietary resources that cannot be accessed unless you are a subscriber. All of these online services allow users to access some part of the Internet functions listed above, but most of them do not allow you to perform ALL of the Internet functions.

Likewise, there are approximately 60,000 dial up bulletin boards in the United States. Instead of reaching these bulletin boards through the Internet, users access these bulletin boards using a modem and their telephone lines. Many of these bulletin boards provide some degree of Internet connectivity; however, all have their own proprietary resources, and many are highly specialized.

3. **A QUICK GLOSSARY.**

As in any insular community, the Internet has its own lingua franca. While not nearly complete, this glossary will give you the basics you need to speak the Internet language.

**BTW.** By the way.

**FAQ.** Frequently Asked Questions. Most sites and newsgroups now have FAQs to handle the repeated questions of newbies. It is good practice to review any available FAQs to learn about the site or newsgroup before asking any questions.

**Flame.** A personal invective, often ad hominem. May be sent privately, but often posted for public ridicule. Ex: "I was flamed for using the term 'trekkie' on the alt.fan.star.trek newsgroup."

**FTF.** Face to face.

**HTML.** Hyper-text markup language. The codes used to create enhanced formatting of Web pages.

**IMHO.** In my humble opinion.
Netiquette. Guidelines for social conduct online. Some netiquette rules: (a) do not write in all caps—it means you are shouting, (b) if you are responding to someone’s email, include the key provisions of the prompting email (but only those provisions), and (c) do not post off topic.

Newbie. A term, frequently derogatory, for new users of the Internet. Ex: "The newbie was flamed for posting a message in ALL CAPS."

Newsgroups. The misnomer term for discussion topics in USENET. Postings to newsgroups are also similarly mislabeled "articles."

Post. The process of making material available publicly. Ex: "I posted my recipe for Grandma’s fried chicken on alt.foods.death."

OTOH. On the other hand.

RTFM. Read the Frigging Manual. (Yes, normally a stronger word is intended...).

Sysop. System Operator. The person who runs the system or site.

TIA. Thanks in advance.

URL. Uniform Resource Locator. The addressing convention for Websites.

4. EMOTICONS.

Online communication is stripped of the body language and vocal inflections that comprise our face-to-face and phone conversations. As a result, words lacking this context can easily be misconstrued or misunderstood. Therefore, it is good practice to express some emotions if you think readers might not understand the context. Frequently, this happens when a writer makes a critical, sarcastic, risque, ambivalent, or potentially inflammatory statement. In those cases, you may want to convey emotion to assist the reader in understanding.

To help, certain conventions have developed about characters and their meaning. The following list are the basic "emoticons" you can use to express what your words do not. To interpret the emoticons, look at them sideways!

:-) The Smiley. When you have made a joke or are happy about the previous statement.
:-) The Winky. When your remark is witty, sarcastic, saucy or risque.
:-| "Good news/bad news." I use this when I am ambivalent or have mixed feelings.
:-O Unnamed. The "excited utterance"—what you just said was shocking.
:-| Unnamed. A "kiss."
:-( The Frownie. The prior statement was disappointing or upsetting.

(There is a running debate about whether to include the "nose" in the emoticons. I am in favor of adding noses, the practice is not uniform.)

Some users substitute words for emoticons; in place of a smiley, they would write <smile> or <grin>. Sometimes this is shortened to <g>. These cues are important, so watch for them.
5. **How to Get Online.**

To get online, you need the proper hardware, software and service.

(a) **Hardware.** First, you need a computer. Faster computers will perform better; if you plan to run SLIP/PPP, you should expect to run a Pentium class machine.

Second, you need a modem. Modems operating at 14,400 baud are now standard and quite affordable. 28,800 baud modems are available but they are expensive and you will get no greater performance if the site you connect to does not similarly operate a modem at least as fast. Note that while 14,400 baud is a fast modem, it is bare minimum for Web browsing and inadequate at that.

Finally, a proper multimedia kit will allow you to enjoy some of the sounds and graphics available on the Web.

(b) **Software.** You need a telecommunications program. Your modem probably came with an adequate program for the basic Internet functions (i.e., everything but the Web), but you must have a program such as Mosaic or Netscape to fully enjoy the Web. (On the Mac, the program is MacWeb). If you plan to run SLIP/PPP, you may need a more heavy duty program such as NetManage’s Chameleon.

If your access to the Internet is through an online service, most software designed to access these services will permit you to do all Internet functions allowed by the service. Many are being updated to allow Web browsing.

Finally, operating systems such as OS/2 have Web browsers built in.

In addition to your telecommunications package, over time some other software tools will come in handy. For example, you may want a program that permits compression and decompression of files, such as PKZip. Software to review digitized photos or to run videos will also be useful. Much of this software can be downloaded once you are online as "shareware" (available for free but you must pay for the license to use it) or even "freeware" or "public domain."

(c) **Service connection.** Finally, you need a service connection to the Internet. As I have explained, many online services and bulletin boards allow you to access parts of the Internet, and that may be adequate.

If you want complete access to the Internet, I recommend getting a "shell" account from a service provider such as Netcom or CRL. These are no-frills Internet access providers that put few restrictions on your ability to use the Internet. While these providers will let you run UNIX, generally they offer a menu of options.

Real technophiles will want to consider getting their own direct connection to the Internet through a SLIP/PPP account. These accounts essentially turn your computer into a node on the Internet. The good news is that this can substantially speed up your access. The bad news is that fast computers and modems are essential! Further, these accounts can be difficult to configure because you have to do it all yourself. There is now software available that lets you run a shell account in a "pseudo-SLIP" fashion and therefore increases your speed; however, some shell providers have banned the software.
6. **How to Get on the Internet.**

The following service providers are only a small fraction of your options. Finding the right service provider for you may require some upfront investigation about costs, Internet access provided, etc. Ask around!!

**AOL.** Contact: (800) 827-6364. AOL has proven extremely popular and has assumed a leadership role in the online industry. It added 500,000 users in December and January alone! The growth has caused frequent busy signals and system overloads, but overall many users believe AOL is the friendliest and nicest looking of the major commercial services.

**CRL.** Contact: info@crl.com or (415) 381-2800. Similar to Netcom but without as many access points.

**Delphi.** Contact: info@delphi.com or (800) 695-4995. Not a particularly pretty service, but it does give you full Internet access.

**Netcom.** Contact: info@netcom.com or (800) 353-6600. Many local access points, most of which can be very busy. Their NetCruiser software, which provides a graphical user interface, has been well received.

**The WELL.** Contact: info@well.com or (415) 332-4338. A longstanding and prominent presence in cyberspace, the WELL prides itself on a close sense of community online. The WELL used to be an expensive online option but has tried to be more responsive to the competitive environment.

7. **Legal URLs.**

Once you get online, figure on losing many hours exploring all the weird, cool, and sometimes useful stuff out there. If you want a fast start in the legal realm, however, the following list will get you connected to some powerful online legal resources—for free!

- **Code of Federal Regulations**
  (includes SEC regulations!)
  http://www.pls.com:8001/his.cfr.html

- **Cornell Law School**
  (Probably the best law school site)
  [gopher. or www.] law.cornell.edu

- **Electronic Frontier Foundation**
  (One of my favorite sites)
  [ftp. or gopher. or www.] eff.org

- **EDGAR**
  (Searchable public company filings!)
  http://town.hall.org/edgar/edgar.html

- **Emory Law School**
  http://www.law.emory.edu/

- **FedWorld**
  (MANY government agencies)
  http://www.fedworld.gov/

- **GAMA**
  (Online forms bank)
  http://www.gama.com/form.html

- **House of Representatives**
  http://www.house.gov

- **Indiana Law School**
  http://www.law.indiana.edu/law/journ.html
(Full text law reviews)

John Marshall Law School  http://www.jmls.edu/

Journal of Law and Technology  http://www.urich.edu/~jolt/
(full text online only journal)

Legal Domain Network (Chicago-Kent)  http://www.kentlaw.edu/lawnet/lawlinks.html
(Searchable files of USENET legal newsgroups)

Library of Congress (Marvel)  gopher://marvel.loc.gov
(Includes searchable copyright registrations!)

Library of Congress (Thomas)  http://thomas.loc.gov
(Newt’s baby. Full text of House and Senate Bills and Congressional Record. Very powerful!)

Patent and Trademark Office  http://www.uspto.gov/

The Seamless Web  http://www.ingress.com/tsw/
(Other law firm Web pages)

United States Code  http://www.pls.com/his/usc.html

US DOJ Antitrust Division  http://gopher.usdoj.gov/atr.html

US Treasury  http://www.ustreas.gov/cgi-bin/allforms
(All IRS forms)


Carol Woodbury’s home page  http://www.mcs.com/~carolwoo/home.html
(One of the nicest and most useful personal home pages I’ve seen. Her legal resource index is tremendous!)

Yahoo  http://akebono.stanford.edu/yahoo/
(Not exclusively legal, but a comprehensive index of thousands of Websites. An excellent starting point—except you’ll never finish!)
Economic FAQs About the Internet

Jeffrey K. MacKie-Mason and Hal R. Varian

June 1995

Abstract:

This is a set of Frequently Asked Questions (and answers) about the economic, institutional, and technological structure of the Internet. We describe the history and current state of the Internet, discuss some of the pressing economic and regulatory problems, and speculate about future developments.

What is a FAQ?

FAQ stands for Frequently Asked Questions. There are dozens of FAQ documents on diverse topics available on the Internet, ranging from physics to scuba diving to how to contact the White House. They are produced and maintained by volunteers. This FAQ answers questions about the economics of the Internet (and towards the end offers some opinions and forecasts).

Where can the current version of this FAQ be found?

An earlier version of this FAQ was published in the Summer 1994 issue of the Journal of Economic Perspectives.

The Internet is changing at an astonishing rate so we have used this opportunity to revise and update the information in that earlier document. Future updates, can be found on the Web servers at the Economics Department and the School of Public Policy at the University of Michigan.

Background

What is the Internet?

The Internet is a world-wide network of computer networks that use a common communications protocol, TCP/IP (Transmission Control Protocol/Internet Protocol). TCP/IP provides a common language for interoperation between networks that use a variety of local protocols (Ethernet, Netware, AppleTalk, DECnet and others).

Where did it come from?

In the late sixties, the Advanced Research Projects Administration (ARPA), a division of the U.S. Defense Department, developed the ARPAnet to link together universities and high-tech defense contractors. The TCP/IP technology was developed to provide a standard protocol for ARPAnet communications. In the mid-eighties the NSF created the NSFNET in order to provide connectivity to its supercomputer centers, and to provide other general services. The NSFNET adopted the TCP/IP protocol and provided a high-speed backbone for the developing Internet.

What do people do on the Internet?
Probably the most frequent use is e-mail. After that are file transfer (moving data from one computer to another) and remote login (logging into a computer that is running somewhere else on the Internet). In terms of traffic volume, as of December 1994 about 32% of total traffic was file transfer, 16% was World Wide Web (WWW), 11% was netnews, 6% was email, 4% was gopher, and the rest was for other uses. (Figures taken from Merit NIC's port usage statistics.) People can search databases (including the catalogs of the Library of Congress and scores of university research libraries), download data and software, and ask (or answer) questions in discussion groups on numerous topics (including economics research).

How big is the Internet?

From 1985 to December 1994, the Internet grew from about 200 networks to well over 45,000 and from 1,000 hosts (end-user computers) to over four million. About 1,000,000 of these hosts are at educational sites, 1,300,000 are commercial sites, and about 385,000 are government/military sites, all in the U.S. Most of the other 1,300,000 hosts are elsewhere in the world. (See the Network Wizards domain count.) NSFNET traffic grew from 85 million packets in January 1988 to 86 billion packets in November 1994. (A packet is about 200 bytes, and a byte corresponds to one ASCII character.) This is more than a six hundred-fold increase in only six years. The traffic on the network is currently increasing at a rate of 6% a month. (NSFNET statistics are available at Merit's Network Information Center.)

John Quarterman estimates that as of October 1994 there were about 8 million people directly connected to the Internet, and about 6 million more people who can access the Internet "indirectly" through online services. The numbers in the latter category are likely substantially larger today. Of course the total number of people who have access to the Internet via email is much larger—it may even approach the 20--30 million figures bandied about in the mass media.

Organization

Who runs the Internet?

The short answer is "no one." The Internet is a loose amalgamation of computer networks run by many different organizations in over seventy countries. Most of the technological decisions are made by small committees of volunteers who set standards for interoperability.

What is the structure of the Internet?

The US portion of the Internet is best thought of as having three levels. At the bottom are local area networks (LANs); for example, campus networks. Usually the local networks are connected to a regional, or mid-level network. The mid-levels connect to one or more backbones. A backbone is an overarching network to which multiple regional networks connect, and which generally does not serve directly any local networks or end-users. The U.S. backbones connect to other backbone networks around the world. There are, however, numerous exceptions to this structure.

A few years ago the primary backbone was the NSFNET. On April 30, 1995 the NSFNET ceased operation and now traffic in the US is carried on several privately operated backbone. The new "privatized Internet" in the US is becoming less hierarchical and more interconnected. The separation between the backbone and regional networkers of the current structure are blurring, as more regionals are connected directly to each other through network access points (NAPs), and traffic passes through a chain of regionals without any backbone transport.
What are the backbone networks?

In January 1994 there were four public fiber-optic backbones in the U.S.: NSFNET, Alternet, PSInet, and SprintLink. The NSFNET was funded by the NSF; it evolved directly out of ARPANET, the original TCP/IP network. The other backbones were private, for-profit enterprises.

By summer 1995 there were at least 14 national and super-regional high-speed TCP/IP networks in the U.S. As interconnection proliferates, the distinction becomes less important. A map of the major interconnection points and the numerous networks that use them is available at CERFNET.

MCI, which helped operate the original NSFNET, is probably the largest carrier of Internet traffic today; they claim to carry 40% of all Internet traffic. However, this is a highly competitive market; Sprint, Alternet, and PSInet are also signing up many customers.

What was the NSFNET?

The NSFNET was the first backbone for the US portion of the Internet. It was originally conceived as a way for researchers to submit jobs to supercomputers located at various universities around the US. Subsequently it was realized that the excess capacity on this backbone could be used to exchange data among universities that had nothing to do with supercomputing. The NSF annually paid about $11.5 million for the NSFNET operation for several years, but eventually decided that the technology was mature enough that it could be more effectively provided by the private market.

What happened to the NSFNET?

The NSFNET backbone was shut down on April 30, 1995, as the NSF funding for it ended. NSF is continuing to fund some regional nets, but this funding steadily decreases to zero over five years. Instead, the NSF is funding Network Access Points (NAPs) near Chicago, San Francisco, and New York. The NAPs are interconnection points for backbone providers. See [Fazio1995] for an article describing the transition in detail; current information is available at the Merit Web site for information on the transition. The NSF is also funding a routing arbiter service to provide fair and efficient routing among the various backbones and regionals.

The NSF is also funding the vBNS (very-high speed backbone network service) to connect five of its supercomputer sites at 155 Mbps. Its emphasis will be on developing capabilities for high-definition remote visualization and video transmission.

How much did NSFNET cost?

It is difficult to say how much the Internet as a whole costs, since it consists of thousands of different networks, many of which are privately owned. However, it is possible to estimate the cost of the NSFNET backbone, since it was publicly supported. In 1993, NSF paid Merit about $11.5 million per year to run the backbone. Approximately 80% of this was spent on lease payments for the fiber optic lines and routers. About 7% of the budget was spent on the Network Operations Center, which monitor traffic flows and troubleshoots problems.

To give some sense of the scale of this subsidy, add to it the approximately $7 million per year that NSF paid to subsidize various regional networks, for a total of about $20 million. Based on estimates that there were approximately 20 million Internet users (most of whom were connected to the NSFNET in one way or another), the NSF subsidy amounted to about $1 per user per year. Of course, this was significantly less than the total cost of the Internet; indeed, it does not even include all of the public funds, which came from state governments, state-supported universities, and other national governments as well. No one really knows how much all this adds up
to, although there are some research projects underway to try to estimate the total U.S. expenditures on the Internet. It has been estimated—read "guessed"—that the NSF subsidy of $20 million per year was less than 10% of the total by expenditure U.S. public agencies on the Internet.

*Who provides access outside of the U.S.?

There are now a large number of backbone and mid-level networks in other countries. For example, most western European countries have national networks that are attached to EBone, the European backbone. The infrastructure is still immature, and quite inefficient in some places. For example, the connections between other countries often are slow or of low quality, so it was common to see traffic between two countries that is routed through the NSFNET in the U.S. [Braun and Claffy 1993].

Technology

Is the Internet different from telephone networks?

Yes and no. Most backbone and regional network traffic moves over leased phone lines, so at a low level the technology is the same. However, there is a fundamental distinction in how the lines are used by the Internet and the phone companies. The Internet provides connectionless packet-switched service whereas telephone service is circuit-switched. (We define these terms below.) The difference may sound arcane, but it has vastly important implications for pricing and the efficient use of network resources.

What is circuit-switching?

Circuit networks use circuit switching: an end-to-end circuit must be set up before the call can begin. A fixed share of network resources is reserved for the call, and no other call can use those resources until the original connection is closed. This means that a long silence between two teenagers uses the same resources as an active negotiation between two fast-talking lawyers. One advantage of circuit-switching is that it enables performance guarantees such as guaranteed maximum delay, which is essential for real-time applications like voice conversations. It is also much easier to do detailed accounting for circuit-switched network usage.

How is packet-switching technology different from circuit-switching?

The Internet uses "packet-switching" technology. The term "packets" refers to the fact that the data stream from your computer is broken up into packets of about 200 bytes (on average), which are then sent out onto the network. Each packet contains a "header" with information necessary for routing the packet from origination to destination. Thus each packet in a data stream is independent.

The main advantage of packet-switching is that it permits "statistical multiplexing" on the communications lines. That is, the packets from many different sources can share a line, allowing for very efficient use of the fixed capacity. With current technology, packets are generally accepted onto the network on a first-come, first-served basis. If the network becomes overloaded, packets are delayed or discarded ("dropped").

How are packets routed to their destination?

The Internet technology is connectionless. This means that there is no end-to-end setup for a session; each packet is independently routed to its destination. When a packet is ready, the host computer sends it on to another computer, known as a router. The router examines the destination address in the header and passes the packet along to another
router, chosen by a route-finding algorithm. A packet may go through 30 or more routers in its travels from one host computer to another. Because routes are dynamically updated, it is possible for different packets from a single session to take different routes to the destination.

Along the way packets may be broken up into smaller packets, or reassembled into bigger ones. When the packets reach their final destination, they are reassembled at the host computer. The instructions for doing this reassembly are part of the TCP/IP protocol.

Some packet-switching networks are "connection-oriented" (notably, X.25 networks, such as Tymnet and frame-relay networks). In such a network a connection is set up before transmission begins, just as in a circuit-switched network. A fixed route is defined, and information necessary to match packets to their session and defined route is stored in memory tables in the routers. Thus, connectionless networks economize on router memory and connection set-up time, while connection-oriented networks economize on routing calculations (which have to be redone for every packet in a connectionless network).

What is the physical technology of the Internet?

Most of the network hardware in the Internet consists of communications lines and switches or routers. In the regional and backbone networks, the lines are mostly leased telephone trunk lines, which are increasingly fiber optic. Routers are computers; indeed, the routers used on the NSFNET were modified commercial IBM RS6000 workstations, although custom-designed routers by other companies such as Cisco, Wellfleet, 3-Com and DEC probably have the majority share of the market.

What does "speed" mean?

"Faster" networks do not move electrons or photons at faster than the speed of light; a single bit travels at essentially the same speed in all networks. Rather, "faster" refers to sending more bits of information simultaneously in a single data stream (usually over a single communications line), thus delivering n bits faster. Phone modem users are familiar with recent speed increases from 300 bps (bits per second) to 2400, 9600 and now 19,200 bps. Leased-line network speeds have advanced from 56 Kbps (kilo, or 10^3 bps) to 1.5 Mbps (mega, or 10^6 bps, known as T-1 lines) in the late 80s, and then to 45 Mbps (T-3) in the early 90s. Lines of 155 Mbps are now available, though not yet widely used. The U.S. Congress had called for a 1 Gbps (giga, or 10^9 bps) backbone by 1996. This goal has been nearly achieved in testbeds, though it now looks like it will be at least a couple of more years before we see gigabit speeds in the public backbone.

Current T-3 45 Mbps lines can move data at a speed of 1,400 pages of text per second; a 20-volume encyclopedia can be sent coast to coast in half a minute. However, it is important to remember that this is the speed on the superhighway---the access roads via the regional networks still mostly use the much slower T-1 connections.

Why do data networks use packet-switching?

Economics can explain most of the preference for packet-switching over circuit-switching in the Internet and other public networks. Circuit networks use lots of lines in order to economize on switching and routing. That is, once a call is set up, a line is dedicated to its use regardless of its rate of data flow, and no further routing calculations are needed. This network design makes sense when lines are cheap relative to switches.

The costs of both communications lines and computers have been declining exponentially for decades. However, since about 1970, switches (computers) have become relatively cheaper than lines. At that point packet switching became economic: lines are shared by multiple connections at the cost of many more routing calculations by the switches. This preference for using many relatively cheap routers to manage few expensive lines is evident in the
topology of the backbone networks. For example, in the NSFNET any packet coming on to the backbone had to pass through two routers at its entry point and again at its exit point. A packet entering at Cleveland and exiting at New York traversed four routers but only one leased T-3 communications line.

`What are ATM and cell-switching technologies?`

The international telephone community has committed to a future network design that combines elements of both circuit and packet switching to enable the provision of integrated services. The ITU (formerly CCITT, an international standards body for telecommunications) has adopted a "cell-switching" technology called ATM (asynchronous transfer mode) for future high-speed networks. Cell switching closely resembles packet switching in that it breaks a data stream into packets which are then placed on lines that are shared by several streams. One major difference is that cells have a fixed size while packets can have different sizes. This makes it possible in principle to offer bounded delay guarantees (since a cell will not get stuck for a surprisingly long time behind an unusually large packet).

An ATM network also resembles a circuit-switched network in that it provides connection-oriented service. Each connection has set-up phase, during which a "virtual circuit" is created. The fact that the circuit is virtual, not physical, provides two major advantages. First, it is not necessary to reserve network resources for a given connection; the economic efficiencies of statistical multiplexing can be realized. Second, once a virtual circuit path is established switching time is minimized, which allows much higher network throughput. Initial ATM networks are already being operated at 155 Mbps, while the non-ATM Internet backbones operate at no more than 45 Mbps. The path to 1000 Mbps (gigabit) networks seems much clearer for ATM than for traditional packet switching.

What changes are likely in network technology?

Present there are many overlapping information networks (e.g., telephone, telegraph, data, cable TV), and new networks are emerging rapidly (paging, personal communications services, etc.). Each of the current information networks was engineered to provide a particular type of service and the added value provided by each different type was sufficient to overcome the fixed costs of building overlapping physical networks.

However, given the high fixed costs of providing a network, the economic incentive to develop an "integrated services" network is strong. Furthermore, now that all information can be easily digitized separate networks for separate types of traffic are no longer necessary. Convergence toward a unified, integrated services network is a basic feature in most visions of the much publicized "information superhighway" (e.g., [National Academy of Sciences1994]). The migration to integrated services networks will have important implications for market structure and competition.

When will the "information superhighway" arrive?

The federal High Performance Computing Act of 1991 aimed for a gigabit per second (Gbps) national backbone by 1995. Five federally-funded testbed networks are currently demonstrating various gigabit approaches. To get a feel for how fast a gigabit per second is, note that most small colleges or universities today have 56 Kbps Internet connections. At 56 Kbps it takes about five hours to transmit one gigabit!

Efforts to develop integrated services networks also have exploded. Several cable companies have already started offering Internet connections to their customers. AT&T, MCI and all of the "Baby Bell" operating companies are involved in mergers and joint ventures with cable TV and other specialized network providers to deliver new integrated services such as video-on-demand. ATM-based networks, although initially developed for phone systems, ironically have been first implemented for data networks within corporations and by some regional and backbone providers.
How is Internet access priced?

What types of pricing schemes are used?

Until recently, nearly all users faced the same pricing structure for Internet usage. A fixed-bandwidth connection was charged an annual fee, which allowed for unlimited usage up to the physical maximum flow rate (bandwidth). We call this "connection pricing". Most connection fees were paid by organizations (universities, government agencies, etc.) and the users paid nothing themselves.

Simple connection pricing still dominates the market, but a number of variants have emerged. The most notable is "committed information rate" pricing. In this scheme, an organization is charged a two-part fee. One fee is based on the bandwidth of the connection, which is the maximum feasible flow rate; the second fee is based on the maximum guaranteed flow to the customer. The network provider installs sufficient capacity to simultaneously transport the committed rate for all of its customers, and installs flow regulators on each connection. When some customers operate below that rate, the excess network capacity is available on a first-come, first-served basis for the other customers. This type of pricing is more common in private networks than in the Internet because a TCP/IP flow rate can be guaranteed only network by network, greatly limiting its value unless a large number of the 20,000 Internet networks coordinate on offering this type of guarantee.

Networks that offer committed information pricing generally have enough capacity to meet the entire guaranteed bandwidth. This is a bit like a bank holding 100% reserves in case all depositors want to withdraw on the same day. However, full provisioning is necessary with existing TCP/IP network technology since there is no commonly used way to prioritize packets, and because the statistical fluctuations in traffic are huge.

For most usage, the marginal packet placed on the Internet is priced at zero. At the outer fringes there are a few exceptions. For example, several private networks (such as Compuserve) provide email connections to the Internet. Several of these charge per message above a low threshold. The public networks in Chile [Baeza-Yates et al. 1993] and New Zealand [Brownlee1994] charge their customers by the packet for all international traffic. An economic study of the New Zealand system can be found in [Carter and Guthrie1994].

What other types of pricing have been considered?

Standard economic theory suggests that prices should be matched to costs. There are three main elements of network costs: the cost of connecting to the net, the cost of providing additional network capacity, and the social cost of congestion. Once capacity is in place, direct usage cost is negligible, and by itself is almost surely is not worth charging for given the accounting and billing costs (see [MacKie-Mason and Varian1995b]).

Charging for connections is conceptually straightforward: a connection requires a line, a router, and some labor effort. The line and the router are reversible investments and thus are reasonably charged for on annual lease basis (though many organizations buy their own routers). Indeed, this is essentially the current scheme for Internet connection fees.

Charging for incremental capacity requires usage information. Ideally, we need a measure of the organization's demand during the expected peak period of usage over some period, to determine its share of the incremental capacity requirement. In practice, it might seem that a reasonable approximation would be to charge a premium price for usage during pre-determined peak periods (a positive price if the base usage price is zero), as is routinely done for electricity. However, casual evidence suggests that peak demand periods are much less predictable than for other utility services. One reason is that it is very easy to use the computer to schedule some activities for off-peak hours,
leading to a shifting peaks problem. In addition, so much traffic traverses long distances around the globe that time zone differences are important. Network statistics reveal very irregular time-of-day usage patterns [MacKie-Mason and Varian 1995a].

How can the Internet deal with increasing congestion?

If you have read this far in the article, you should have a good basic understanding of the current state of the Internet—we hope that most of the questions you have had about the how the Internet works have been answered. Starting here we will move from FAQs and "facts" towards conjectures, FEOs (firmly expressed opinions), and PBI (partially baked ideas). We first discuss congestion problems.

Nearly all usage of the Internet backbones is unpriced at the margin. Organizations pay a fixed fee in exchange for unlimited access up to the maximum throughput of their particular connection. This is a classic problem of the commons. The externality exists because a packet-switched network is a shared-media technology: each extra packet that Sue User sends imposes a cost on all other users because the resources Sue is using are not available to them. This cost can come in form of delay or lost (dropped) packets.

Without an incentive to economize on usage, congestion can become quite serious. Indeed, the problem is more serious for data networks than for many other congestible resources because of the tremendously wide range of usage rates. On a highway, for example, at a given moment a single user is more or less limited to putting either one or zero cars on the road. In a data network, however, single user at a modern workstation can send a few bytes of e-mail or put a load of hundreds of Mbps on the network. Today any undergraduate with a new Macintosh is able to plug in a digital video camera and transmit live videos to another campus or home to mom, demanding as much as 1 Mbps. Since the maximum throughput on current backbones is only 45 Mbps, it is clear that even a few users with relatively inexpensive equipment could bring the network to its knees.

Congestion problems are not just hypothetical. For example, congestion was quite severe in 1987 when the NSFNET backbone was running at much slower transmission speeds (56 Kbps) [Bohn et al. 1993]. Users running interactive remote terminal sessions were experiencing unacceptable delays. As a temporary fix, the NSFNET programmed the routers to give terminal sessions (using the telnet program) higher priority than file transfers (using the ftp program).

More recently, many services on the Internet have experienced severe congestion problems. Large ftp archives, Web servers at the National Center for Supercomputer Applications, the original Archie site at McGill University and many services have had serious problems with overuse. See [Markoff 1993] for more detailed descriptions.

Congestion on the trans-Atlantic link, which has been only 6Mbps, has been quite severe, causing researchers requiring substantial bandwidth to schedule their work during the wee hours. Since the advent of WWW and CU-SeeMe video-conferencing, there has also been seriously disruptive congestion in Europe on the E-Bone.

If everyone just stuck to ASCII email congestion would not likely become a problem for many years, if ever. However, the demand for multi-media services is growing dramatically. Although the supply of bandwidth is increasing dramatically, so is the demand. If congestion remains unpriced it is likely that there will be increasingly damaging episodes when the demand for bandwidth exceeds the supply in the foreseeable future.

What non-price mechanisms can be used for congestion control?

Administratively assigning different priorities to different types of traffic is appealing, but impractical as a long-run solution to congestion costs due to the usual inefficiencies of rationing. However, there is an even more severe technological problem: it is impossible to enforce. From the network’s perspective, bits are bits and there is no
certain way to distinguish between different types of uses. By convention, most standard programs use a unique identifier that is included in the TCP header (called the "port" number); this is what NSFNET used for its priority scheme in 1987. However, it is a trivial matter to put a different port number into the packet headers; for example to assign the telnet number to ftp packets to defeat the 1987 priority scheme. To avoid this problem, NSFNET kept its prioritization mechanism secret, but that is hardly a long-run solution.

What other mechanisms can be used to control congestion? The most obvious approach for economists is to charge some sort of congestion price. However, to date, there has been almost no serious consideration of congestion pricing for backbone services, and even tentative proposals for usage pricing have been met with strong opposition. We will discuss pricing below but first we examine some non-price mechanisms that have been proposed.

Many proposals rely on voluntary efforts to control congestion. Numerous participants in congestion discussions suggest that peer pressure and user ethics will be sufficient to control congestion costs. For example, recently a single user started broadcasting a 350-450Kbps audio-video test pattern to hosts around the world, blocking the network's ability to handle a scheduled audio broadcast from a Finnish university. A leading network engineer sent a strongly-worded e-mail message to the user's site administrator, and the offending workstation was disconnected from the network. However, this example also illustrates the problem with relying on peer pressure: the inefficient use was not terminated until after it had caused serious disruption. Further, it apparently was caused by a novice user who did not understand the impact of what he had done; as network access becomes ubiquitous there will be an ever-increasing number of unsophisticated users who have access to applications that can cause severe congestion if not properly used. And of course, peer pressure may be quite ineffective against malicious users who want to intentionally cause network congestion.

One recent proposal for voluntary control is closely related to the 1987 method used by the NSFNET [Bohn et al. 1993]. This proposal would require users to indicate the priority they want each of their sessions to receive, and for routers to be programmed to maintain multiple queues for each priority class. Obviously, the success of this scheme would depend on users' willingness to assign lower priorities to some of their traffic. In any case, as long as it is possible for just one or a few abusive users to create crippling congestion, voluntary priority schemes that are not robust to forgetfulness, ignorance, or malice may be largely ineffective.

In fact, a number of voluntary mechanisms are in place today. They are somewhat helpful in part because most users are unaware of them, or because they require some programming expertise to defeat. For example, most implementations of the TCP protocols use a "slow start" algorithm which controls the rate of transmission based on the current state of delay in the network. Nothing prevents users from modifying their TCP implementation to send full throttle if they do not want to behave "nicely."

A completely different approach to reducing congestion is purely technological: overprovisioning. Overprovisioning means maintaining sufficient network capacity to support the peak demands without noticeable service degradation. This has been the most important mechanism used to date in the Internet. However, overprovisioning is costly, and with both very-high-bandwidth applications and near-universal access fast approaching, it may become too costly. In simple terms, will capacity demand grow faster than the decline in capacity cost?

Given the explosive growth in demand and the long lead time needed to introduce new network protocols, the Internet may face serious problems very soon if productivity increases do not keep up. Therefore, we believe it is time to seriously examine incentive-compatible allocation mechanisms, such as various forms of congestion pricing.

**Can bandwidth be reserved?**

The current Internet offers a single service quality: "best efforts packet service." Packets are transported first-come, first-served with no guarantee of success. Some packets may experience severe delays, while others may be dropped and never arrive.
However, different kinds of data place different demands on network services. E-mail and file transfers require 100% accuracy, but can easily tolerate delay. Real-time voice broadcasts require much higher bandwidth than file transfers, and can only tolerate minor delays, but they can tolerate significant distortion. Real time video broadcasts have very low tolerance for delay and distortion.

Voice telephony networks handle the quality of service problem by assigning each call a physical circuit with fixed resources sufficient to guarantee a minimal quality of service. One limitation of this scheme is that the amount of resources devoted to each call is hardwired into the engineering of the network. As we have discussed, the Internet takes the approach of sharing all of its resources, all of the time, which accomodates the wildly varying bandwidth requirements of different applications, and which gains from averaging over the wildly varying bandwidth requirements during a session with most applications. A hybrid approach to offering different resources, along with guarantees, to different uses would be to allow flexible, dynamic resource reservation. That is, allow a user (or her software agent) to declare how much bandwidth, what maximal delay and what type of delay variation she requires for a given session, and allocate those resources to her. An experimental implementation of such a scheme is given in the RSVP protocol [Zhang et al. 1993].

How can users be induced to choose the right level of service?

Because of different resource requirements, network efficiency can be increased if the different types of traffic are treated differently---giving a delay guarantee to, say, a real-time video session but not to routine e-mail or file transfer. But in order to do this, the user must truthfully indicate what type of traffic he or she is sending. If real-time video bit streams get the highest quality service, why not claim that all of your bit streams are real-time video?

[Cocchi et al. 1992] point out that it is useful to look at network pricing as a mechanism design problem. The user can indicate the “type” of his transmission, and the workstation in turn reports this type to the network. In order to ensure truthful revelation of preferences, the reporting and billing mechanism must be incentive compatible. The field of mechanism design has been criticized for ignoring bounded rationality of human subjects. However, in this context, the workstation is doing most of the computation, so that quite complex mechanisms may be feasible.

Why should pricing be taken seriously for congestion control?

Let us turn this question on its head: Why should data network usage be free even to universities, when telephone and postal usage are not? The question is, does society benefit more from priced or unpriced network resources?

As we have argued, other approaches to controlling congestion are either flawed or have undesirable side-effects. Pricing approaches have the overwhelming advantage that they permit users, acting individually (or as organizations, if the pricing is only applied at the organizational level) to express the value that they place on obtaining network services. Thus, pricing directly provides the information needed to allocate scarce resources during times of congestion to those users who value them most. There is no need to assign arbitrary priorities, or to force high-value users to suffer from being stuck in a first-come, first-served line behind low-value users. The paper by [MacKie-Mason et al. 1995a] in this volume, and [MacKie-Mason and Varian 1994] discuss the advantages of pricing for congestion in more detail.

How might prices be used to control congestion?

We have elsewhere described a scheme for efficient pricing of the congestion costs ([MacKie-Mason and Varian 1995b], [MacKie-Mason and Varian 1995a]). The basic problem is that when the network is near capacity, a user's incremental packet imposes costs on other users in the form of delay or dropped packets. Our scheme for internalizing this cost is to impose a congestion price on usage that is determined by a real-time Vickrey auction.
Following the terminology of Vernon Smith and Charles Plott, we call this a "smart market."

The basic idea is simple. Much of the time the network is uncongested, and the price for usage should be zero. When the network is congested, packets are queued and delayed. The current queuing scheme is FIFO. We propose instead that packets should be prioritized based on the value that the user puts on getting the packet through quickly. To do this, each user assigns her packets a bid measuring her willingness-to-pay for immediate servicing. At congested routers, packets are prioritized based on bids. In order to make the scheme incentive-compatible, users are not charged the price they bid, but rather are charged the bid of the lowest priority packet that is admitted to the network. It is well-known that this mechanism provides the right incentives for truthful revelation.

This scheme has a number of nice features. In particular, not only do those with the highest cost of delay get served first, but the prices also send the right signals for capacity expansion in a competitive market for network services. If all of the congestion revenues are reinvested in new capacity, then capacity will be expanded to the point where its marginal value is equal to its marginal cost.

What are some problems with a smart market?

Prices in a real-world smart market cannot be updated continuously. The efficient price is determined by comparing a list of user bids to the available capacity and determining the cutoff price. In fact, packets arrive not all at once but over time, and thus it would be necessary to clear the market periodically based on a time-slice of bids. The efficiency of this scheme, then, depends on how costly it is to frequently clear the market and on how persistent the periods of congestion are. If congestion is exceedingly transient then by the time the market price is updated the state of congestion may have changed.

A number of network specialists have suggested that many customers---particularly not-for-profit agencies and schools---will object because they do not know in advance how much network utilization will cost them. We believe this argument is partially a red herring, since the user's bid always controls the maximum that network usage costs. Indeed, since we expect that for most traffic the congestion price will be zero, it should be possible for most users to avoid ever paying a usage charge by simply setting all packet bids to zero. When the network is congested enough to have a positive congestion price, these users will pay the cost in units of delay rather than cash, as they do today.

We also expect that in a competitive market for network services, fluctuating congestion prices would usually be a "wholesale" phenomenon, and that intermediaries would repackage the services and offer them at a guaranteed price to end-users. Essentially this would create a futures market for network services.

There are also auction-theoretic problems that have to be solved. Our proposal specifies a single network entry point with auctioned access. In practice, networks have multiple gateways, each subject to differing states of congestion. Should a smart market be located in a single, central hub, with current prices continuously transmitted to the many gateways? Or should a set of simultaneous auctions operate at each gateway? How much coordination should there be between the separate auctions? All of these questions need not only theoretical models, but also empirical work to determine the optimal rate of market-clearing and inter-auction information sharing, given the costs and delays of real-time communication.

Another serious problem for almost any usage pricing scheme is how to correctly determine whether sender or receiver should be billed. With telephone calls it is clear that in most cases the originator of a call should pay. However, in a packet network, both "sides" originate their own packets, and in a connectionless network there is no mechanism for identifying party B's packets that were solicited as responses to a session initiated by party A. Consider a simple example: A major use of the Internet is for file retrieval from public archives. If the originator of each packet were charged for that packet's congestion cost, then the providers of free public goods (the file archives)
would pay nearly all of the congestion charges induced by a user’s file request. Either the public archive provider would need a billing mechanism to charge requesters for the (ex post) congestion charges, or the network would need to be engineered so that it could bill the correct party. In principle this problem can be solved by schemes like “800”, “900” and collect phone calls, but the added complexity in a packetized network may make these schemes too costly.

How large would congestion prices be?

Consider the average cost of the NSFNET backbone in 1993: about $10^6 per month, for about 60,000 * 10^6 packets per month. This implies a cost per packet (around 200 bytes) of about 1/600 cents. If there are 20 million users of the NSFNET backbone (10 per host computer), then full cost recovery of the NSFNET subsidy would imply an average monthly bill of about $0.08 per person. If we accept the estimate that the total cost of the U.S. portion of the Internet is about 10 times the NSFNET subsidy, we come up with 50 cents per person per month for full cost recovery. The revenue from congestion fees would presumably be significantly less than this amount.

The average cost of the Internet is so small today because the technology is so efficient: the packet-switching technology allows for very cost-effective use of existing lines and switches. If everyone only sent ASCII email, there would probably never be congestion problems on the Internet. However, new applications are creating huge demands for additional bandwidth. A video e-mail message could easily use 10^4 more bits than a plain text ASCII e-mail with the “same” information content and providing this amount of incremental bandwidth could be quite expensive. Well-designed congestion prices would not charge everyone the average cost of this incremental bandwidth, but instead charge those users whose demands create the congestion and need for additional capacity.

What are the problems associated with Internet accounting?

One of the first necessary steps for implementing usage-based pricing (either for congestion control or multiple service class allocation) is to measure and account for usage. Accounting poses some serious problems. For one thing, packet service is inherently ill-suited to detailed usage accounting, because every packet is independent. As an example, a one-minute phone call in a circuit-switched network requires one accounting entry in the usage database. But in a packet network that one-minute phone call would require around 2500 average-sized packets; complete accounting for every packet would then require about 2500 entries in the database. On the NSFNET alone nearly 60 billion packets are being delivered each month. Maintaining detailed accounting by the packet similar to phone company accounting may be too expensive.

Another accounting problem concerns the granularity of the records. Presumably accounting detail is most useful when it traces traffic to the user. Certainly if the purpose of accounting is to charge prices as incentives, those incentives will be most effective if they affect the person actually making the usage decisions. But the network is at best capable of reliably identifying the originating host computer (just as phone networks only identify the phone number that placed a call, not the caller). Another layer of expensive and complex authorization and accounting software will be required on the host computer in order to track which user accounts are responsible for which packets. Imagine, for instance, trying to account for student e-mail usage at a large public computer cluster.

One interesting approach has been tested and reported by [Edell et al., 1995]. They found that most traffic could be treated as connection-oriented by tracking the setup and tear-down of TCP sessions. On that basis, they were able to collect real-time usage accounting data on two T-1 lines leaving the UC Berkeley campus, and to introduce a pilot billing server. Another tool is NetTraMet, which has been used in New Zealand for several years to do network counting.

Accounting is more practical and less costly the higher the level of aggregation. For example, the NSFNET collected some information on usage by each of the subnetworks that connect to its backbone (although these data are based
on a sample, not an exhaustive accounting for every packet). Whether accounting at lower levels of aggregation is worthwhile is a different question that depends importantly on cost-saving innovations in internetwork accounting methods.

**What are some of the economic problems for commerce on the Internet?**

Imagine walking into a bookstore, looking up a book, finding it on the shelves, browsing through its neighbors on the shelf, and finally paying for it with a credit card at the counter. None of this required an explicit set of pre-negotiated contracts or complicated protocols. The value of the Internet will be much greater if this kind of "spontaneous commerce" becomes commonplace. In order for this to become a reality, it will be necessary to design Internet search and discovery tools, browsing tools, and payment mechanisms. Research on all these topics is underway.

However, the Internet environment also offers new challenges. One big one is security: what protocols can ensure that your credit card number or, for that matter, the details of your purchase, remain private and secure?

**How does electronic currency work?**

What is so hard about electronic currency? After all, debit and teller machine cards are in common use over networks. Credit cards are widely used over the telephone network. It turns out that there are several difficult problems to be solved, though the problems vary with the type of currency under discussion. For example, bank debit cards and automatic teller cards work because they have reliable authentication procedures based on both a physical device and knowledge of a private code. Digital currency over the network is more difficult because it is not possible to install physical devices and protect them from tampering on every workstation. Credit cards over the phone network are relatively secure because phone tapping is difficult and costly, and there is no central database connected to the network that contains all of the voice-provided credit card numbers. When a credit card number is transmitted over the Internet in the clear, however, "sniffing" it is relatively easy and inexpensive, and following its path may lead to a massive database of valid card numbers.

A variety of schemes are being developed. See the Economics of the Internet Web page for some links to at least 14 different systems! Many of these systems use forms of public key cryptography to encrypt payment records. This is relatively straightforward for, say, credit card numbers, but becomes substantially more difficult if you want to ensure anonymity. See [Chaum92] for a description of one such electronic cash system.

**Why are so many different types of electronic currency being developed?**

There are many different types of currency in ordinary, non-network use: cash, personal checks, cashier's checks, money orders, credit cards, debit cards, bearer bonds, and so forth. Each of these has different characteristics along a number of dimensions: anonymity, security, acceptability, transactions costs, divisibility, hardware independence, off-line operation, etc. Likewise, for a rich variety of commercial transactions to develop on the net, it will be necessary to have a variety of currency types in use.

**How will electronic currency affect the money supply, taxes, illicit activity?**

There is already a casino on the Internet, as well as some pornography. It is claimed that various hate groups have used email and bulletin boards for correspondence. Private electronic cash transactions on public networks are likely
to facilitate tax evasion and illegal transactions (such as narcotics). No one knows how the introduction of electronic cash will affect macroeconomic variables.

How should information services be priced?

Our focus thus far has been on the technology, costs and pricing of network transport. However, most of the value of the network is not in the transport, but in the value of the information being transported. For the full potential of the Internet to be realized it will be necessary to develop methods to charge for the value of information services available on the network.

There are vast troves of high-quality information (and probably equally large troves of dreck) currently available on the Internet, all available as free goods. Historically, there has been a strong base of volunteerism to collect and maintain data, software and other information archives. However, as usage explodes, volunteer providers are learning that they need revenues to cover their costs. And of course, careful researchers may be skeptical about the quality of any information provided for free.

Charging for information resources is quite a difficult problem. A service like CompuServe charges customers by establishing a billing account. This requires that users obtain a password, and that the information provider implement a sophisticated accounting and billing infrastructure. However, one of the advantages of the Internet is that it is so decentralized: information sources are located on thousands of different computers. It would simply be too costly for every information provider to set up an independent billing system and give out separate passwords to each of its registered users. Users could end up with dozens of different authentication mechanisms for different services.

A deeper problem for pricing information services is that our traditional pricing schemes are not appropriate. Most pricing is based on the measurement of replications: we pay for each copy of a book, each piece of furniture, and so forth. This usually works because the high cost of replication generally prevents us from avoiding payment. If you buy a table we like, we generally have to go to the manufacturer to buy one for ourselves; we can't just simply copy yours. With information goods the pricing-by-replication scheme breaks down. This has been a major problem for the software industry: once the sunk costs of software development are invested, replication costs essentially zero. The same is especially true for any form of information that can be transmitted over the network. Imagine, for example, that copy shops begin to make course packs available electronically. What is to stop a young entrepreneur from buying one copy and selling it at a lower price to everyone else in the class? This is a much greater problem even than that which publishers face from unauthorized photocopying, since the cost of replication is essentially zero.

There is a small literature on the economics of copying that examines some of these issues. However, the same network connections that exacerbate the problems of pricing "information goods" may also help to solve some of these problems. For example, [Cox1992] describes the idea of "superdistribution" of "information objects" in which accessing a piece of information automatically sends a payment to the provider via the network. However, there are several problems remaining to be solved before such schemes can become widely used.

Regulation and public policy

What does the Internet mean for telecommunications regulation?

The growth of data networks like the Internet are an increasingly important motivation for regulatory reform of telecommunications. A primary principle of the current regulatory structure, for example, is that local phone service is a natural monopoly, and thus must be regulated. However, local phone companies face ever-increasing competition from data network services. For example, the fastest growing component of telephone demand has been for fax transmission, but fax technology is better suited to packet-switching networks than to voice networks, and
faxes are increasingly transmitted over the Internet. As integrated services networks emerge, they will provide an alternative for voice calls and video conferencing, as well. This "bypass" is already occurring in the advanced private networks that many corporations, such as General Electric, are building.

As a result, the trend seems to be toward removing barriers against cross-ownership of local phone and cable TV companies. The regional Bell operating companies have filed a motion to remove the remaining restrictions of the Modified Final Judgment that created them (with the 1984 breakup of ATT). The White House, Congress, and the FCC are all developing new models of regulation, with a strong bias towards deregulation (for example, see the Senate Bill 652, passed on 15 June 1995).

Internet transport itself is currently unregulated. This is consistent with the principal that common carriers are natural monopolies, and must be regulated, but the services provided over those common carriers are not. However, this principal has never been consistently applied to phone companies: the services provided over the phone lines are also regulated. Many public interest groups are now arguing for similar regulatory requirements for the Internet.

One issue is "universal access," the assurance of basic service for all citizens at a very low price. But what is "basic service"? Is it merely a data line, or a multimedia integrated services connection? And in an increasingly competitive market for communications services, where should the money to subsidize universal access be raised? High-value uses which traditionally could be charged premium prices by monopoly providers are increasingly subject to competition and bypass.

A related question is whether the government should provide some data network services as public goods. Some initiatives are already underway. For instance, the Clinton administration has required that all published government documents be available in electronic form. Another current debate concerns the appropriate access subsidy for primary and secondary teachers and students.

What are some of the competing visions for the National Information Infrastructure?

There are probably as many visions of the NII as there are nodes on the Internet. But the two broad models are the Internet model ("many to any") and the cable TV model ("broadcast to couch potatoes"). A well-written discussion of the "Internet model" vision is available in [National Academy of Sciences1994]. One critical issue is the amount of bandwidth provided from the home. The Internet model sees bandwidth as being more-or-less symmetric; the cable TV model sees a much more limited outbound bandwidth: essentially enough for home shopping. As one wit has said about interactive TV networks, "how much bandwidth do you need to send 'I want it' to the Home Shopping Network?"

What will be the market structure of the information highway?

If different components of local phone and cable TV networks are deregulated, what degree of competition is likely? Similar questions arise for data networks. For example, a number of observers believe that by ceding backbone transport to commercial providers, the federal government has endorsed above-cost pricing by a small oligopoly of providers. Looking ahead, equilibrium market structures may be quite different for the emerging integrated services networks than they are for the current specialized networks.

One interesting question is the interaction between pricing schemes and market structure. If competing backbones continue to offer only connection pricing, would an entrepreneur be able to skim off high-value users by charging usage prices, but offering more efficient congestion control? Alternatively, would a flat-rate connection price provider be able to undercut usage-price providers, by capturing a large share of low-value "baseload" customers who prefer to pay for congestion with delay rather than cash? The interaction between pricing and market structure
may have important policy implications, because certain types of pricing may rely on compatibilities between competing networks that will enable efficient accounting and billing. Thus, compatibility regulation may be needed, similar to the interconnect rules imposed on regional Bell operating companies.

How will the choice of service architecture affect the network services available?

The architecture of a network can have important implications for the nature of goods available. For instance, the Internet provides access to an incredibly diverse array of information sources, from personal home pages to fully searchable and professionally managed archives. We believe that the salient feature that drives the diversity of the Internet is that the network provides only bit transportation services; it is up to the end hosts to construct higher-level applications on top of this raw transport service. This architecture has the great advantage that it need not be modified as new applications arise, because applications are implemented entirely at the end hosts and no centralized authority needs to approve such implementations. We call such an architecture complete blind.

There are also a wide variety of services available via 900 numbers on the phone network. In this case the network is application-aware (voice telephony circuits) but content-blind. In comparison, the offerings of cable television, which is content-aware, are rather limited in scope. To what extent do these differences reflect the effect of architecture on the provision of content? [MacKie-Mason et al. 1995b] explore this question, focusing on opportunities to price discriminate, service provider liability, the costs of implementing an aware architecture, and the effects of clutter from the availability of too many applications or too much content.

What are other important economic problems for the future Internet?

How will network distribution and electronic publishing affect intellectual property rights?

One immediate challenge for information service provision over public networks is the definition and protection of intellectual property rights. Existing intellectual property law is far from adequate to handle digital materials. The standard motivation for copyright is that it will encourage the creation and distribution of new works. But if copies of digital works can be produced at zero cost and distributed with perfect fidelity, what will this do to the incentive to produce originals? Several writers have suggested that a new conception of the value of intellectual property, and a new focus on the locus of the value-added will be necessary. See, for example, [Barlow1994], and [Dyson1995].

What problems will the Internet face in the next 2 years?

We think that the major network service challenge in the next 2 years will be to find ways to support interconnection. The technical problems are relatively straightforward; it's the accounting and economic problems that are tricky. We think it inevitable that a system of settlements will emerge.

What are settlements? When you place a call to Paris, you transit at least 3 telco networks: your local provider, a long distance company, and France Telecom. These companies keep track of calls and make payments to each other based on how much traffic flows in each direction through their networks. There is a similar system in place for postal services.

Some economists have suggested that such a settlement policy will likely arise for the Internet. Since one carrier
imposes costs on another by sending it incremental traffic, it seems appropriate that some monetary payments accompany this traffic. Others argue that traffic flows are sufficiently symmetric that a "no settlements" policy is workable, especially given the nearly-zero incremental cost of transport (as long as capacity is sufficient). Indeed, to date interconnected Internet networks have not used settlements.

Nonetheless, resource usage is not always symmetric, and it appears that the opportunities to free-ride on capacity investments by other network providers are increasing. For example, suppose a new net provider hosts a number of World Wide Web servers near a NAP, and then purchases a very short connection to the NAP. Web traffic flows are very asymmetric: a handful of bytes come in from users making requests, and megabytes are sent back out in response. Thus, for the low cost of leasing a short-distance connection to a NAP, a provider could place a huge load onto other networks to distribute to their users, while this provider does not have to deliver much incoming traffic.

The new NAPs (funded by NSF) anticipate that interconnected networks will want to implement settlements. The conditions of use for the NAPs explicitly permit settlements, but they must be negotiated independently by the interconnecting networks; as of this writing it appears that none have yet done so. Further, the necessary technical, accounting, and economic infrastructure is not in place.

What economic problems will the Internet face in the next 3-5 years?

New protocols such as IPv6 and ATM will become more widespread in this timeframe. Such protocols will be better able to deal with integrated services and congestion management. This should allow for new applications such as video based conferencing and collaboration tools to become widely used. Also we expect to see some progress made on standardizing new tools for information discovery, search and collaboration.

What economic problems will the Internet face in the next 5-10 years?

Once flexible protocols and killer apps are available, users will likely demand considerably more bandwidth. For example, all-optical networks could spring up in high-density areas [Gilder1992]. But along with this increase in demand for bandwidth will come a recognition of the commodity nature of network transport. The industry will have to find some way to recover fixed costs. One approach is common carriage and regulation, but we hope that less regulated and more competitive solutions can be found.

Further Reading

We have written several papers that provide further details on Internet technology, costs, and pricing problems (see, e.g., [MacKie-Mason and Varian1995b], [MacKie-Mason and Varian1995a], [MacKie-Mason and Varian1995c], and [MacKie-Mason and Varian1992]). We maintain two large, comprehensive WWW servers containing links to related information. A comprehensive catalog of electronic materials concerning the economics of the Internet can be found at the Economics of the Internet site. A comprehensive directory of information available on the Internet concerning telecommunications more broadly is available at the University of Michigan School of Public Policy telecommunications site.

References

Baeza-Yates et al. 1993
Barlow1994

Bohn et al. 1993

Braun and Claffy1993

Brownlee1994

Carter and Guthrie1994

Cocchi et al. 1992

Cox1992

Dyson1995

Edell et al. 1995

Fazio1995

Gilder1992

Gupta et al. 1994

MacKie-Mason and Varian1995a
MacKie-Mason and Varian1995b

MacKie-Mason and Varian1995c

MacKie-Mason and VarianTo appear

MacKie-Mason et al. 1995a

MacKie-Mason et al. 1995b

Markoff1993

Murphy and Murphy1994

National Academy of Sciences1994

Zhang et al. 1993

About this document ...

Economic FAQs About the Internet

This document was generated using the LaTeX2HTML translator Version 95.1 (Fri Jan 20 1995) Copyright © 1993, 1994, Nikos Drakos, Computer Based Learning Unit, University of Leeds.

The command line arguments were:
latex2html -no_images -split 0 FAQs.tex.

The translation was initiated by Jeffrey K. MacKie-Mason on Tue Jul 11 10:27:47 EDT 1995
The authors wish to acknowledge support from National Science Foundation grant SBR-9230481. The most current version of this paper will be available for anonymous ftp, gopher, and in HTML format for World Wide Web access at gopher.econ.lsa.umich.edu. Both authors are members of the Department of Economics, University of Michigan, Ann Arbor, MI 48109-1220. They can be reached at jmm@umich.edu and Hal.Varian@umich.edu.

We are grateful to the American Economics Association for permission to reprint substantial portions of that material.

Beginning in the early 1990s, the statistics do not reflect the size of the total U.S. network because alternative backbones began appearing. It is generally believed that the NSFNET accounted for at least 75 of U.S. backbone traffic until around September 1994, after which its share rapidly fell as the NSFNET was gradually phased out. Shutdown occurred on 30 April 1995.

Recall that a byte is equivalent to one ASCII character.

Because most cable networks are one-way, many of these initial efforts use an "asymmetric" network connector that brings the input in through the TV cable at 10 Mbps, but sends the output out through a regular phone line at about 14.4 Kbps. This scheme may be popular since most users tend to download more information than they upload.

The single largest current use of network capacity is file transfer, much of which is distribution of files from central archives to distributed local archives. The timing for a large fraction of file transfer is likely to be flexible. Just as most fax machines allow faxes to be transmitted at off-peak times, large data files could easily be transferred at off-peak times---if users had appropriate incentives to adopt such practices.

The effects of network congestion are usually negligible until usage is very close to capacity.

Many university employees routinely use email rather than the phone to communicate with friends and family at other Internet-connected sites. Likewise, a service is now being offered to transmit faxes between cities over the Internet for free, then paying only the local phone call charges to deliver them to the intended fax
machine. And during early 1985, several versions of Internet voice telephone software have been released, allowing people to hold two-way conversations --- using large amounts of bandwidth --- but paying nothing to offset the service quality degradation they are imposing on other users.

...cost.

See [Gupta et al. 1994] for a related study of priority pricing to manage Internet congestion.

...changed.

[MacKie-Mason et al. 1995a] and [Murphy and Murphy1994] describe an alternative congestion pricing scheme that would set prices based on a current measure of congestion in a gateway, then communicate these to the user. The user would then decide how much traffic to send during the current pricing interval. This mechanism is easier to implement, but at least in principle it does not match the efficiency of the smart market.

...zero.

Since most users are willing to tolerate some delay for email, file transfer and so forth, most traffic should be able to go through with acceptable delays at a zero congestion price, but time-critical traffic will typically pay a positive price.

...request.

Public file servers in Chile and New Zealand already face this problem: any packets they send in response to requests from foreign hosts are charged by the network. Network administrators in New Zealand are concerned that this blind charging scheme is stifling the production of information public goods. For now, those public archives that do exist have a sign-on notice pleading with international users to be considerate of the costs they are imposing on the archive providers.

...packets.

Statistical sampling could lower costs substantially, but its acceptability depends on the level at which usage is measured---e.g., user or organization---and on the statistical distribution of demand. For example, strong serial correlation can cause problems.

...traffic.

If this example doesn't seem compelling because the costs are borne by the networks whose users are generating the demand for the large Web traffic flows, then imagine that the free-riding provider instead services junk email servers that send out vast quantities of unsolicited email. Other users don't want to reach these servers, so this net does not have to provide capacity to handle incoming traffic.
From yo-yo status reports to ToiletCam, Internet site makes point of the pointless

BY DAN GILLMOR
Mercury News Computing Editor

When television consisted mainly of the three networks, a critic called it a vast wasteland.

Then came cable — 57 channels and nothing on, observed a rock star.

Now we have the Internet's World Wide Web (WWW), with tens of thousands of interconnected channels known as "pages," each of which can contain text, pictures, sounds and more.

And if one new web site, called Useless WWW Pages, is any indication, technology still may be outpacing civilization.

The Useless WWW Pages' creator calls his site America's Funniest Home Hypermedia, though it has entries from several continents among its dozens of pages.

To see them properly, you need a web software browser such as Mosaic. Click

See WEB, Back Page

The ToiletCam on the Internet

web site called Useless WWW

Pages gives a minute-by-minute

updated photograph of a toilet.

From the San Jose Mercury News

Used with permission.
And now for something completely useless . . .

WEB from Page 1A

your computer’s mouse on an item showing on one page, and up comes text, images or another web page; the linked material can be on the same computer or on a machine in another state or country. It’s fairly easy to set up a WWW site, as the Useless WWW Pages demonstrate.

Several of the more than 50 Useless sites cannot even be described in a family newspaper, much less quoted from. Among the quotable, um, highlights:

Astroboy’s Yo-Yo Status Server, on which you can find the status of a red Hummingbird yo-yo (it has the Smokey & the Bandit Men logo on one side and a Kodak logo on the other.) On Monday at 12:18 p.m. PST, Astroboy’s yo-yo was Down.

Crazy Dutch Number-plates, a discussion about and listing of license plates (and their numerology) in the Netherlands, with photographs. Look for Palindromic plates such as NL-22-LL; Four-equal-character plates such as DD-DD-73; and Abbreviation plates such as HT-TP-13 (HTTP standing for HyperText Transfer Protocol, an Internet standard).

Steve Berlin’s list of all his T-shirts. They feature people in the music industry, comic-book characters and movie stars, not to mention nerd-related and political subjects.

The Toilet Cam, a minute-by-minute updated photograph of a toilet. As of 12:23 p.m., it was not in use.

Categorical lists

The main Useless page also includes links connecting to lists encompassing entire categories, such as The Uselessness of Pets (pictures of people’s pets and, as a bonus, an audio clip of Socks the first cat in full yowl), the Uselessness of Cars (Christopher’s Sentra, Honda’s Escort, etc.), and more.

Paul Phillips, a student and part-time Internet consultant at Primum, a San Diego company that provides Internet services, claims responsibility for the Useless Pages. He’s been working on the site for several months, he says, a little at a time.

Zen-like, he cautions that if you’re looking for all this, you’ve missed it. He adds, “Humor value doesn’t count as usefulness.”

Attention for employer

However, Phillips does admit that the page, as hoped, has attracted attention to his employer, which is useful at least to Primum. Phillips doesn’t really want to say which of the pages are the most useless, but he’s begun a Useless WWW Pages Hall of Fame. It begins with Kenny Z’s CD List—“As CD lists go,” Phillips writes on his Hall of Fame listing, “it is only average, but

New casino planned

SPARKS, Nev. (AP) — The City Council has unanimously approved zoning and plan changes paving the way for a 1,341-acre development in Spanish Springs. Plans for the Wingfield Springs project include 2,242 housing units, a 27-hole championship golf course and a hotel casino.
The War Between alt.tasteless and rec.pets.cats

Anyone can be off-color now and then. But it takes a particular genius to be truly tasteless. The first in a three-part series on some of the more colorful of Usenet's 4,000 news groups.

By Josh Quittner

I wasn't Trashcan Man's idea to raid rec.pets.cats, though I'm sure he wished it had been.

Inciting a riotous Usenet flame war, like the war between alt.tasteless and rec.pets.cats, isn't a common notion of a good time. Then again, neither is starting fires in trashcans, blowing up one's hand with a firecracker or crashing a university computer system - all things that Trashcan Man has done, and done proudly.

If you're a reader of alt.tasteless, as I am, you've probably heard of Trashcan Man. His real name is Constantino Tobio Jr., and he's a 21-year-old history major at Columbia University, in Manhattan. Everyone, though, calls him by his self-appointed nickname.

Trashcan Man's two favorite possessions are a coin purse made from a kangaroo scrotum and a tin of Vegemite. Vegemite is an Australian food substance made from yeast extract. It has the consistency of axle grease. Among readers of alt.tasteless, who prize Vegemite for its sublimely disgusting flavor, the spread has achieved cult-like status. According to one a.l.t.er, "It was the grossest thing I ever tasted. It's about as thick as peanut butter, and to say it tastes like shit would be an understatement."

You can buy it in health food stores.

Trashcan Man has yet to sample his: "I fear it, man, I fear it," he says, wistfully.

Which is an intriguing thought: Trashcan Man fearing something. He doesn't even fear Karen Kolling, and she is the one who finally brought him down. Trashcan Man, like most of the hardcore correspondents on alt.tasteless, spends so much time probing the darkest grottoes of human experience and imagination that the thought of his actually fearing something is itself frightening to contemplate.

You should know that Usenet, the battleground for what has become known as The War Between alt.tasteless and rec.pets.cats, is the Internet's answer to Time Warner's 500 channels of cable. Usenet makes 500 channels seem limited, frankly. There are more than 4,000 "news groups" on Usenet: more come online every week. Each one is dedicated to one niche interest or another. You can read daily collections of messages dedicated to LISP programming in one group (comp.lang.lisp), Bob Dylan's music (rec.music.dylan) in another, and fireworks (rec.pyrotechnics) in a third. This last one is the group Trashcan Man posted to on July 4, 1995, minutes after he nearly blew off his fingers with a blockbuster firecracker.

Usenet is like a vast computer bulletin board, readable by more than 10 million people around the world every day. It actually does cable one better: It's already interactive. You can post notes to Usenet groups, ask questions, comment on someone else's remarks, conjecture idly and often.

Which is how Trashcan Man and his pals started the war of words that got out of control.

It's hard to say with precision how many people actually read any one news group. (The term news groups is peculiar, since most of the postings, known as "articles," would not be considered news. Nevertheless, Usenet users refer to them in this way.) The Internet, as you probably know, is anarchic, not owned by anyone, and monitored mainly at its ever-expanding edges by the system administrators who sell or give people access. Periodically, various surveys attempt to poll Internet sites that distribute net news. These surveys give rough estimates of who reads which news groups.

So who reads the articles posted to alt.tasteless? According to a Q&A in the alt.tasteless FAQ (most news groups have FAQs, or Frequently Asked Questions files), 60,000 people around the world browse it. You can believe it or not; I choose to believe it in the same way that I believe most people will slow down and take a good look at the carnage of a car accident. Why do we look?

WELCOME TO ALT.TASTELESS
1. What is alt.tasteless?
A news group devoted to tasteless phenomena in all its forms. A place for people with a twisted and sick sense of...
humour. In alt.tasteless we like to get into the details: short jokes have their forum in alt.tasteless. jokes, we want the feel of it, the smell of it, the stench of it, every little rotten and pus-oozing detail. And then of course some rough gifts of it in alt.binaries.pictures.tasteless or alt.tasteless.pictures.  
- From the alt.tasteless FAQ

Alt.tasteless was created in the autumn of 1990 "as a place to keep the sick people away from rec.humor and other forums," according to Steven Snedker, a Danish journalist for Denmark's largest computer magazine, "Alt.tastelessers see this as an important turn in Usenet history, on a par with the creation of alt.sex. Both alt.tasteless and alt.sex are fine forums that serve their purpose to keep the other parts of Usenet clean, and to dig further into the stuff discussed."

Of course, Snedker adds, "I might be a bit ignorant here, as I don't read alt.sex. I mean after all, I'm Danish."

Trashcan Man urged me to correspond with Snedker, one of alt.tasteless's founding fathers, as well as the author of the 710-line FAQ quoted from above. He was the first person to be quoted "Mr. A.T.," a lifetime honor Snedker likens to "winning the Mr. Universe Contest.” Snedker won the title for his collected postings; to say Snedker likes to write about the scatological is a serious understatement, comparable to saying M.F.K. Fisher liked to write about food.

"Shitting feels good. Sex feels good. Killing your boss feels good," Snedker wrote me in e-mail one day. "But you're actually not allowed to talk about it, although almost everyone either actually does these things (I know people who do) or at least fantasize about doing them. In alt.tasteless there's no hypocrisy: We call things by their real name. And nothing is sacred."

For Snedker, Trashcan Man, and some of the others, there is something transcendent about being really gross. Anyone can be off-color now and then. It takes a particular kind of genius, though, to be truly tasteless, to shock people who have devoted a lifetime to collecting revolting facts, disgusting jokes, and synonyms for the word "penis." "There's no forum in the world like alt.tasteless," Snedker writes. "I know of no other place where people can trade toilet experiences in such an atmosphere of friendship, sharing, and understanding. Where dead-baby jokes can be enjoyed. Where cynicism can be so funny."

Trashcan Man discovered alt.tasteless in January 1993, led there by a friend who, he says, "knew me since I was 6, starting fires and pissing on them to put them out."

He adds: "I have been disgusting for as long as I can remember."

This is one of the amazing things about the global Internet: Whole communities are crystallizing around marginal interests. Here you have Trashcan Man, feeling disgusting and alienated in New York City, who checks into Usenet one day and, blaaaaa! He finds other disgusting, alienated people, people who think exactly like he does, only they live in Denmark and Canada and London and Ohio.

Now, you can say that Howard Stern, the king of alt.tasteless morning drive-time shock radio, does that too. You drive into Manhattan on a weekday, roll down your window to pay a toll, and all around you hear Stern's voice as if piped over a loudspeaker - the combined effect of a thousand car radios from a thousand commuter cars. But one fundamental difference between Howard Stern fans and alt.tasteless readers is the Stern correspond, don't only connection - is on Usenet, people and interact.

A funny sort of thing happens when some people want others to be like them, like the one over the telephone in the Wells in 1992, a quip of the Weird Miscellaneous Cyberspace silliness that began by the time the people who had come to think of one place in the world as a great for the non-outsiders (and who are typical Wellsters, communal July discussing wh"
ig, and understanding. Jokes can be enjoyed. Where funny.”

I discovered alt.tasteless in here by a friend who, he
told me was 6, starting fires and
down put them out.”

been disgusting for as long

amazing things about the
tasteless communities are crys-
arginal interests. Here you

feel disgusting and

York City, who checks into
d, blaaaat! He finds other

tasteful people, people who think

only they live in Denmark

London and Ohio.

by that Howard Stern, the

morning drive-time shock

you drive into Manhattan

don’t your window to say a

and you hear Stern’s voice as if

speaker – the combined effect

radio from a thousand com-

fundamental differences

Stern fans and alt.tasteless

readers is the Stern fans don’t connect, don’t

correspond, don’t even know each other. Their

only connection is through a radio personality.

On Usenet, people actually find each other

and interact.

A funny sort of out-of-control synergy hap-
pens when some people connect online. It’s

like wilting, electronic style, and it happens all

over the online world, not just on Usenet. On

the Well in 1992, a bunch of people who fre-
quented the Weird Conference moved in on the

Miscellaneous Conference, posting assorted

silliness that offended, among others, a man

who had come to the Misc Conference looking

for solace in the aftermath of a grandparent’s

death. It ended a day or so later when the per-

petrators (they were “only trying to have fun”) apologetic and apologized and apologized.

Then, as is typical of the often-navel-gazing

Well-ites, the community spent from April until

July discussing what it all meant.

When Trashcan Man discovered alt.tasteless,

it was as if he had been reunited with his long-

lost brothers. There was a gush of recogni-
tion, a feeling that, finally, he belonged somewhere.

“We’re probably quite a bunch of misfits deep

down inside,” he says of his Usenet group. “We

don’t seem to conform to society’s norms of

decorum and good taste. Deep inside we have

desire to just be as disgusting as possible.”

In alt.tasteless, Trashcan Man found a place

where “disgusting” is a grudging compliment.

It is not a rebuke, as it was at Our Lady Queen

of Martyrs, the parochial school he attended in

Man’s articles. He was scatological. He was

sacrilegious. He was really disgusting.

He was tasteless and they loved him.

One night last summer, the boys on alt.tasteless

were feeling, well... if it were a Usenet group

might be called alt.restless. Maybe they were

getting bored with each other. Maybe they

“I know of no other place where people can trade toilet

experiences in such an atmosphere of friendship, sharing,

and understanding. Where dead-baby jokes can be enjoyed.

Where cynicism can be so funny.”

Forest Hills, one of the more tasteful sections of

Queens. A lifetime in parochial schools led to

Trashcan Man’s first postings on alt.tasteless,

riffs off a blasphemous idea he had: “What

would have happened if the crucifixion had

been an impalement?”

For starters, “Doubting Thomas touching

the wound would have been more dramatic.

And people would make the sign of the stick,”

he said.

Many alt.tasteless people enjoyed Trashcan

craved the sensation of saying something really

gross, and getting a Big Reaction. You know,
something sisterly, like EEEEEEEEEWWW

GROOOOOSSSS! You never get that kind of

response on alt.tasteless.

Someone – no one remembers who – sug-
gested invading another Usenet group. A

Usenet party raid! The suggestion was well

received by other a.Users. But whom to raid?

After much discussion, a likely target emerged:

Rec.pets.cats.
Rec.pets.cats, as you can tell from the name, is a Usenet group for serious cat lovers. It's the kind of place where people like to discuss cat health problems and adorable things their kitties did. If you were able to put all of humanity on a giant spectrum, cat lovers would undoubtedly occupy the frequency opposite people who are alternatively tasteless.

A PhD grad student named Adam Steele, from Canada, suggested what he termed a "stealth attack," designed to engage the unsuspecting cat people. He fired the opening shot in The War Between alt.tasteless and rec.pets.cats by posting the following article, anonymously, to rec.pets.cats:

I have two cats — Sootikin (Sooti for short) a 2-year old female, and Choad.

Choad (stupid name) is a neutered tom who was dumped on me by my scumbag ex-roommate (he had been given it by one of the two women he was dating at the time).

I'm not what you would call a real study type guy (although I have a lot of women friends), so when I date it's really important to me. Anyway, Sooti goes into heat something fierce (sometimes it seems like it's two weeks on, two weeks off), I had a date a while back, when she was really bad. yawling and presenting all the time — not the most auspicious setting for a date. While dinner was cooking, I tried to stimulate her vagina with a Q-tip because I had heard that one can induce ovulation that way. My date came into the bathroom while I was doing this, and needless to say I don't think she bought my explanation. The date was a very icy experience after that.

Choad's problem is that he has really stinky shits (paint peeler).

During my most recent date — I don't know if this was a jealousy thing — he shit in the bathtub. I live in a loft, and the bathroom is open for ventilation, so in a few seconds we were gasping for air. Another date ruined, I'm getting desperate.

What should I do. I love my cats, so I don't want to get rid of them, but I can't go on like this any more. It's my love life, or them. Please help!!!

Moby (not my real name ;-) Sooti & Choad

Some of the more earnest participants on rec.pets.cats took this article seriously and offered advice. They recommended a trip to the vet for Sooti, a change of diet for Choad. But it quickly became apparent that something was wrong. Hordes of new "cat lovers" suddenly besieged rec.pets.cats, offering extremely tasteless advice. One correspondent suggested nailing the hapless cats to a breadboard. Another thought firing "multiple .357 copper-jacketed hollowpoints" longitudinally through Sooti and Choad would solve the problem. (The cats' names are slang words indigenous to alt.tasteless. Choad is a word for penis, of course, and Sooti ... e-mail me if you need to know.)

During the ensuing months, it is safe to say that hundreds of messages passed back and forth. Whenever life began to return to normal at rec.pets.cats, someone from alt.tasteless would post an article there looking for, say, a good recipe for Polynesian cat. Occasionally, someone from rec.pets.cats would try to fight back by posting an article about his or her cute kitty on alt.tasteless. But that only led people like Trashcan Man to respond with their own articles about topics such as vivisecting the cat and having sex with its innards.

Yes, Trashcan Man was right there on the front lines of the war.

One day, a (real) rec.pets.cat person posted an article to his own alt.periodicals about a neighborhood cat, Trashcan Man had in the face with muriatic acid. Of course, about as sensible as putting it in a microwave oven.

It was around this time that I decided enough was enough.

Kolling lives with her partner and Little Bit, in the San Francisco Bay Area. She has been reading cat-related Usenet articles for about as long as she's been online.

"A lot of people dog owners feel about the use of the analogues, Kolling tells me over the phone that many people use the analogues. But they're not as effective as they are in real life."

Kolling says many cat people are not typical computer people.
an article to his own news group asking whether anyone could suggest a way of keeping a neighborhood dog from harassing his cat. Trashcan Man had a suggestion: Spray it in the face with muriatic acid, a form of hydrochloric acid. Of course this is dangerous — about as sensible as warming a cat by putting it in a microwave oven (which someone had previously recommended).

It was around this time that Karen Kolling decided enough was enough.

Kolling lives with her three cats, Sweetie, Holly, and Little Bit, in the San Francisco Bay area. She has been reading and posting to rec.pets.cats about as long as Trashcan Man has been on alt.tasteless.

"A lot of people don't understand how pet owners feel about their pets. A lot of times, people use the analogy of pets being like kids," Kolling tells me over the phone. "Suppose someone went around in a park putting up posters of your kid getting mutilated. This is what it was like."

Kolling says many of the people in rec.pets.cats are not what you'd describe as typical computer people. "We have a lot of unsophisticated users in this group." Many people are steered to the group when they are dealing with the grief of losing a pet, for instance.

Kolling is a sophisticated user: She's a software engineer for Adobe Systems and has been a Usenet regular for more years than she can recall. Shortly after the alt.tasteless invasion, she can set the kill file to get rid of the messages of Joe Smith. And that is precisely what she taught her friends to do. It worked for a while, until alt.tasteless people began "counterfeiting" names so you wouldn't know it was Joe Smith," she says.

If there were any rules for behavior in the first place, the people from alt.tasteless were clearly no longer playing by them. "That took it unquestioningly beyond freedom of speech," Kolling says.

So did some other moves that escalated the war. One convention on Usenet is known as cross-posting. Cross-posting is a way of automatically posting the same article to other groups. An article on, say, a rabies outbreak in the Northeastern US might be as interesting to rec.pets.cats as it is to readers of rec.pets.dogs. So you would cross-post it. One day, Kolling responded to a tasteless posting that had been planted on rec.pets.cats. She didn't look closely...
Security Clearance:
The distance between you and the floor after you learn how easy it is to use RSA.

Developing applications with advanced encryption and authentication features doesn't have to be a headache. In fact, once you see how easy it is to work with the world's most trusted data security system, you might find yourself downright gleeful.

With BSAFE® 2.0 or TIPETM 1.1, the latest releases of the world's best-selling crypto software developer's kits, you'll have everything you need to build secure applications. The only thing you won't need is a Ph.D. in number theory or cryptography. Both toolkits (RSA Public Key Cryptosystem and a host of other algorithms) easy.

developers have the full support of RSA's staff of clowns, cryptographers and engineers. You'll have vtophraphy shop standing behind your like we stand behind other BSAFE® and TIPETM
or e-mail us at info@rsa.com. It could mean the ng up your heels or just kicking yourself.

be some things are better left unread.

kits are available for a variety of popular platforms, and source code licensing is also available.

94. RSA Data Security, Inc., 100 Marine Parkway, Suite 500, Redwood City, CA 94065-1051

noted that there about Trashcan was clear: "noe.

"So I asked "because I value.

"See, when I was not school.

Says, "It was the post, not being effective tool to.

Trashcan Maker.

threats, nor did he's guilty of, he aggregator in a firm his Net connecti.

munity - was pa cruel. It was onl.

hurt. It was all.

Wrong, says &

"This whole ti.

ing about the ch.

said. "There are.

is like the Wild &

and you can do: that's the way it.

"If people war
noted that there had been complaints – again – about Trashcan Man. The tone of the message was clear: Knock it off, or else.

“So I knocked it off,” Trashcan Man says, “because I value my Net access.”

“See, when I got suspended, the biggest loss was not school – I didn’t give a flying fuck,” he says. “It was the Net access – not being able to post, not being able to get e-mail. It’s a very effective tool to control me.”

Trashcan Man says he never sent anyone death threats, nor did he harass anyone by phone. All he’s guilty of, he maintains, is being a prime agitator in a flame war. Threatening to cut off his Net connection – his connection to his community – was patently unfair, bordering on cruel. It was only words, after all; no one was hurt. It was all in fun, right?

Wrong, says Kolling.

“This whole thing says something interesting about the character of the Internet,” she said. “There are folks who think the Internet is like the Wild West, where there are no rules and you can do anything. Well, I don’t think that’s the way it should be.”

“If people want to post stuff like this to alt.tasteless, fine,” Kolling adds. “But it doesn’t belong in rec.pets cats.”

For his part, Trashcan Man has calmed down a bit. “Oh, I still do the usual flame, but not as a bait. I have changed my flamming habits such that I now flame people whom I feel deserve it on news groups that I inhabit,” he e-mailed me recently. “This includes alt.binaries.pictures.tasteless, and, to a somewhat weak (i.e. alt.fan.karl-malden.nude).”

In the fall, Trashcan Man will graduate, God willing. He has no immediate plans, other than to “get a job. Preferably a job with Net access.”

In the long run, though, “I have political aspirations,” Trashcan Man said. “I’m a member of the Republican Party on campus. I have often proclaimed that I am the future of the Republican Party.”

“A lot of people don’t understand how pet owners feel about their pets. A lot of times, people use the analogy of pets being like kids. Suppose someone went around in a park putting up postcards of your kid getting mutilated. This is what it was like.”

more toned-down degree, on rec.arts.marching.band. But now I flame only when I feel the flaming is begged, i.e., when I’m insulted, or when I see someone monumentally stupid or just ignorant, or when my hemorrhoids are acting up. But, newsgroup invasions are probably a thing of the past, unless they are very

If you are unsure of how to connect to Usenet, see Chapter 5 of The Internet Guide for New Users, by Daniel Dern.

Josh Quittner (quit@newsday.com) covers technology for Newsday. He co-wrote the high-tech thriller Mother’s Day with his wife, Michelle Slatta.
SECTION 2

JURISDICTION AND VENUE
Statement of the Case

Course of Proceeding and Disposition

On January 25, 1994, a federal grand jury in Tennessee returned a twelve-count indictment against Robert Thomas and his wife, Carleen Thomas, charging them with conspiracy (18 U.S.C. §371) (count 1); transmitting obscene computer-generated images known as "Graphics Interchange Format" files or "GIF files"\(^1\) in interstate commerce and aiding and abetting (18 U.S.C. §§1465, 2) (counts 2 - 7); shipping obscene videotapes in interstate commerce and aiding and abetting (18 U.S.C. §§1462, 2) (counts 8 - 10). Mr. Thomas alone was charged in count eleven (11) with mailing child pornographic magazines in interstate commerce and aiding and abetting (18 U.S.C. §§2252(a)(1), (2)). Count twelve (12) was a criminal forfeiture allegation (18 U.S.C. §1467).

Mr. and Mrs. Thomas appeared twice in federal district court for the Northern District of California, San Jose division, before being arraigned on March 15, 1994, in federal court in Memphis, Tennessee. Both Mr. and Mrs. Thomas were represented by the same attorney, Richard Williams of San Jose, California. Mr. Williams did not obtain local counsel for Mr. and Mrs. Thomas.

Mr. Williams filed bizarre, if not completely irrelevant, pre-trial motions in this case, including a "Notice for Immediate Court Action" in the Northern District of California, seeking to relate this prosecution to the "Radiation Survivors" litigation pending in that jurisdiction. (N.A.R.S. v. Walters, Case No. C-

\(^1\) GIF files are described in greater detail in the Statement of Facts, infra.
83-1861 MHP) (7/14/94).

Mr. Williams filed a motion to dismiss alleging that the North American Free Trade Agreement precluded this prosecution and that Miller v. United States, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) was "unconstitutional." (4/18/94, Motion to Dismiss.)

Mr. Williams filed a motion to suppress evidence in the Northern District of California. The district court in California declined to hear the motion and dismissed it without prejudice to Mr. Williams's refiling it in district court in Tennessee. (Case No. 3-94-30005 WDB.) (3/16/94, Order at 7.) Mr. Williams did not refile this motion or any suppression motion with the trial court.

Mr. Williams did file a motion for change of venue to the Northern District of California, arguing that Mr. Thomas did not send the GIF files to Tennessee but rather Inspector Dirmeyer electronically retrieved them from California to Tennessee in order to artificially create venue. (4/18/94, Motion to Dismiss at 3.) This motion was denied by the trial court. (5/12/94, Order.)

In additional to not refiling a suppression motion, Mr. Williams filed no discovery motions in the Western District of Tennessee nor did he make any requests for discovery from the government. (7/8/94 RT 6.) Mr. Williams failed to file a potentially dispositive motion to dismiss counts two (2) through seven (7) based on United States v. Carlin Communications, 815 F.2d 1367 (10th Cir. 1987) (holding that 18 U.S.C. §1465 applies
only to tangible objects). Mr. Williams also failed to file motions to sever the child pornography count or to sever the defendants.

The jury trial began on July 19, 1994, in the Western District of Tennessee. The jury returned its verdict on July 28, 1994. The jury acquitted Mr. Thomas of the child pornography charge (count eleven). The jury convicted Mr. Thomas of conspiracy (count one); transporting obscene GIF files (counts 2 - 7); and transporting obscene video cassettes (counts 8 - 10). The jury also found the forfeiture allegation to be true (count 12).

Mr. Williams failed to file a motion for new trial. Mr. Thomas retained Thomas J. Nolan as counsel on September 16, 1994, well after the time for filing a new trial motion had lapsed. (9/16/94, Motion for Substitution of Attorney.) Mrs. Thomas retained James D. Causey of Memphis, Tennessee as her new counsel.

On December 2, 1994, the trial judge sentenced Mr. Thomas to thirty-seven (37) months under level nineteen (19) of the Federal Sentencing Guidelines and denied bail pending appeal to Mr. Thomas. (12/2/94 RT 64.) This sentence consists of a base level of ten (10); an enhancement of five (5) levels because the material was distributed for pecuniary gain; and an enhancement of four (4) levels because the material portrayed "sadistic or masochistic conduct or other depictions of violence." U.S.S.G. §2G3.1(a), (b).

Mr. Thomas was denied a two level reduction for "acceptance
of responsibility" under U.S.S.G. §3E1.1.

The Sixth Circuit denied Mr. Thomas's motion for bail pending appeal on January 20, 1995. (1/24/95, Order.)

On December 9, 1994, Mr. Thomas filed a notice of appeal. Mr. Thomas surrendered himself on February 8, 1995.

On March 3, 1995, the trial court ordered the forfeiture of all of Mr. Thomas' computer equipment. (3/3/95, Order.)

Statement of Facts

Amateur Action Bulletin Board System

In February, 1991, Robert Thomas began operating "Amateur Action Bulletin Board System" (hereinafter "bulletin board") from his home in Milpitas, California. (RT 739, R. Thomas.)

A computer bulletin board system is an electronic form of the familiar thumb-tack and cork-board bulletin boards that are used everyday to display messages, reminders, photographs, magazine articles and the like. (RT 255, McMahon.) A computer bulletin board simply represents a collection of information (messages, reminders, photographs, etc.) stored on one computer that can be accessed by other computers via telephone lines and communication equipment. Id. A computer bulletin board system can store hundreds of thousands of times as much information as a conventional message board. (RT 256, McMahon.)

Just as cork-boards reflect the varied interests of different individuals and groups, bulletin boards are devoted to
an extraordinary range of subject matter. The Sixth Circuit, for example, has an electronic bulletin board, called "ABBS," that provides updates on docketing of cases and Circuit rules. Mr. Thomas's bulletin board featured a collection of computer files with a sexually explicit subject matter intended for adults.

All of these bulletin board systems, including Mr. Thomas's, work in much the same way. Information intended for the bulletin board first must be converted into computer files so that the text and pictures can be stored by the computer. Computers understand only binary information -- 0's and 1's, and computer files are nothing more than lengthy strings of binary code, organized into groups of 0's and 1's. (RT 256, McMahon.)

Mr. Thomas used an electronic device called a "scanner" to convert pictures from sexually explicit magazines into computer files. (RT 258-9, McMahon.) These magazines were purchased by Mr. Thomas in public adult book stores in California. (RT 740, R. Thomas.) Mr. Thomas also purchased videotapes in adult bookstores and sold these tapes to bulletin board members. (RT 749, R. Thomas.) Mr. Thomas's scanner created the GIF files that were organized in a binary code format. Mr. Thomas stored a collection of these GIF files on a computer attached to a group of modems. (RT 259-60, McMahon.)

A modem is a communications device that enables a computer

---

to send and receive computer files over telephone lines.\(^3\)

Subject to the controls set in place by the operator of a bulletin board, modems permit other owners of computers and modems to dial the bulletin board and access the information stored there. Depending upon the type of modem used, many computers can access the resources of a bulletin board at any one time. (RT 265, McMahon.)

Access to the GIF files on Mr. Thomas’s bulletin board was limited to members of the bulletin board only. (RT 310, Dirmeyer.) Membership required paying a fee and completing and signing an application form, including the applicant’s age and the following statement: "I am a legal adult and request adult file access. I will use Amateur Action BBS GIF files for my private use . . ." (RT 317, Dirmeyer.) Applicants also had to specify an individual password. (RT 318, Dirmeyer.)

Once applicants became members of the bulletin board, they could accessed the GIF files on the bulletin board by performing the following actions:

1) using a computer and a modem to initiate a telephone call, dialing the telephone number for the bulletin board;

2) once the call was answered by a modem at the bulletin board, establishing membership identity by typing their password;

3) once the bulletin board confirmed membership, selecting the GIF file(s) to be retrieved and retrieving them;

\(^3\) "Modem" stands for "modulator-demodulator" and allows binary computer data to be converted into analog telephone signals and back into binary computer data.
4) after their modem completed retrieving the selected GIF file(s), converting each GIF file for viewing on their computer's screen (monitor), or printing the file on a printer. (RT 294, McMahon.)

It is important to note the specifics of the operation of a bulletin board. Members of Mr. Thomas's bulletin board retrieved ("downloaded," in computer parlance) GIF files from Mr. Thomas's computer in lengthy streams of binary code, consisting of 0's and 1's. (RT 257, McMahon.) The files did not become viewable images until members "decoded" or "unscrambled" the GIF files in their homes on their computer screens or in printed form, using their printers. (RT 256-57, McMahon.)

All of the computer equipment used to run the bulletin board was located in, and never left, Mr. Thomas' home in Milpitas, California. Mr. Thomas did not have to take any action and did not even have to be at home for bulletin board members to retrieve GIF files. (RT 294, McMahon; RT 745, R. Thomas.) Members could retrieve GIF files without Mr. Thomas being aware of who signed onto the bulletin board, or where the member was located, or what GIF files were being retrieved. (RT 745, R. Thomas.) The members of the bulletin board took the active steps noted above to dial the bulletin board and electronically retrieve the GIF files from Mr. Thomas's home. (RT 294, McMahon.)

Mr. Thomas did not sent the GIF files or descriptions out of his home. The strings of 0's and 1's making up Mr. Thomas's binary files were retrieved by members of the bulletin board, who used their computers to "unscramble" the binary code into a
On August 20, 1993, Postal Inspector David Dirmeyer joined Mr. Thomas's bulletin board from Memphis, Tennessee, using the name "Lance White." (RT 313, Dirmeyer.) As "Lance White," Inspector Dirmeyer subsequently retrieved the GIF files and ordered the videotapes which form the basis for this indictment. (RT 325, 335, Dirmeyer.) There was no evidence that Mr. Thomas's bulletin board had any members in the state of Tennessee other than Dirmeyer or that he ever solicited subscribers from Tennessee.

In January, 1994, Inspector Dirmeyer sent an envelop containing three child pornographic magazines to Mr. Thomas, using the address of the "Mail Boxes, Etc." store in Milpitas. (RT 500-02, Dirmeyer.) Mr. Thomas never requested to see or receive child pornography materials. (RT 756, R. Thomas.) On January 10, 1994, Inspector Dirmeyer watched until Mrs. Thomas picked up the envelop containing these magazines at the "Mail Boxes Etc." store. (RT 499, Dirmeyer.) Inspector Dirmeyer followed her home and executed a search warrant for the Thomases's home. (RT 501, Dirmeyer.) During the search of the residence, Inspector Dirmeyer seized all of the computer equipment and the GIF files used to operate the bulletin board, in addition to the envelope containing the child pornography magazines. These magazines formed the basis of the child pornography charge (RT 558, Dirmeyer.) which resulted in an acquittal by the jury.
Denial of a Fair Trial

The indictment charged six (6) videotapes and thirteen (13) GIF files as obscene. Inspector Dirmeyer, however, read graphic paragraph-long descriptions of seven (7) videotapes to the jury, one of which described a videotape not charged in the indictment. (RT 331, 405-10, 457, 480, Dirmeyer.)

Over forty (40) GIF files were introduced into evidence and viewed by the jury even though at least twenty-seven (27) of these GIF files were not charged in the indictment. (E.g., RT 428-31, Dirmeyer.) Forty five (45) descriptions of GIF files were read to the jury -- five were read twice, and one three times. The government also introduced Exhibits 31 and 32, containing graphic descriptions of hundreds of videotapes and 16,415 GIF files available on the bulletin board. (RT 397, Dirmeyer.)

The descriptions of the GIF files and videotapes read to the jury were extremely graphic, often recounting in detail, violent and bizarre behavior such as genital mutilation, bondage and rape. (E.g., RT 406-07, 429, 434, Dirmeyer.) None of the descriptions themselves were charged in the indictment as obscene.

The prosecution offered additional irrelevant and

4 1) AA-8589 (RT 348, Dirmeyer; RT 680, C. Thomas.); 2) AA-8278 (RT 350, Dirmeyer; RT 387, Dirmeyer.); 3) AA-15198(RT 359, Dirmeyer; RT 679, C. Thomas.); 4) AA-13216 (RT 360, Dirmeyer; RT 387, Dirmeyer) and 5) AA-13517 (RT 461, Dirmeyer; RT 679, C. Thomas.).

5 GIF file AA-11935 (RT 352, Dirmeyer; RT 387, Dirmeyer; RT 766, R. Thomas.)
inflammatory evidence such as the various categories of sexually explicit GIF files available on the bulletin board (RT 765-67, 769-771, R. Thomas.) and Mr. Thomas's advertising methods (RT 768-69, R. Thomas.).

None of this testimony or evidence drew an objection from the defense, nor was the jury ever admonished to limit its consideration of this inflammatory, irrelevant and prejudicial testimony.

**Jury Instructions**

Although four counts (counts 2, 3, 6, and 9) alleged more than one GIF file or videotape as obscene, the court never instructed the jurors that all twelve of them had to agree that one specific item in each count was obscene in order to convict.⁶ (RT 923, Jury Ins.)

On counts two (2) through ten (10), the court improperly instructed the jury that a determination of obscenity could be made on the basis of simply viewing the GIF files and the videotapes. (RT 892, Jury Ins). The court should have explained to the jury that when material is directed toward a deviant sexual group, the government must provide expert testimony to explain why the material appeals to the prurient interest and, therefore, may be obscene.

The judge also misinstructed the jury on the elements of 18 U.S.C. § 1465 (transporting obscene material in interstate

⁶ Count 11, alleging child pornography, also contained multiple items. Mr. Thomas was acquitted on this count and, therefore, does not address this issue with regard to count 11.

IV. MR. THOMAS’S CONVICTION VIOLATES THE FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH. (Counts 1 - 7)

A. Mr. Thomas Lawfully Possessed the GIF Files in His Home and Did not Transport Them in Interstate Commerce.

Possession of obscene material in one’s home is protected under the First Amendment. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). In this case, Mr. Thomas possessed GIF files containing sexually explicit material in his home and never sent them into interstate commerce. Thus, his conduct falls squarely within Stanley’s scope.

Although Stanley reaffirmed a "valid government interest in dealing with the problem of obscenity" (Id. at 563, 89 S.Ct. at 1247, 22 L.Ed.2d at 548), Stanley recognized an individual’s fundamental right to be free from government intrusions into one’s home, except in very limited circumstances. Id. at 564, 89 S.Ct. at 1247, 22 L.Ed.2d at 549. The Court held that mere private possession of obscene material may not be prohibited. It made clear that labeling materials "obscene" does not justify any and all government infringement on First Amendment rights. Id. at 565, 89 S.Ct. at 1248, 22 L.Ed.2d at 549.

Mr. Thomas owned and possessed the allegedly obscene GIF files in his home in Milpitas, California. The bulletin board software and computer equipment that stored these files were all
physically located in his home. All that left Mr. Thomas's home were electronic pulses that passed through a telephone line. No tangible material ever left Mr. Thomas's home. The computer transmission remained in incomprehensible electronic form when it arrived at another person's computer. To produce a recognizable image on a computer screen or paper, these transmissions had to be "decoded" by that person's computer. The transmission could have remained indefinitely in electronic form in another computer and may never have been decoded into a visual image. Mr. Thomas had no involvement in whether the recipient ever decoded the transmission.

In defining the First Amendment's scope, Stanley declared:

If the First Amendment means anything it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. Id. at 565, 89 S.Ct. at 1248, 22 L.Ed.2d at 550.

If the First Amendment is to retain any meaning in this age of technology, the government must be restrained from prosecuting individuals for potentially obscene computer files possessed in their homes just as it is prohibited from prosecuting individuals for potentially obscene books possessed in their homes. Under Stanley's rationale, Mr. Thomas's conviction must be reversed.

B. The Community Standard of Memphis, Tennessee Should Not Have Applied to the GIF Files in This Case.

Under Miller's three-part obscenity test, the jury is directed to apply "contemporary community standards" to determine whether (a) "the average person . . . would find the work, taken
as a whole, appeals to the prurient interest; and (b) whether the
work depicts or describes, in a patently offensive way, sexual
conduct." Miller, supra, 413 U.S. at 24, 93 S.Ct. at 2615, 37
L.Ed.2d at 431. In applying the Miller test, the trial court
instructed the jury members to apply the standards of "the
community from which you come." (RT 902, Jury Ins.) This
instruction resulted in the jury’s applying the standards of
Memphis, Tennessee.

Typically, in cases involving interstate transportation of
obscene material, juries are instructed to apply the community
standards of the geographic area where the material arrives.
See, e.g., United States v. Investment Enterprises, 10 F.3d 263
(5th Cir. 1993); United States v. Easley, 927 F.2d 1442 (8th Cir.
1991); United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982),
cert. denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803
(1983). When a defendant elects to send material to a particular
location it is appropriate that he or she be held accountable to
that location’s standards.

The present case is different, however, because of the
nature of computer communications. Mr. Thomas did not mail the
GIF files or cause the GIF files to be sent in interstate
commerce. Mr. Thomas’s business is essentially an electronic
bookstore where Mr. Thomas makes material available to his
customers. See Cubby Inc. v. Compuserve, Inc., 776 F. Supp. 135,
140 (S.D.N.Y. 1991). The customers in this case, could
electronically browse through the available material, pick items,
and take these items back home.
If a resident of Memphis, Tennessee travels to California and buys a book alleged to be obscene, any prosecution of the California bookseller would be based on the standards of the California community where the bookstore is located, not Memphis's community standards. See, e.g., Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (Indiana bookstore prosecuted under state obscenity and federal RICO laws subject to Indiana community standards); Kaplan v. California, 413 U.S. 115, 118, 93 S.Ct. 2680, 2683, 37 L.Ed.2d 492, 496 (1973) (California bookstore subject to California community standard); Sequoia Books, Inc. v. Ingemunson, 901 F.2d 630 (7th Cir. 1990) (Illinois bookstore prosecuted under Illinois community standards). The standards of the customer's community are simply irrelevant to the prosecution of the bookstore.

C. Under a Traditional Concept of "Geographic Community", the Community Standards of Northern California Should Have Been Applied.

If the Court does apply a traditional geographic community standard, the standards of Northern California should be applied because Mr. Thomas's bulletin board is physically located in Northern California. Like the bookstores in Fort Wayne Books and Kaplan, Mr. Thomas's bulletin board was located in one place and his customers travelled (albeit by computer) to his place of business to review and retrieve material. See, Cubby, supra. Like the customers of a bookstore who decide what book to buy and bring home, the members of the bulletin board select and retrieve material to bring home. Because Mr. Thomas's business was located exclusively in Northern California, he should be held to
the standards of that community.

To impose the standards of Memphis, Tennessee on national communications networks would have a chilling effect on the free speech rights of members of other communities. These networks would be compelled to self-censor and impose on the entire nation the standards of the most restrictive community. See Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (expressive material cannot be limited to what is suitable for children).

The Supreme Court has recognized that the most sensitive or immature members of society should not be allowed to dictate what is "fit" for the rest of society. Mishkin v. New York, 383 U.S. 502, 509, 86 S.Ct. 958, 964, 16 L.Ed.2d 56, 62 (1966). The Tennessee jury was allowed to apply its "community standards" at the expense of the freedom of expression of Northern Californians. Such an application of the Miller test imposes "the hazard of self-censorship of constitutionally protected material." Id. at 511, 86 S.Ct. at 965, 16 L.Ed.2d at 63.

D. Computer Bulletin Board Technology Requires the Application of a New Definition of Community.

In obscenity cases, the jury is to apply "contemporary community standards" in determining whether material is obscene. Miller, supra, 413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431. The Court in Miller did not articulate any specific definition of "community" but only established that, as a constitutional minimum, the jury must apply something less than a national standard. Jenkins v. Georgia, 418 U.S. 153, 158, 94 S.Ct. 2750, 2753, 41 L.Ed.2d 642, 648 (1974). By ruling in the
negative (i.e., that community standards do not necessarily equate with national standards), the Court has never defined what does constitute a community.

There is nothing in the case law that requires the definition of "community" to be in geographic terms. In fact, the courts have emphasized that material should be judged based on people's attitudes, not the geographic location of the trial. *United States v. Marks*, 520 F.2d 913, 918 (6th Cir. 1977) (rev'd on other grounds) (upholding obscenity conviction in Western Kentucky when there was testimony about the community standards of Cincinnati, Ohio). In common usage, "community" is not defined geographically but as "a body of individuals organized into a unit or manifests ... some unifying trait." *Webster's Third Int'l. Dictionary* (1986).\(^{21}\)

Learned Hand first introduced the concept of "community standards" in the obscenity case of *United States v. Kennerley*, 209 Fed. 119, 121 (S.D.N.Y. 1913) and recognized in 1913 that the definition of "community" was more flexible and polymorphous than simply a particular geographic plot of land. Judge Hand rejected the notion that geographic location was the principal determination of community. *See Jacobellis v. Ohio*, supra, 378 U.S. at 192, 84 S.Ct. at 1680, 12 L.Ed.2d at 801.

In defining community standards in the *Miller* case, the Supreme Court neither anticipated nor took into account the rapid

\(^{21}\) The Supreme Court noted the danger of material being judged by the standards of a "particularly sensitive or insensitive person or group." *Hamling v. United States*, 418 U.S. 87, 107, 94 S.Ct. 2887, 2902, 41 L.Ed.2d 590, 614-15 (1974) (emphasis added.)
advances in computer technology. "Communication technology is
dynamic [and] capable tomorrow of making today obsolete".
Midwest Video Corp v. FCC, 571 F.2d 1025, 1052 (8th Cir. 1978).
The rapid growth of national and global computer networks have
radically altered the nature of communications and have allowed
persons to interact without geographic constraints in a "non-
physical universe called cyberspace." Byasse, Jurisdiction of
Cyberspace: Applying Real World Precedent to the Virtual
Community, 30 Wake Forest L Rev. 197 (Spring 1995).

The traditional application of geographic communities no
longer comports with the reality of 20th Century technology and
society. Note, Obscenity in the Age of Direct Broadcast
Satellite: A Final Burial for Stanley v. Georgia, a National
Obscenity Standard and Other Miscellany, 33 Wm. & Mary L Rev. 949
(1992). "The cybercommunity is not separate from your community
of friends; it's just not geographically local." "Welcome to
Cyberspace" (Time magazine, Spring 1995) at 21.

Today, a computer and a telephone line bind people closer
together and create a greater sense of unity than their block,
neighborhood or town. Computer networks have changed the way
people relate to each other. People work and socialize on
national and international computer networks; people meet in
electronic "chat rooms" to discuss the issues of the day and
correspond through electronic mail. Members of the computer
community have even dubbed their community "Cyberia." Hardy, The
Proper Legal Regime for Cyberspace, 55 U.Pitt.L.Rev. 993, 994
(1994); see also Katsh, Law in a Digital World: Computer
Networks and Cyberspace, 38 Vill.L.Rev. 403 (1993).

The cyberspace community is as much a community as traditional geographic divisions. This community should have the right to articulate its standards on the issue of obscenity. A definition of community based on connections between people rather than one based on geographic location will ensure that all communities have the right to define protected speech.

This Court should not force contemporary, computer-oriented communities into the ill-fitting definition of community as a geographic location. The Court should examine the community created by computer technology and adopt a rule that protects and encourages freedom of speech and expression.

For these reasons, and the reasons set forth in more detail in the amici briefs, Mr. Thomas's convictions should be reversed because his First Amendment rights were violated.

V. VENUE IN THE WESTERN DISTRICT OF TENNESSEE WAS IMPROPER.
(Counts 1 - 7)

Proper venue is a fundamental constitutional safeguard in a criminal trial.\textsuperscript{22} United States v. Johnson, 323 U.S. 273, 276, 65 S.Ct. 249, 250-51, 89 L.Ed. 236, 239 (1944). The venue decision in obscenity cases affect which community standards apply and can have a critical impact on whether the defendant's activity is criminal or not. United States v. Peraino, 645 F.2d 548, 550-51 (6th Cir. 1981). In an obscenity prosecution, the jury must evaluate the material by applying the standards of the

\textsuperscript{22} Amicus Society for Electronic Access addresses in detail the impermissible chilling effect of expansive determination of venue in obscenity cases.
"appropriate community." The "appropriate community" is often defined as the district from which the jury is drawn. *Id.*


Mr. Thomas created the GIF files in his home in Milpitas, California and stored these GIF files on a computer in his home. Mr. Thomas did not send any GIF files to Memphis and none of the alleged conspiratorial acts relating to the GIF files occurred in the Western District of Tennessee. Mr. Thomas never traveled to Memphis, Tennessee nor did he solicit bulletin board members in Memphis. The acts that did occur in Tennessee, such as the selection and downloading of GIF files, were initiated and performed solely by Inspector Dirmeyer.

The trial court ruled that the Western District of Tennessee was the proper venue because the material would have to be judged by the standards of that community. (5/12/94, Order). As demonstrated in Part IV, supra, the standards of the Western District of Tennessee should not have been applied to determine whether the material was obscene. The court should have applied
the standards of the Northern District of California or of the "cyberspace" community. Accordingly, Mr. Thomas's motion to change venue (3/16/94, motion) should have been granted. 23

VI. AS A MATTER OF LAW, EXPERT TESTIMONY WAS REQUIRED FOR THE JURY TO FIND THE MATERIAL "PRURIENT" AND, THEREFORE, OBSCENE. (All Counts)

The first prong of the Miller obscenity test requires the jury to find that the material, taken as a whole, appeals to the "prurient interest." Miller, supra, 413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431. "Prurient" is defined as material that appeals to an unhealthy, abnormal, shameful or morbid interest in sex. Brockett, supra.

The Supreme Court explained that "prurient interest" is based on the average person's interest in the material or, if the material is aimed at a sexually deviant group, then the interest of the members of that sexually deviant group. Mishkin, supra, 383 U.S. at 508, 86 S.Ct. at 963, 16 L.Ed.2d at 62 (1966).

Prurient material must be sexually stimulating, albeit in an abnormal manner. Id. Material that is unpleasant or distasteful is not prurient unless it sexually stimulates in an abnormal manner. See, e.g., Cohen v. California, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284, 291 (1971) (profanity not obscene due to lack of sexual content).

23 Even if venue in Tennessee was proper on the three (3) videotape counts (counts 8 - 10), venue on the six (6) GIF file counts (counts 2 - 7) was not proper in Tennessee. These counts should have been severed and transferred to California. Pursuant to policies favoring joint trial of counts and judicial economy, the entire case could have been transferred to California. See, e.g., United States v. Halper, 590 F.2d 422, 430 (2nd Cir. 1978).
PRES-KAP, INC. d/b/a Prestige Travel of Rockland, Appellant,  
v.  
SYSTEM ONE, DIRECT ACCESS, INC., Appellee. 

No. 93-1440.  

District Court of Appeal of Florida,  
Third District.  
April 12, 1994.  

Adams, Quinton & Fuller and Jonathan N. David, Miami, and Barry S.  
Kantrowitz, Chestnut Ridge, NY, for appellant.  
Zarco & Associates and Mark E. Buechele, Miami, for appellee.  

Before BARKDULL and HUBBART and BASKIN, JJ.  

HUBBART, Judge.  
This is an appeal by a nonresident defendant corporation from a  
non-final order denying its motion to dismiss a breach contract action  
for lack of in personam jurisdiction over it. We have jurisdiction to  

I  
The plaintiff System One Direct Access, Inc. is a Delaware  
corporation which owns and operates a computerized airline reservation  
system. [FN1] The computer base for this system, as well as the  
plaintiff's billing and main business office, is located in Miami,  
Florida; the plaintiff also maintains a branch business office in New  
York City, New York. The plaintiff extensively markets its reservation  
system throughout the country and has written lease contracts with  
travel agencies nationwide. In exchange for a monthly fee, the  
plaintiff provides the travel agency involved with computer terminals  
which allow the agency to access through telephone lines the plaintiff's  
computer base in Miami so as to book airline, automobile, and hotel  
reservations essential to a travel agency's operations. Prior to 1987,  
the plaintiff was a division of Eastern Airlines; since then, Eastern  
was purchased by a holding company which converted the plaintiff into a  
separate corporation.  

FN1. The relevant jurisdictional facts are contained in  
the affidavits filed by the parties in support of and in  
opposition to the defendant's motion to dismiss.  

The defendant Pres-Kap, Inc. d/b/a Prestige Travel of Rockland is  
a New York corporation which owns and operates a travel agency in  
Rockland County, New York; its sole place of business is Rockland  
County, New York, and all its travel business is conducted out of this  
office. As part of its nationwide marketing effort, the plaintiff,  
through a representative from its New York office, solicited the  
defendant's business at the defendant's travel agency in Rockland  
County, New York, where the lease contract sued upon was negotiated; in  
December 1989, the vice president of the defendant executed the subject  
lease in New York, which lease was subsequently forwarded to the  
plaintiff's Miami office where it was executed by the plaintiff's  
representative. Thereafter, the plaintiff delivered and installed  
computer terminals in the defendant's travel agency in New York.  
Prior to that date, the defendant had entered into three similar
lease contracts with the plaintiff's predecessor at Eastern Airlines from 1982-89, which contracts were likewise solicited by the plaintiff at the defendant's place of business in New York; however, a provision in past contracts subjecting the defendant to suit in Florida in the event of a dispute was deleted from the present contract. The defendant paid a monthly billing charge on the lease contract by mailing the required fee to the plaintiff's billing office in Miami; all other business between the parties was conducted by the defendant through the plaintiff's New York office.

In early 1991, a dispute arose between the parties concerning the alleged malfunctioning of the airline reservation system. The defendant made complaints to the plaintiff's New York office, but allegedly no effort was made to repair the equipment. As a result, in March 1991, the defendant stopped making its monthly lease payments under the contract, and in July 1991, the plaintiff removed the leased computer terminals at the defendant's request.

The plaintiff thereafter brought suit below against the defendant for breach of the lease agreement. The defendant moved to dismiss this action for lack of in personam jurisdiction over the defendant; the trial court denied the motion. This appeal follows.

II

The law is well settled that in order for a state court to subject a nonresident defendant to an in personam judgment, due process requires that the nonresident defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); Venetian Salami Co. v. Parthenais, 554 So.2d 499, 500 (Fla. 1989). In particular, the applicable due process test is whether the conduct of the nonresident defendant in connection with the forum state is such that the defendant could reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); Venetian Salami, 554 So.2d at 500.

In the instant case, the record clearly shows that the defendant is a New York corporation doing business in New York as a travel agency with no offices outside of New York; that the plaintiff, through its New York office, solicited the defendant's business in the state of New York where the subject contract, as well as prior contracts, were negotiated by the parties and executed by the defendant; that the computer equipment supplied under the contract was delivered to the defendant in New York; and when the defendant experienced difficulties with the computerized equipment, complaints were directed to the New York office of the plaintiff. Moreover, a provision in past contracts, subjecting the defendant to suit in Florida in the event of a dispute between the parties, was deleted from the contract being sued upon. The defendant's only contact with Florida is twofold: (1) the defendant forwarded all rental payments under the contract to the plaintiff's billing office in Miami, and (2) the computer database of the plaintiff's airline reservation system, which the defendant accessed through computer terminals, is located in Miami. Contrary to the trial court's determination, however, we conclude that these two contacts cannot convert this obviously New York-based transaction into a Florida transaction so that the defendant could reasonably expect to be sued in Florida in the event the transaction soured.

It is settled law that "an individual's contract with an out-of-state party alone can[not] automatically establish sufficient minimum contacts in the other party's home forum" to support an assertion of in personam jurisdiction against the out-of-state defendant, even where, as here, the foreign defendant allegedly breaches that contract by failing to make the required payments in Florida.
Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985); Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989). The additional factor in this case that the computer database for the contracted-for information happens to be located in Florida cannot change this result. There is no showing on this record that the defendant was even aware of the exact electronic location of the subject computer database, as this clearly would have been of little importance to it. And even if such knowledge had been shown, this surely would not have altered the defendant's reasonable expectation that New York courts would be resorted to in the event of a dispute between the parties over this New York-based contract solicited by the plaintiff in New York, negotiated by the parties in New York, executed by the defendant in New York, and serviced by the plaintiff in New York. It is true that the defendant may have benefited financially from the subject contract, as well as prior similar contracts, but this was a financial gain arising from a New York, not a Florida-based business transaction. This being so, we think the trial court erred in denying the defendant's motion to dismiss this action for lack of in personam jurisdiction over the defendant. The maintenance of the instant suit against the defendant, based on the totality of the circumstances, offends traditional notions of fair play and substantial justice—and therefore does not comply with the minimum-contacts due process requirement which must be met before Florida may assume in personam jurisdiction over a nonresident defendant. Indeed, a contrary decision would, we think, have far-reaching implications for business and professional people who use "on-line" computer services for which payments are made to out-of-state companies where the database is located. Across the nation, in every state, customers of "on-line" computer information networks have contractual arrangements with out-of-state supplier companies, putting such customers in a situation similar, if not identical, to the defendant in the instant case. Lawyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states. [FN2] Based on the trial court's decision below, users of such "on-line" services could be haled into court in the state in which supplier's billing office and database happen to be located, even if such users, as here, are solicited, engaged, and serviced entirely instate by the supplier's local representatives. Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends traditional notions of fair play and substantial justice. Burger King Corp.; International Shoe Co.; Venetian Salami Co.

FN2. For example, Westlaw is based in St. Paul, Minnesota, and all bills are generated and paid in St. Paul. (Source: Westlaw Customer Service (800) 937-8529). Lexis is based in Dayton, Ohio, and all bills for use of the Lexis System are generated in and paid in Dayton. (Source: Lexis Customer Service (800) 543-6862).

For the above-stated reasons, the non-final order under review is reversed, and the cause is remanded to the trial court with directions to dismiss the action against the defendant for lack of in personam jurisdiction.

Reversed and remanded.

BASKIN, J., concurs.

BARKDULL, Judge, dissenting.
WARNING TO ALL INTERNET USERS AND PROVIDERS

THIS MEMORANDUM SETS FORTH THE ENFORCEMENT POSITION OF THE MINNESOTA ATTORNEY GENERAL'S OFFICE WITH RESPECT TO CERTAIN ILLEGAL ACTIVITIES ON THE INTERNET.

PERSONS OUTSIDE OF MINNESOTA WHO TRANSMIT INFORMATION VIA THE INTERNET KNOWING THAT INFORMATION WILL BE DISSEMINATED IN MINNESOTA ARE SUBJECT TO JURISDICTION IN MINNESOTA COURTS FOR VIOLATIONS OF STATE CRIMINAL AND CIVIL LAWS.

The following discussion sets out the legal basis for this conclusion.

Minnesota's general criminal jurisdiction statute provides as follows:

A person may be convicted and sentenced under the law of this State if the person: (1) Commits an offense in whole or in part within this state; or (2) Being without the state, causes, aids or abets another to commit a crime within the state; or (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state.

It is not a defense that the defendant's conduct is also a criminal offense under the laws of another state or of the United States or of another country. Minnesota Statute Section 609.025 (1994).

This statute has been interpreted by the Minnesota Supreme Court. In State v. Rossbach, 288 N.W.2d 714 (Minn. 1980), the defendant appealed his conviction for aggravated assault. The defendant, standing inside the border of an Indian Reservation, had fired a rifle across the boundary line at a person outside the border. The defendant claimed that Minnesota courts did not have jurisdiction because his act took place off of Minnesota lands. Applying Minnesota Statute § 609.025 and the common law, the Minnesota Supreme Court affirmed the conviction, holding that the intentional impact within Minnesota land created jurisdiction. Id. at 715-16.

The Minnesota Court of Appeals reached a similar result in State v. Brown, 486 N.W.2d 816 (Minn. Ct. App. 1992). In Brown, the court implicitly found that Minnesota courts had criminal jurisdiction over individuals in Iowa who mailed unlicensed gambling equipment to Minnesota residents. Id. at 817-18.

Minnesota courts have applied similar jurisdictional principles in civil cases. In State v. Red Lake DFL Committee, 303 N.W.2d 54 (Minn. 1981), the Minnesota Supreme Court held that state courts had jurisdiction over a committee of the Red Lake Indian Tribe which had purchased space for political advertisements in a newspaper circulated in the state. At issue was whether the committee had to register under state ethical practices laws.
The committee argued that it had done nothing outside of the reservation, since the transaction with the newspaper took place inside the reservation, and the committee did not assist in the circulation of the newspaper. In holding that the committee was required to register under state ethical practices law, the Supreme Court responded to this argument as follows:

Defendants say nothing they did occurred outside the reservation, but they choose to ignore that what they did caused something to occur beyond the reservation boundaries, namely, the dissemination of a political message, which is the activity here sought to be regulated. Id. at 56 (emphasis added).

The above principles of Minnesota law apply equally to activities on the Internet. Individuals and organizations outside of Minnesota who disseminate information in Minnesota via the Internet and thereby cause a result to occur in Minnesota are subject to state criminal and civil laws.

An Example Of Illegal Activity On The Internet - Gambling

Gambling appears to be an especially prominent aspect of criminal activity on the Internet. There are a number of services outside of Minnesota that offer Minnesota residents the opportunity to place bets on sporting events, purchase lottery tickets, and participate in simulated casino games. These services are illegal in Minnesota.

Lotteries

A lottery is defined as "a plan which provides for the distribution of money, property or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected." Minnesota Statute Section 609.75, Subdivision 1(a) (1994).

Generally, it is unlawful in Minnesota to sell or transfer a chance to participate in a lottery. Minnesota Statute Section 609.755(2) (1994). It is also unlawful to disseminate information in Minnesota about a lottery, except a lottery conducted by an adjoining state, with intent to encourage participation therein. Minnesota Statute Section 609.755(3).

Acts in Minnesota in furtherance of a lottery conducted outside of Minnesota are included, notwithstanding its validity where conducted. Minnesota Statute Section 609.75, Subdivision 1(c) (1994). Violation of these provisions is a misdemeanor, punishable by up to 90 days in jail, or a fine of up to $700, or both. Minnesota Statute Section 609.755 (1994); 609.02, Subdivision 3 (1994). It is a gross misdemeanor under Minnesota law to conduct a lottery. Minnesota Statute Section 609.76, Subdivision 1(3) (1994). A gross misdemeanor is punishable by up to one year in jail, or a $3,000 fine, or both. Minnesota Statute Section 609.02, Subdivision 4 (1994).
Sports Bookmaking

Sports bookmaking is defined as "the activity of intentionally receiving, recording or forwarding within any 30-day period more than five bets, or offers to bet, that total more than $2,500 on any one or more sporting events." Minnesota Statute Section 609.75, Subdivision 7 (1994). Engaging in sports bookmaking is a felony, which is punishable by more than one year imprisonment. Minnesota Statutes Sections 609.76, Subdivision 2 (1994); 609.02, Subdivision 2 (1994). Intentionally receiving, recording, or forwarding bets or offers to bet in lesser amounts is a gross misdemeanor. Minnesota Statute Section 609.76, Subdivision 1(7) (1994).

Accomplice Liability

Minnesota's accomplice statute provides that one who intentionally aids, advises, counsels, or conspires with another to commit a crime is equally liable for that crime. Minnesota Statute Section 609.05, Subdivision 1 (1994). Therefore, persons or organizations who knowingly assist Internet gambling organizations in any unlawful activity may themselves be held liable for that unlawful activity. Thus, for example, Internet access providers and credit card companies that continue to provide services to gambling organizations after notice that the activities of the organizations are illegal would be subject to accomplice liability.

In addition to being illegal under Minnesota law, the Internet gambling organizations appear to violate several provisions of the federal law. All of the services appear to violate 18 United States Code Section 1084, which prohibits the foreign or interstate transmission of bets or wagers or information on bets or wagers by use of a wire communication. In as much as the Internet gambling organizations involve lotteries, they would also appear to violate 18 United States Code Section 1301 (prohibiting the "importing or transporting" of lottery tickets; 18 United States Code Section 1302 (prohibiting the mailing of lottery tickets); and 18 United States Code Section 1304 (prohibiting the "broadcasting" of lottery information). Sections 1084 and 1301 provide for felony-level penalties, while Sections 1302 and 1304 provide for misdemeanor penalties.

Placing A Bet Through Internet Gambling Organizations

Minnesota residents should be aware that it is unlawful to make a bet through Internet gambling organizations. Minnesota law makes it a misdemeanor to place a bet unless done pursuant to an exempted, state-regulated activity, such as licensed charitable gambling or the state lottery. Minnesota Statute Sections 609.75, Subdivisions 2 - 3; 609.755(1) (1994). The Internet gambling organizations are not exempted. Therefore, any person in Minnesota who places a bet through one of these organizations is committing a crime.

Minnesota residents should also be aware of forfeiture provisions related to unlawful gambling activity. Minnesota Statute Section 609.762, Subdivision 1 (1994) provides that the following items are subject to forfeiture:
(a) Devices used or intended for use, including those defined in section 349.30, subdivision 2, as a gambling device, except as authorized in sections 349.11 to 349.23 and 349.40;
(b) All moneys, materials, and other property used or intended for use as payment to participate in gambling or a prize or receipt for gambling; and
(c) Books, records, and research products and materials, including formulas, microfilm, tapes, and data used or intended for use in gambling.

A "gambling device" is defined as "a contrivance which for a consideration affords the player an opportunity to obtain something of value, other than free plays, automatically from the machine or otherwise, the award of which is determined principally by chance." Minnesota Statute Section 609.75, Subdivision 4 (1994).

Under this definition of "gambling device", a computer that is used to play a game of chance for something of value would be subject to forfeiture. Gambling is just one example of illegal activity on the Internet. However, the same jurisdictional principles apply with equal force to any illegal activity.

Please direct any inquiries regarding this notice, or report violations of Minnesota law to the Law Enforcement Section, Minnesota Attorney General’s Office, Suite 1400, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2131, telephone (612) 296-7575.
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-6648
No. 94-6649

ROBERT ALAN THOMAS
AND CARLEEN THOMAS

Appellants,

v.

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BRIEF FOR AMICUS CURIAE
ELECTRONIC FRONTIER FOUNDATION

Shari Steele
Michael Godwin
ELECTRONIC FRONTIER FOUNDATION
Suite 801
1667 K Street, N.W.
Washington, DC 20006
(202) 861-7700
Internet: ssteele@eff.org

APRIL 19, 1995

INTEREST OF THE AMICUS CURIAE

The Electronic Frontier Foundation (EFF) is a privately funded nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and telecommunications technology. EFF was founded by Mitchell Kapor, a leading pioneer in software development who was the first CEO of the Lotus Development Corporation and developed the Lotus 1-2-3 spreadsheet software, and John Perry Barlow, an author and lecturer interested in digital technology and society.

The Electronic Frontier Foundation is concerned with the chilling effect the District Court's decision will have on the freedom of speech of users of electronic communications and on the growth of online communications technology and communities. EFF respectfully asks this
court to overturn the lower court's decision regarding the files downloaded from the Amateur Action bulletin board system.

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1
STATEMENT OF THE ISSUE 4
SUMMARY OF THE ARGUMENT 5
ARGUMENT 6

I. THE DISTRICT COURT'S APPLICATION OF THE MEMPHIS, TENNESSEE, COMMUNITY STANDARDS TO THE AMATEUR ACTION BULLETIN BOARD SYSTEM IS UNCONSTITUTIONAL IN THAT IT RESTRICTS EVERYONE IN THE WORLD TO ONLY MATERIALS THAT ARE DEEMED FIT FOR CITIZENS OF MEMPHIS, TENNESSEE 6

II. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF MEMPHIS, TENNESSEE, WHEN THE MATERIALS WERE DOWNLOADED TO A COMPUTER DISK IN MEMPHIS BUT NEVER ACTUALLY ENTERED THE "MEMPHIS COMMUNITY" 7

III. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF MEMPHIS, TENNESSEE, BECAUSE ELECTRONIC COMMUNICATIONS GIVE INDIVIDUALS THE AUTONOMY TO SELECT THE ELECTRONIC COMMUNITIES THEY WISH TO JOIN AND PROVIDE SCREENING MECHANISMS TO RESTRICT ACCESS TO CHILDREN 11

IV. THIS IS A CASE OF FIRST IMPRESSION AND SHOULD BE CONSIDERED IN LIGHT OF THE SERIOUS CHILLING EFFECT ON FREEDOM OF EXPRESSION THAT WOULD RESULT FROM THE LIMITING OF SPEECH ON ALL COMPUTER COMMUNICATIONS TO THE STANDARDS OF THE MOST RESTRICTIVE COMMUNITY 16

CONCLUSION 19
CERTIFICATE OF SERVICE 20

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

CASES

City of Belleville v. Morgan, 60 Ill. App. 3d 434, 376 N.E.2d 704 (1974) 8
Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976) 8
LaRue v. State, 611 S.W.2d 63 (Tex. Crim. App. 1980) 8
Miller v. California, 413 U.S. 15 (1974) 6,9,14
People v. Better, 33 Ill. App. 3d 58, 337 N.E.2d 272 (1975) 8
Stanley v. Georgia, 394 U.S. 557 (1972) 8
United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973) 8
United States v. Bagnell, 679 F.2d 826, 836 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) 8
United States v. Dachsteiner, 518 F.2d 20, 21-22 (9th Cir.), cert. denied,
OTHER AUTHORITY


STATEMENT OF THE ISSUE

SHOULD MEMPHIS, TENNESSEE, BE PERMITTED TO DICTATE THE APPROPRIATE COMMUNITY STANDARDS FOR ALL ONLINE COMMUNITIES THAT CAN BE ACCESSED FROM MEMPHIS, EVEN WHERE WARNINGS AS TO THE NATURE OF THE MATERIALS ARE CLEARLY POSTED, CHILDREN ARE DENIED ACCESS TO ADULT MATERIALS, AND USERS SELF-SELECT WHICH ONLINE COMMUNITIES TO JOIN?

SUMMARY OF THE ARGUMENT

This is a case of first impression regarding jurisdiction over computer networks. Online communications are physically nonterritorial, and individuals have a heightened ability to self-select which electronic "communities" to join, and are empowered to willingly and knowledgeably accept or block access to materials available electronically. Any obscenity definition that relies on the boundaries of the physical world is dangerous to the growth of online communications, in that such a definition would require all electronic communities to limit acceptable speech to only what is acceptable in the most restrictive of physical-world communities. In a realm where adults can easily avoid unwanted materials and prevent their children from accessing these materials, the state's interest in protecting the unwanted or underage from exposure to materials is substantially weakened, and First Amendment protections of speech and association must prevail.

Computer communications are still in their infancy, but we already know that they implicate long-standing speech and privacy issues under the Constitution. The precedents we set today may radically affect the course of the computer networks of the future, and with it the fate of an important tool for the exchange of ideas in a democratic society. When the law limits or inhibits the use of new technologies, or when it fails to provide the same degree of protection for a new communications technology that it provides for older methods of communicating, it creates a grave risk of compromising speech and privacy interests protected by the Bill of Rights. In this brief, Amicus Curiae Electronic Frontier Foundation respectfully asks this Court to make the determination that utilizing geographical community standards to satisfy the test for obscenity is inappropriate when dealing with networked communications that never actually enter any physical community.

ARGUMENT
I. THE DISTRICT COURT'S APPLICATION OF THE MEMPHIS, TENNESSEE, COMMUNITY STANDARDS TO THE AMATEUR ACTION BULLETIN BOARD SYSTEM IS UNCONSTITUTIONAL IN THAT IT RESTRICTS EVERYONE IN THE WORLD TO ONLY MATERIALS THAT ARE DEEMED FIT FOR CITIZENS OF MEMPHIS, TENNESSEE.

Under the current obscenity test, first articulated by the Supreme Court in 1974 in Miller v. California, 413 U.S. 15 (1974), materials are considered obscene if 1) the average person, applying contemporary community standards, would find the materials, taken as a whole, appeal to the prurient interest, 2) the materials depict or describe, in a patently offensive way, sexual conduct specifically prohibited by applicable state law, and 3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The community standards criteria was included in this three-prong obscenity test because "our nation is simply too big and diverse for [the Supreme] Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists... It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [People] in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed [uniformity]." Id.

Tennessee is but a single locality that can access the international telecommunications network generally and the Amateur Action bulletin board system specifically. Robert and Carleen Thomas had no physical contacts with the State of Tennessee, they had not advertised in any medium directed primarily at Tennessee, they had not physically visited Tennessee, nor had they any assets or other contacts there. The law enforcement official in Tennessee, not the Thomases, took the actions required to gain access to the materials, and it was his action, not the Thomases, that caused them to be "transported" into Tennessee (i.e., copied to his local hard disk). The Thomases may indeed have been entirely unaware that they had somehow entered the Tennessee market and had subjected themselves to the standards applicable in that community.

This case is operationally indistinguishable from one in which a Tennessee resident travels to California and purchases a computer file containing adult-oriented material that he brings back to his home. Whatever sanctions the local community in Tennessee might impose on the purchaser -- and we note here that the Supreme Court has consistently held that private possession of obscene materials cannot be outlawed -- the seller, who had not "knowingly transported" material into Tennessee, would not have violated federal law.

Application of geographically-based community standards to transmissions over the global network, if interpreted to allow conviction on the basis of any access of a bulletin board system by a member of any community with standards that would disapprove of the materials in question, will have the perverse effect of prohibiting, worldwide, anything disapproved in any single territorial location -- precisely the kind of uniform national (or global) standard that the community standards test was designed to avoid.

II. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF MEMPHIS, TENNESSEE, WHEN THE MATERIALS WERE DOWNLOADED TO A COMPUTER DISK IN MEMPHIS BUT NEVER ACTUALLY ENTERED THE "MEMPHIS COMMUNITY."
Courts have struggled with the concept of "community standards" and have upheld a wide variety of geographic definitions of community. See, 
Karo and McBrian, Note: The Lessons of Miller and Hudnut: On Proposing a 
Pornography Ordinance that Passes Constitutional Muster, 23 U. Mich. J.L. 
Rev. 179 (1989). State courts have approved units ranging from state 
(People v. Calbud, Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140 
(1980); LaRue v. State, 611 S.W.2d 63 (Tex. Crim. App. 1980); Commonwealth 
v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976); People v. Better, 
33 Ill. App. 3d 58, 337 N.E.2d 272 (1975); and Pierce v. State, 292 Ala. 
473, 296 So. 2d 218 (1974), cert. denied, 419 U.S. 1130 (1975)) to county 
(Sedelbauer v. Indiana, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 
1035 (1982); and State v. DePiano, 150 N.J. Super. 309, 375 A.2d 1169 
(1977)) to city (People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264 (1974), 
cert. denied, 421 U.S. 993 (1975); and City of Belleville v. Morgan, 60 
Commonwealth, 214 Va. 490, 201 S.E.2d 798, cert. denied, 419 U.S. 902 
(1974)). Federal courts have held community to mean state (United States v. 
Danley, 523 F.2d 369, 370 (9th Cir. 1975)), county (United States v. 
Bagnell, 679 F.2d 826, 836 (11th Cir. 1982), cert. denied, 460 U.S. 1047 
(1983)), and federal judicial district (United States v. Dachsteiner, 518 
F.2d 20, 21-22 (9th Cir.), cert. denied, 421 U.S. 954 (1975)).

In addition, courts have recognized a distinction between what is 
distributed to the community and what is simply possessed in the home. In 
Stanley v. Georgia, 394 U.S. 557 (1972), the Supreme Court first made the 
legal distinction between the distribution and the possession of obscene 
materials. In Stanley, the Court held that an individual had the right to 
possess obscene materials, based on the privacy of the home. While that 
case has been challenged throughout the years, the Court has continued to 
hold that possession of obscenity cannot be outlawed. While the Court has 
refused to hold that Stanley requires states to permit obscene materials to 
be imported (United States v. 12 200-ft. Reels of Film, 413 U.S. 123 
(1973)), transported through interstate commerce (United States v. Orito, 
413 U.S. 139 (1973). See also, United States v. Reidel, 402 U.S. 354) or 
sent over telephone wires (Sable Communications of California, Inc. v. 
Federal Communications Commission, 492 U.S. 115 (1989)), the Court's 
reasoning has been "that the States have a legitimate interest in 
prohibiting dissemination or exhibition of obscene material when the mode 
of dissemination carries with it a significant danger of offending the 
sensibilities of unwilling recipients or of exposure to juveniles." Miller 

The "mode of dissemination" of electronic communications actually 
minimizes the stated dangers. Unlike any other form of communication, 
networks and online services require passwords. This is an important 
point, because the password provides the disseminator of the information 
with the opportunity to refuse access to children. It also permits 
disseminators to prescreen and warn potential users of the system of the 
nature of the materials to be found online. There is advance notice of the 
nature of the communications, which provides an uninterested consumer with 
the knowledge to avoid access.

In preparing the case against Robert and Carleen Thomas, Federal 
Postal Inspector David Dirmeyer applied for and was granted a password to 
the Amateur Action bulletin board system. Before Inspector Dirmeyer was 
granted the password, he was screened to ensure that he was not a minor and 
was warned about the explicit nature of the materials. In spite of the 
warnings, he chose to access the Amateur Action bulletin board system 
database and to download files -- a process that does not happen 
automatically or accidentally, but rather requires the knowledgeable and
active participation and decision-making of the recipient to select specific items to retrieve and to run the program necessary for the retrieval and viewing of those items. This was clearly not an undesired exposure to these materials.

In applying the federal law against interstate distribution of obscene material, the U.S. government is seeking to prevent adverse impacts on local communities that stem from causes that have a range and source too great to be handled by the local territorial community. Absent some real or threatened adverse impact on the local community, the rationale for federal intervention fails. Here, there was simply no such impact.

The fact that someone in Tennessee could call a computer in California, or indeed anywhere else in the world, to access materials the physical sale of which might be prohibited in Tennessee, is neither news nor reason for concern. As noted, a citizen of Tennessee might get on a plane and go anywhere in the world in short order and be exposed to or obtain and bring home similar material. Accessing materials through a computer screen is most often, and was in this case, an entirely private matter with no risk of accidental or incidental exposure. Even if conducted in groups in a private setting, it is akin to reading books or other materials that might be physically obtained and imported into the local jurisdiction with impunity. It does not involve posting signs, entering into sales transactions, establishing a building, or taking other steps of any kind that might even become known to, much less adversely impact upon, the members of the local geographic community.

Acknowledging the lack of impact of the actions involved in this case on the local community, and finding that the federal government had no legitimate basis on which to prohibit such activity, does not amount to a concession that the local geographic community might not regulate actions that had such an impact. If a local system operator or user were to sell admission to view the screens in question, for example, or if the local user were to have displayed the screens in question in a store window, then perhaps the local community could impose some sort of regulation. But no such local commercial activity nor any such public exhibition occurred in this case.

III. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF MEMPHIS, TENNESSEE, BECAUSE ELECTRONIC COMMUNICATIONS GIVE INDIVIDUALS THE AUTONOMY TO SELECT THE ELECTRONIC COMMUNITIES THEY WISH TO JOIN AND PROVIDE SCREENING MECHANISMS TO RESTRICT ACCESS TO CHILDREN.

Communities, it seems, no longer depend on physical location, and old legal definitions that look to physical location no longer work in a world where individuals regularly "visit" places that have no physical location. Howard Rheingold, who has authored a book describing his interactions on the WELL, a virtual community he considers home, described the relationship:

A virtual community is a group of people who may or may not meet one another face-to-face, and who exchange words and ideas through the mediation of computer bulletin boards and networks. In cyberspace, we chat and argue, engage in intellectual discourse, perform acts of commerce, exchange knowledge, share emotional support, make plans, brainstorm, gossip, feud, fall in love, find friends and lose them, play games and metagames, flirt, create a little high art and a
lot of idle talk. We do everything people do when people get together, but we do it with words on computer screens, leaving our bodies behind. Millions of us have already built communities where our identities commingle and interact electronically, independent of local time or location.


Each participant in this form of communication chooses not only whether, and where to participate, but also whether to send or receive information at any specific time; at what rate writing and reading (sending and receiving) will occur; and what topic this communication will concern. Hiltz and Turoff, The Network Nation 29 (1993). Participants also have the option of "filtering" out messages and files in many ways, ranging from simply choosing not to download files to sophisticated text analysis programs that can effectively block receipt of all messages containing non-text files such as graphics or containing certain words, phrases or names.

If application of local, geographically-based community standards to determine whether material is "obscene" is inappropriate in this new context, how, then, can that determination be made with due regard to the rights of members of various communities to establish their own divergent standards? EFF respectfully submits that the very best source of a definition regarding what constitutes "obscenity," for purposes of determining when U.S. (or other) law should intervene to prohibit electronic distribution of materials, is the standard set by the community of users that, collectively, set the rules applicable to any particular online forum in question. Where, as here, the nature of the materials is clearly disclosed on warning screens encountered as the users access the system, or is otherwise made plain, those who sign on -- who voluntarily join the community -- have already determined that the materials in question do not violate their own sensibilities, or have accepted responsibility for their own sensibilities should the material offend them after all. If the operators of a system were to post materials that violated the collective standards of that user community, the community in question could quickly correct things by voting with their modems to go elsewhere.

Like any other community, online communities use censure and other peer group actions to enforce their own rules. Violators of these rules will find themselves ejected, ignored, lambasted, or gently guided as apropos to the transgression. This process is directly and incontrovertibly analogous to its physical-world counterpart. When violators of the standards of geographical communities become unbearable, people either remove themselves from the violator's presence, eject the violator, or attempt to correct the violator's behavior. When legal action is sometimes required, the standards of the local community are applied, not those of a distant town in another state, nor those of any hypothetical national censorship body.

As one might expect, online communities have in practically all cases developed their own arbitration and dispute-resolution systems -- applying their own community standards to their own issues and problems spontaneously in the absence of directives compelling them to do so. These compromise and arbitration systems vary with the scale and sophistication
of the online community, and range from a single arbitrator or moderator, through "town hall" committee-like structures (often informal, but still effective), to complex systems of community-approved (and enforced) regulations complete with fines and even "incarceration" (temporary removal from the online community, with no ability to send or receive messages or files to and from the group in question). In fact, some communities have invoked the "death penalty," completely deleting a recalcitrant's user i.d. from the system. See, e.g., Julian Dibbell, "A Rape in Cyberspace," The Village Voice, December 21, 1993, 38(51): pp. 36-42.

We reaffirm the right of communities to regulate the contents of the materials to which their members are exposed. Part of this right is the right of a community not to have its standards dictated by another community. Miller v. California, supra. Those who wish to associate for religious purposes, for example, should have a right to establish places where materials inconsistent with those purposes are excluded. Those who wish to exchange speech offensive to others should have an ability, indeed have a right, to establish spaces where such speech can be exchanged. The First Amendment exists to protect potentially offensive speech, as no one tries to ban the inoffensive kinds. Communities and places should not be defined exclusively in terms of physical geography, particularly when community standards and self-regulation are already evolving rapidly in the online world. The trial court's decision, if allowed to stand, will tear apart these years of online community self-moderation and internal arbitration development, all without any notable benefit or protection to any community, geographically defined or otherwise.

This is an age when computer networks allow the formation of virtual communities, globally, without any significant impact on local, territorial communities. Any decent regard for preservation of freedom of expression and the free flow of information (at least other than formation posing more direct physical threats to local communities than those presented in this case) requires protection of the right of each individual to associate with others, to communicate freely with others and, in effect, to "travel" throughout the online spaces made available by the global networks.

The boundaries between online places and communities are the tools used for ensuring voluntary association, such as the passwords and warning screens used in this case. These passwords and screens provided ample opportunities for anyone in Tennessee to avoid coming into contact with the materials in question. They also provided the opportunity for people who share the standards of the community to establish and implement that community standard.

In most online contexts, receipt of materials must be actively and willfully initiated by the receiver, not the sender. In addition, password schemes permit parents to readily supervise (and, if the parents choose, to easily prevent) their own children's access to online materials. Determining what is appropriate for their children are parents' rights and responsibilities (Wisconsin v. Yoder, 406 U.S. 205 (1972)), and this screening capability is not available in telephony or postal mail and package shipping, nor in broadcast television or radio.

Today's technology provides "space" in which system operators like the Thomases can form communities with others of similar interests. Communication in this space happens quietly and does not interrupt, offend, otherwise intrude upon people of differing interests. The materials that travel in this space should be judged by the standards of the local "residents" therein. The community of Memphis citizens has few or no members in common with the community of Amateur Action bulletin board.
system users and maybe even the larger community of adult-oriented bulletin board system users. The standards of the bulletin board system users are the correct community standards to apply.

The Thomases may reasonably have believed that California standards, like the standards of the Amateur Action bulletin board system community, permit the materials in question. This is clearly not a case in which the electronic community's standards are beyond the pale. To punish this speech, the government must establish a more compelling interest which would prohibit using an online community's standards to judge speech and publication in that community. The standards of the group that voluntarily joined together to establish and use the bulletin board system in question should govern.

IV. THIS IS A CASE OF FIRST IMPRESSION AND SHOULD BE CONSIDERED IN LIGHT OF THE SERIOUS CHILLING EFFECT ON FREEDOM OF EXPRESSION THAT WOULD RESULT FROM THE LIMITING OF SPEECH ON ALL COMPUTER COMMUNICATIONS TO THE STANDARDS OF THE MOST RESTRICTIVE COMMUNITY.

Electronic communications are different than other forms of communications, and this difference must be legally recognized in order to avoid a severe chilling effect on speech on the networks. The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). Broadcast radio and television are treated differently under the law than cable television, which, in turn, is treated differently than magazines and books. Factors such as risk of exposure to children and uninterested adults, level of intrusion, and spectrum or bandwidth scarcity have all been taken into account in determining appropriate limitations of speech by government. The requirements placed on the Thomases and other system operators by the trial court's ruling will have a chilling effect on the provision of online services.

Given that it was lawful for the system operators convicted in this case to maintain their bulletin board system system physically in the geographical community where it was located, the only way in which they might have avoided violation of the distribution law, as interpreted by the trial court, would have been to establish elaborate technical means to screen incoming calls. This may not even be physically possible, in light of the growing ability to route networked communications through numerous locations, and the failure of technology like calling line identification ("caller i.d.") to be deployed globally and interoperably. Even if some steps might provide some such screening of calls originating from territories that disapprove of the content in question, however, no obligation to take such steps should be established. Any such doctrine would seriously burden the entire communications infrastructure. It would impossibly require system operators, who may not have the resources to retain regular legal counsel, to stay informed regarding the rules of countless local jurisdictions. In effect, only the wealthy would afford to operate. And it would interfere with the interoperability of computer based communications systems.

Additionally, the invasiveness of some forms of the technology that might in the future be able to provide enough identifying information to be used for such screening is controversial and may pose very serious privacy problems. Given this, the lack of clear standards, and other reliability and authentication issues, no court should mandate the use of this unproven and possibly easily-exploitable technology.

Cases upholding convictions of those who send physical objects
through the U.S. mail are distinguishable. In such cases, it is easy for
the distributor of material obscene under Tennessee standards to decline to
send physical objects to that jurisdiction. In contrast, the system
operators in this case had no way to check in advance where any particular
person might be calling from. They did not themselves take the steps
required to send the copy to the local jurisdiction. And the installation
mechanisms designed to protect against such an occurrence would be both
expensive and unfeasible, and, in fact, probably physically impossible.

The question presented by this case is, in essence, how best to
protect Tennessee citizens from what they consider the adverse effects of
"obscene" materials while preserving, as fully as possible, the right of
groups with differing sensibilities to associate and to form communities
that establish and enforce different standards. Ultimately, that question
reduces to one involving who should bear the burden of preventing undesired
exposure to offensive material -- combined with the question of how,
generally, to preserve the free flow of lawful information and the right of
all groups lawfully to associate. EFF submits that the appropriate answer
is to be found in exactly the kinds of labeling and password protection
schemes found in this case. Requiring system operators like the Thomases
to accurately label and appropriately fence off potentially offensive
materials is appropriate. Thereafter, any local territorial community that
wants to enforce its own obscenity standards has a duty to use tools to
help it stay away from the offending materials.

CONCLUSION

Applying Tennessee community standards to the Amateur Action
bulletin board system would have the perverse effect of imposing unworkable
burdens on system operators and all providers of electronic communications
and computer based information services, or of imposing a single national
( perhaps even global) standard regarding what constitutes obscenity, or
of prohibiting an otherwise constitutionally protected free exchange of
speech under circumstances in which no significant detrimental impact on
local territorial communities could be shown.

For the foregoing reasons, Amicus Curiae Electronic Frontier
Foundation respectfully asks this Court to reverse the District Court's
convictions regarding files downloaded from the Amateur Action bulletin
board system.

Respectfully submitted,

Shari Steele
Michael Godwin
ELECTRONIC FRONTIER FOUNDATION
1667 K Street, N.W.
Suite 801
Washington, DC 20006
(202) 861-7700
Internet: sssteele@eff.org

By: Shari Steele

By: Michael Godwin

ATTORNEYS FOR AMICUS CURIAE
As requested, here is the text of the CompuServe v. Patterson jurisdiction case. Sorry for the "unusual" formatting. If anyone has more information about the case, I'd appreciate hearing about it.
Richard S. Patterson, et al.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action be and hereby is DISMISSED without prejudice for want of personal jurisdiction.

DATE: August 11, 1994

KENNETH J. MURPHY, CLERK

/5/

(By) W.J. Harrison, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CompuServe Incorporated, :

Plaintiff, :

v :

Case No. C2-94-91

Richard S. Patterson, :

et al., :

Defendants. :

OPINION AND ORDER
This declaratory judgment action presents an interesting question of personal jurisdiction arising out of the collision of the interests of two parties on the "information superhighway." Plaintiff, CompuServe, Inc., an Ohio-based provider of computer information services, has sued one of its customers, Richard S. Patterson, and his business entity, FlashPoint Development, in Ohio, seeking a declaratory judgment that it has not infringed upon the defendants' trade names or otherwise engaged in unfair competition. The defendants, residents of Texas, have moved to dismiss the complaint, raising as one ground the lack of personal jurisdiction over them in the State of Ohio. For the following reasons, the Court concludes that defendants' electronic links to the State of Ohio are too tenuous to support the exercise of personal jurisdiction over them, and therefore will grant the motion to dismiss.

I.

The facts relating to personal jurisdiction may be gleaned from the complaint, the motion to dismiss and affidavit filed by the defendant, and the memorandum contra filed by the plaintiff. They can be summarized as follows.

Patterson is a CompuServe user. As stated in the user agreement,

The CompuServe information service ... consists of computing and information service and software, information and other content provided by CompuServe Incorporated ("CompuServe"). In addition, third parties provide information, software, and other content ... which may be accessed over the Service.

A CompuServe user is required to access the system through his own hardware and telephone line, and pays fees for the
use of the network. A consumer need not ever physically be present in the State of Ohio in order to become a CompuServe user. In this case, Patterson became a user in Harris County, Texas. However, the basic CompuServe agreement recites that the agreement was "made and performed in Ohio" and that it is governed and construed in accordance with the law of the State of Ohio.

The relationship between CompuServe and Patterson is apparently further defined by what CompuServe has designated as a "Shareware Registration Agreement." That Agreement allows a customer such as Patterson to place software developed by the customer into the CompuServe system for use or purchase by others. If other users take advantage of that software, and pay fees for doing so, CompuServe remits 85% of those fees to the person who has provided the software. The Shareware Registration Agreement also recites that it was entered into in Columbus, Ohio, but it is apparent that the act of assenting to the terms of that agreement occurs at the customer's own computer terminal.

This lawsuit arises out of certain software which Patterson claims to have developed, and which is entitled "WinNav," "Windows Navigator," and "FlashPoint Windows Navigator." Sometime in late 1993, CompuServe announced to its users that it had developed, and would soon be releasing, a Windows version of a program to be entitled "CompuServe Navigator." As a result of this announcement, Patterson advised CompuServe of his claim to a common law trademark in the names "WinNav," "Windows Navigator," and "FlashPoint
Windows Navigator," and suggested that if CompuServe released its software, it would be violating his trademark rights. In its complaint, CompuServe seeks a declaratory judgment that its contemplated use of the names "CompuServe Navigator" or "CompuServe Navigator for Windows" would not violate any trademarks owned by defendants, or otherwise violate the defendants' property interests.

It appears that Patterson has advertised his software on the CompuServe Network. CompuServe has submitted hard copies of approximately ten such advertisements. At least one of them indicated a price for the software. According to Patterson's affidavit, he has filled a total of 12 orders for software placed by residents of the State of Ohio since May, 1989, with gross receipts of less than $1,000 from these sales. It is unclear whether any of the software which was ordered by Ohio residents is the software which is the subject of this lawsuit.

Other than his relationship with CompuServe and the minimal amount of business which he has done with Ohio residents, there is nothing else in the record suggesting that Patterson has any general or specific business relationship with the State of Ohio or any of its residents. In fact, he denies ever having set foot within Ohio's boundaries. The Court must determine from these facts whether Patterson may constitutionally be required to defend this lawsuit in an Ohio court.

II.
In order to subject a defendant to the in personam jurisdiction of this Court, the Court must find that the Ohio long arm statute permits the exercise of jurisdiction and that the Court's assertion of jurisdiction is within the limits dictated by due process. National Can Corp. v. K. Beverage Co., 674 F.2d 1134 (6th Cir. 1982); Poyner v. Erna Werke GMBH, 618 F.2d 1186, 1187 (6th Cir.), cert. denied, 449 U.S. 841 (1980). Since the Ohio long arm statute is intended to confer jurisdiction to the full extent allowed by the due process clause, the inquiries are essentially the same. R. L. Lipton Distributing Co. v. Dribeck Importers. Inc., 811 F.2d 967, 969 (6th Cir. 1987); In-Flight Devices Corp. v. Van Dusen Air. Inc., 466 F.2d 220, 225 (6th Cir. 1972).

---4---

Defendants contend that plaintiff has failed to meet either the statutory or constitutional requirements for establishing personal jurisdiction. Since plaintiff is asserting the existence of jurisdiction, the burden of proof rests upon it to establish the existence of any minimum contacts between defendants and the forum State of Ohio. KVOS. Inc. v. Associated Press, 299 U.S. 269, 278 (1936); Welsh v. Gibbs, 631 F.2d 436, 438 (6th Cir. 1980), cert. denied, 450 U.S. 981 (1981). However, since the issue of jurisdiction is being determined solely on the basis of briefs and affidavits, plaintiff is required only to make a prima facie showing of jurisdiction, and the Court must consider the pleadings and affidavits in the light most favorable to plaintiff. Welsh v. Gibbs, 631 F.2d at 438-39.

The due process clause "does not contemplate that a
state may make binding a judgment in personam against an
individual or corporate defendant with which the state has no
contacts, ties, or relations." World-Wide Volkswagen Corp.
Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). The
minimum contacts necessary to establish jurisdiction in the
forum state must be "...such that the maintenance of the suit
does not offend 'traditional notions of fair play and
substantial justice.'" International Shoe, 326 U.S. at 316.
The minimum contacts test may be satisfied by doing acts in
the state that bring about a substantial connection with a
state, or cause a known or expected consequence in the state.

--5--

(1957). "The two related functions of the minimum contacts
requirement are that it protects a defendant from the burden
of litigating in an inconvenient forum and prevents the
states from reaching out, through their courts, 'beyond the
limits imposed on them by their status as coequal sovereigns
in a federal system.'" American Greetings Corp. v. Cohn, 839
F.2d 1164, 1169 (6th Cir. 1988).

The Sixth Circuit has developed a three-part test for
determining whether the particular circumstances in any case
provide sufficient contact between a non-resident defendant
and the forum state to support the exercise of personal
jurisdiction:

First, the defendant must purposefully avail
himself of the privilege of acting in the forum
state or causing a consequence in the forum
state. Second, the cause of action must arise
from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

If the above criteria are satisfied, jurisdiction is appropriate if the facts of the particular case are such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe, 326 U.S. at 316. Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968). While this test established a useful analytical framework, each case must be determined on its particular facts. Velantra v. Regle National DeUsines Renault, 336 F.2d 292, 295 (6th Cir. 1964).

--6--

The first step of the three-part analysis enunciated in Southern Machine requires an inquiry into whether defendants have acted or caused consequences within the forum state. This step requires the Court to consider whether each defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denkla, 357 U.S. 235, 253 (1958). In most cases, it is a common sense inquiry as to "whether the defendant has transacted business within the forum state in the usual, commercial sense of 'doing business.'" American Greetings Corp. v. Cohn, 839 F.2d 1164, 1169 (6th Cir. 1988). This provision is designed to ensure that a plaintiff's unilateral activity will not drag an unsuspecting and unwilling defendant into a foreign forum." In-Flight Device, 466 F.2d at 226. It is a
"baseline" requirement that the defendant has become involved, with the forum state through actions freely and intentionally done, which have effects in the forum state. Id. at 228.

The second part of the Southern Machine test requires an analysis of whether the plaintiff's cause of action arises out of or is related to the defendants' contacts with the forum state. The third part of the Southern Machine test requires inquiry into whether the defendants' conduct establishes a "...substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." Southern Machine, 401 F.2d at 381. This analysis requires a determination whether the Court's exercise of jurisdiction would offend "traditional notions of fair play and substantial justice," International Shoe, 326 U.S. at 316, and whether the defendants' conduct relating to the forum was such that they should reasonably anticipate being haled into court here. World-Wide Volkswagen, 444 U.S. at 297. In reaching the decision on fair play and substantial justice, the court must consider such factors as the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interest of other states in securing the most efficient resolutions of controversies. American Greeting Corp., 839 F.2d at 1169-70, citing Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987). When the first two elements of the Southern Machine test have been met, an inference arises that the third is also present. First
A.

As noted above, the first inquiry the Court is required to make is whether Patterson and his company purposely availed themselves of the privilege of conducting business activities within the State of Ohio. "This 'purposeful availment' requirement insures the defendant will not be hailed into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated contacts,' ... or of the unilateral activity of another party or a third person...." Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985) (citations omitted). Although physical entry into the forum state is not necessary in order for the Court to find that a defendant has purposely availed himself of the privilege of conducting business there, see CompuServe. Inc. v. Trionfo, 91 Ohio App. 3d 157, 163 (Franklin Cty. 1993), there is a requirement that the connection between the defendants' activities and the forum state be more than incidental before jurisdiction can constitutionally be exercised.

Because the inquiry which the Court must make is fact-specific, it becomes helpful to analyze the facts of other cases where jurisdiction has been found to be either present or absent, and to determine where, on the spectrum of possible fact situations, this case falls. Although this case appears to be unique in that it involves a nationwide computer information service network, the Court believes it
is sufficiently analogous to other cases involving interstate business negotiations and relationships to make those cases instructive.

The leading case on this issue is Burger King v. Rudzewicz. supra. In that case, the court concluded that it was not unreasonable for a Burger King franchisee in Michigan to be required to defend a lawsuit brought against him for nonperformance under a franchise agreement in the State of Florida, the place of Burger King's main offices. Although the franchisee had little physical contact with the State of Florida, the court noted that the franchisee had reached out to Burger King, a Florida corporation, in order to obtain the benefit of a long-term franchise relationship, and entered into a 20-year contract that required substantial interaction between the Michigan franchise and Burger King's Florida headquarters. The Court also noted that the franchise agreement provided that it was governed by Florida law, and concluded that a defendant's agreement to enter into a contract governed by the law of another state was evidence that the defendant had purposely availed himself of the privilege of acting within that state in obtaining the protection of its laws. Although such a provision, standing alone, or the mere existence of a contract between the parties, would not be sufficient to make the exercise of jurisdiction reasonable, factors such as the length of the relationship between the parties, the extent to which they would have ongoing dealings, and their "interdependent relationship" were enough to make the exercise of
jurisdiction reasonable.

The Burser King analysis provided the basis for two
other decisions where a defendant was required to defend
himself in a distant state by virtue of a contract with a
resident of that state, notwithstanding the absence of the
defendant's physical presence with the forum state. In
Associated Business Telephone Systems Corp. v. Greater
Capital Corp., 861 F.2d 793 (3d Cir. 1988), the court
concluded that a California corporation which contracted with
a New Jersey corporation for telephone service for a hotel in
Illinois could be held to answer a lawsuit arising out of

--10--

that business relationship in the State of New Jersey.
Again, the dispositive factors were that the system continued
to be monitored by the plaintiff in the State of New Jersey,
that the parties had entered into a long-term relationship
requiring continuous communication between plaintiff's New
Jersey office and the defendant, and that the withholding of
dollars due to the New Jersey corporation caused injury
within the State of New Jersey. A similar result was reached
in Unix Sys. Laboratories. Inc. v. Berkeley Software Design,
1993 U.S. Dist. LEXIS 19505 (D. N.J. 1993), a case also
involving computer software. There, the defendant, who had
released software which allegedly violated property rights of
plaintiff, had entered into a licensing agreement with the
plaintiff of long duration, had regularly communicated with
plaintiff's office in New Jersey, had contemplated an ongoing
business relationship with the New Jersey plaintiff in the
development of the software, and had offered infringing software to New Jersey residents. Those factors, together with the defendants' knowledge that its actions would cause injury to the plaintiff in New Jersey, were enough to support the exercise of in personam jurisdiction.

By contrast, the defendant was found not to have purposely availed itself of the privilege of acting in the forum state in Health Communications, Inc. v. Mariner Corp., 860 F.2d 460 (D.C. Cir. 1988). In that case, the plaintiff, a District of Columbia Corporation, was in the business of marketing training programs for employers of persons who served alcoholic beverages. The defendant operated hotels in various parts of the country and agreed to have a workshop conducted for its employees at those locations. The contract was signed in the State of Texas, and workshops were then held at defendant's hotels. When defendant failed to pay for the workshops, the plaintiff sued in the District of Columbia.

In concluding that this relationship between the parties was too attenuated to support the exercise of personal jurisdiction over the defendant in the District of Columbia, the Court noted that the parties entered into a limited and specialized arrangement which did not involve either lengthy negotiations, a future interdependent business relationship, or an actual course of dealing involving substantial communications between the parties. The relationship between the parties was essentially a "one-shot" deal involving
training seminars to be held elsewhere than in the District of Columbia, although after the workshops were held plaintiff provided quarterly newsletters to the defendant. Consequently, although the failure to pay for the plaintiff's services clearly caused an injury within the District of Columbia, the court did not believe that defendant had purposely availed itself of the privilege of doing business in that District. See also Reynolds v. International Amateur Athletic Association, 23 F.3d 1110 (6th Cir. 1994), where the court concluded that the existence of a contract between an Ohio resident and the defendant was insufficient, by itself, to support the exercise of personal jurisdiction, where the contract was not preceded by significant negotiations, there was only a minimal course of dealing within the State of Ohio, and there was no persistent course of conduct between the parties which had consequences in this State.

In the Court's view, this case falls much closer to the end of the spectrum represented by Health Communications. Inc., supra, and Reynolds, supra, than to the situation described in Burger King. There is no evidence that substantial negotiations preceded the entry of Patterson's contract with CompuServe. Rather, the Court concludes that the terms of the contract have been standardized by CompuServe and are offered without alteration to each of its customers on a "take it or leave it" basis. The contract does not contemplate an interdependent, ongoing business
relationship between whatever business a CompuServe customer might happen to be in and CompuServe itself. Rather, it appears that the customer's primary interest is in the information contained on the network, much of which may come from other CompuServe users in States other than Ohio. Although CompuServe acts as a conduit for this type of information sharing, its relationship with its customers is of a far different quality than the relationship between Burger King and its franchisees. The CompuServe-customer relationship can accurately be described as a "minimal course of dealing" similar to that involved in the Reynolds case.

The question remains, however, whether the defendants'

-13-

additional activity of offering software to Ohio residents through CompuServe, even though it may not be the software actually involved in this case, constitutes the purposeful doing of business in the State of Ohio. The Court concludes that, given the minimal nature of defendants' sales to Ohio residents, defendants have not purposefully availed themselves of the privilege of doing business within Ohio. Thus, CompuServe has failed to satisfy the first prong of the Southern Machine test.

B.

The second prong of the Southern Machine test is whether plaintiff's cause of action arises out of the defendants' contacts with the forum state. CompuServe focuses on the defendants' status as CompuServe users in support of its argument that this prong has also been satisfied. The Court,
however, views this reliance as misplaced.

As noted above, this is not a case where an Ohio customer of the defendants is asserting some defect in the software purchased from the defendants. It is also not a suit for breach of the CompuServe customer agreement. Rather, CompuServe claims that its contemplated activities should be evaluated in light of whatever common law trademark or tradename protection defendants have in software which was developed by defendants in Texas. The Court views the presence of this software on the CompuServe network as entirely incidental to the alleged dispute between the parties; indeed, defendants could claim trademark or tradename protection in their software, and potentially have a cause of action against CompuServe for violation of those rights, even if the software were available on some other computer network or were simply being sold directly to consumers in retail outlets.

The similarity in program names that underlies this case did come to the defendants' attention through the CompuServe network. However, the way in which the parties discovered they might have a clash of legal interests is not relevant to the issue of jurisdiction. There is not even any evidence that defendants have sold this software in Ohio, but even if they did, those sales were so de minimis that it is impossible to say that this dispute arose out of defendants' Ohio sales activities. Thus, the second prong of the Southern Machine test has not been satisfied.
Finally, the Court is required to consider whether the exercise of jurisdiction over the defendants would be reasonable, would comport with traditional notions of justice and fair play, and would be in line with the defendants' reasonable expectations about where they might have to defend their activities. In this regard, the Court notes that one of the concerns expressed by the Court of Appeals in Burger King, and commented upon by the Supreme Court, was the perceived impropriety of exercising jurisdiction over out-of-state consumers to collect small amounts of money due under non-negotiated agreements. While sharing that concern, the Supreme Court concluded that, in Burger King, the transaction went far beyond the standard type of consumer transaction involving an out-of-state buyer and an amount of money which would make it prohibitively expensive for the buyer to litigate issues over the contract in the seller's forum. The Court emphasized, however, that the due process clause is sufficiently flexible to "prevent rules that would unfairly enable [plaintiffs] to obtain default judgments against unwitting customers." Burger King, supra at 486.

If this were simply a suit brought by CompuServe to collect a small amount of user fees from a Texas resident who, while seated at his computer terminal, became a member of the CompuServe network, the Court would have a very difficult time concluding that the exercise of jurisdiction over that customer in the State of Ohio was proper. Although
the nature of the controversy between the parties in this case is different, the Court concludes that it is no more connected with purposeful activities within the State of Ohio than the standard customer dispute, and that it would be manifestly unreasonable for this or any Ohio court to exercise jurisdiction over this case.

III.

The defendants have raised a number of other issues in their motion, including the absence of a live case or controversy, failure to meet the jurisdictional amount, and failure to state a claim. The Court's conclusion that it does not have personal jurisdiction over the defendants makes it unnecessary for the Court to reach the merits of those matters. The Court believes, however, from the totality of the circumstances, that it would not be in the interests of justice to transfer this case to a United States District Court within the State of Texas for further proceedings. If, in fact, the matters described in defendants' letters and CompuServe's complaint are still live issues, CompuServe is free to reinstitute this action in a court where personal jurisdiction over the defendants can be obtained. Thus, although recognizing that it has the power to transfer the case if it desires to do so, the Court believes that dismissal for lack of personal jurisdiction is the more appropriate result.

IV.

Based upon the foregoing analysis, the Court concludes
SECTION 3

ACCESS, EDITORIAL CONTROL AND SYSOP LIABILITY
Electronic Networks and Computer Bulletin Boards: Developing a Legal Regime to Fit the Technology

by Eric Schlachter[*]
(updated Spring, 1994)

I. INTRODUCTION

The universe of cyberspace[1] is expanding rapidly. A "virtual" world of tens of millions of users now interact with each other electronically, finding information, friends and lovers, and even a sense of community on-line. While the explosive growth of, and tangible benefits available through, cyberspace offers much promise, there remains much work to be done to develop a coherent, empowering set of legal rules to guide cyberspace denizens. In this paper, I will address the specific problem of assigning causality for legal wrongs between users and system operators ("sysops"). As we will see, this assignation can have a significant impact on the robustness of the cyberspace universe.

II. TRENDS

Before delving into specific legal problems, it is useful to outline briefly some trends. With mega-mergers between telephone, cable, and media companies all seeking to control the data highway, the technology is at a critical crossroads. As a result, only time will tell whether computer bulletin boards will remain a robust technology over the long term. One possibility is that computer bulletin boards will be supplanted by television-based mechanisms which may promote information services but de-emphasize user-to-user interaction. Another possibility is that the digital superhighway, also known as the information infrastructure, may alter the popularity of bulletin boards, as it coalesces activity through one conduit. More likely, however, the digital superhighway will lead to an explosion of "network nodes," essentially independent bulletin boards (as we know them today) that will be accessible to any superhighway driver.

The trends of technology are important because it is hazardous to develop rules, to develop a law of cyberspace, based on the technology as it exists today. If in fact bulletin boards are destined to be a historical curiosity, the eight-track or video telephone of the 1990s, then the problems we see today are not serious. However, I think the trends indicate that the problems are only going to get worse, as less technologically sophisticated people, who do not know the informal norms and rules, behave in ways that inadvertently transcend the rules and create conflict.
III. THE ISSUE OF SYSOP LIABILITY

Specifically, it is useful to focus on one specific problem: the liability of sysops for the actions or statements of their users. This is a thorny legal problem with significant social implications. If we as a social system assign too much causality to the sysops, sysops will leave the industry. If, on the other hand, we do not hold the sysops responsible for users' actions, there will be numerous situations where injured parties are left without recourse or the overall incidence of injury exceeds the social optimum. Therefore, causality as a legal conclusion is bound to dramatically affect the overall status of the computer bulletin board industry.

The causality issue initially gained prominence in 1984, when a sysop was arrested because, unbeknownst to him, stolen telephone charge numbers had been posted on his bulletin board.[2] More recent incidents have involved the sysop's liability for the defamatory statements of others,[3] the dissemination of copyrighted,[4] prurient,[5] or virus-infected material by users,[6] and the transmittal of incorrect information by information services.[7]

IV. DEVELOPING ALTERNATIVE MODELS

In response to these situations, some sysops have sought legal immunity. Others have taken a more proactive and arguably heavy-handed approach, by managing the bulletin board in a way that some have likened to censorship.

In both cases, sysops and commentators have posited various "analogies" to guide the rule making. The models asserted have analogized the sysops' role to, among others, print publishers, information distributors such as libraries or booksellers, information conduits such as the telephone, airwave broadcasters such as television or radio stations, and various real property owners, such as the owners of shopping centers, coffeehouses or bars. You name it, they've analogized to it.

As a quasi-academician, I float these models so that I may duly shoot them down in favor of my own pet theories. Indeed, while these five different models are useful to creating a law of cyberspace, I would like to reapproach the issue of sysop liability by describing three "competing" paradigms. I say these paradigms compete because all three of them are useful and yet no one paradigm "dominates" or otherwise governs all situations.

A. The Co-Conspirator Approach

I can illustrate through the first paradigm. Some have argued, quite persuasively, that sysop liability should accrue only when the sysop has intentionally participated in the harmful conduct.[8] Therefore, if the sysop didn't actually directly cause the harmful conduct, the sysop could still be liable if the sysop can be deemed a "co-conspirator" or criminal facilitator. Requiring this level of "intent" as a threshold is actually quite meaningful, since sysop liability then would only accrue when the fact-finder is convinced that the sysop had actually thought about the harmful actions and intended to participate in them.
However, this paradigm has some weaknesses. First, although the system should require the injured party to prove the sysops' intent, we can anticipate that the system will break down and that the sysop will have to disprove the existence of intent. Second, the paradigm is somewhat tautological and circularly defined, by saying that bad intent is punished when we believe the actions are harmful.

Nevertheless, the "co-conspirator" paradigm warrants consideration because its high threshold immunizes many criminally innocent sysops from criminal liability. At the same time, it provides a relatively clear test for liability for sysops who create all the preconditions for pirate boards or boards for the traffic of stolen information but who do not actually pirate software or steal the telephone codes.

B. The Editorial Control Approach

The second paradigm involves the legal regime of editorial control. Generally speaking, the law responding to new communication technologies has established some sort of sliding scale of editorial control and tort liability. Grossly simplified, the more editorial control the media owner exercises (or, as a legal conclusion, is permitted to exercise), the more tort liability that accrues.[9] Therefore, newspaper and print publishers, which are allowed as a legal conclusion to exercise virtually unrestrained editorial control, are also frequently liable for the statements of others. At the other end of the spectrum, telephone carriers, who as a legal conclusion and practical matter are not able to exercise any editorial control, are given virtual immunity from tort liability for the statements or actions of their users.

In discussing the applicability of this sliding scale to bulletin boards, several camps have emerged. I'll call the first approach the "Prodigy" approach. Prodigy has sought to transcend this sliding scale as applied in cyberspace, arguing that it should have editorial control without tort liability.[10] Others have warned that applying this sliding scale in cyberspace could create "perverse" incentives for sysops to run their boards "blindly," seeking tort immunity by refusing to exercise editorial control.[11]

At the heart of these critiques is an assumption that the existing legal scheme is inadequate to accommodate bulletin board technology. I disagree. If used properly, the sliding scale of control and liability can lead to wholly satisfactory results.

In my opinion, most of the legal confusion about bulletin boards arises because of their multiple functions. Any bulletin board can, at the same time, be a crowded telephone conference call, a soapbox, an email postal carrier, a hotbed of commerce, an information resource, or a gateway to other systems. It is both technologically possible, and indeed logical, that sysops exercise differing levels of control over users' actions and statements depending on which function is being used. Further, because sysops can and should exercise different levels of control over different functions, it is natural that the editorial control sliding scale apply functionally: on those functions where the sysop is exercising control, liability accrues; where the sysop is not exercising control, liability generally should not accrue.
I say generally because it is not good policy to deny injured parties any recourse whatsoever. Where sysops know that the users' statements or actions are harmful, or are alerted to this, they should have an obligation to intervene except when they are acting as information conduits. This provides some protection to injured parties without putting the burden on sysops.

However, with this exception, I see no reason why sysops should not be able to choose their basket of control and liability. If sysops choose to exercise control over an area of their board, they will receive certain legal benefits that would be available to, say, print publishers but will also have more responsibilities. On the other hand, sysops who do not exercise control will increase the incidence of "free" speech and therefore should receive some protection. In either case, the editorial control sliding scale provides the appropriate social cost internalization necessary to a free market equilibrium: sysops who exercise editorial control will bear the social costs of these actions, while those sysops who do not act will not be stuck with unwarranted social costs. In other words, either approach sets private costs of sysop's actions equal to their social costs, a necessary precondition to the free market.

C. The Associational Approach

Having outlined the "co-conspirator" paradigm that might apply generally in the criminal context, and the "editorial control" paradigm that might apply generally in the civil context, I would like to suggest yet a third "transcendental" paradigm that might best govern the relationship between sysops and users, and sysops and the government. This third paradigm relates to the sysop's associational freedoms as outlined in the First Amendment, so that we treat sysops as the leader of an association or group.

Using this paradigm significantly limits the situations where it is appropriate to impose criminal or civil liability on the sysop for the actions or statements of another member. Just as there are few situations where associations or their leaders should be responsible for the statements of members, this paradigm would substantially immunize the association leader (the sysop) from the statements of users. Further, the First Amendment gives associations substantial control over their destiny, including generally the decision over who can be a member. Finally, an association leader can "cut the mike" of a member without incurring legal liability, in effect exercising editorial control. In all cases, aggrieved users have a powerful recourse: the right to create their own associations.

This paradigm warrants special consideration because of the crucial role bulletin boards may play in group formation over time. It has been noted that computer communications have facilitated the creation of new groups, and these groups can transcend geography while affiliating on common and often very specialized interests.[12] Excessive imposition of liability on sysops will effectively curtail group formation and hinder associational freedom.

Nevertheless, treating all bulletin boards as associations can often be euphemistic: massive commercial entities like Prodigy or CompuServe are no more associations than are Price Club or Fedco. On the other hand, existing groups such as MENSA "meet" on CompuServe to conduct presumably constitutionally protected activities. Distinguishing between euphemistic and
"real" associations can be a difficult and perhaps fruitless line-drawing exercise, but nevertheless we must always be circumspect about how our legal regimes might unduly impose on our constitutionally protected associational freedoms.

V. CONCLUSIONS

Ultimately, I present these three paradigms as heuristics rather than solutions. The technology is moving too fast, and society's acceptance of the transformation into an information economy is too new, for us to set up legal precedents that may prove inadequate or overly restrictive. But I think we'll stay on the right track if, at each point along the way, we take a 'gut check' to ensure we are developing rules that enhance communication rather than stifle it.

The author invites comments and discussion at eschlach@netcom.com.

[1] The tricky definition of cyberspace often befuddles even the most savvy. For the purposes of this paper, I concentrate on the following "access points" to cyberspace: computer bulletin boards, electronic bulletin boards, network nodes, on-line services, computer/electronic information services, videotext systems, electronic mail systems, and electronic networks. For purposes of this paper, I will use the term "computer bulletin board" or "bulletin board" to stand as a proxy for all of these different, but functionally similar, technologies.


[3] The issue of defamation has received a significant amount of attention in the press and legal literature. The only reported case is Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). In Cubby, an electronic newsletter distributed on CompuServe made some disparaging remarks about a rival newsletter. The rival sued the electronic newsletter, the subcontractor who managed the journalism area for CompuServe, and CompuServe. In a decision widely praised in the literature, the judge dismissed CompuServe from the lawsuit, holding that CompuServe was not legally liable for the allegedly defamatory information contained in the newsletter because CompuServe was more like an information disseminator such as a library than a print publisher. See id. at 140.

[4] In a recent decision, a federal district court found a sysop liable for the "publication" of copyrighted digitized photographs from Playboy Magazine when this photographs had been uploaded by users regardless of the sysop's knowledge. Playboy Enters. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993). This decision did not cite or address the reasoning in Cubby, and I generally believe the analysis is inconsistent with the reasoning used in Cubby. Furthermore, the judge in Frena awarded summary judgment to Playboy, thereby not even reaching the factual issues of whether the sysop or BBS was acting like a publisher or whether the sysop had any knowledge that the users had uploaded the infringing photographs.


[9] For a more developed analysis of the contours of this sliding scale, see Schlachter, Cyberspace, the Free Market, and the Free Market of Ideas, supra note *, at 111-18.


SMITH v. CALIFORNIA

No. 9

SUPREME COURT OF THE UNITED STATES

361 U.S. 147; 80 S. Ct. 215; 1959 U.S. LEXIS 1885; 4 L. Ed.2d 205; 14 Ohio Op. 2d 459

October 20, 1959, Argued
December 14, 1959, Decided

PRIOR HISTORY: [***1]

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.


SYLLABUS: Appellant, proprietor of a bookstore, was convicted of violating a city ordinance which was construed by the state courts as making him absolutely liable criminally for the mere possession in his store of a book later judicially determined to be obscene -- even if he had no knowledge as to the contents of the book. Held: As thus construed and applied, the ordinance violates the freedom of the press which is safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. Pp. 148-155.

(a) The free publication and dissemination of books obviously are within the constitutionally protected freedom of the press, and a retail bookseller plays a most significant role in the distribution of books. P. 150.

(b) Legal devices and doctrines, in most applications consistent with the Constitution, may not be constitutionally capable of application where such application would have the effect of inhibiting freedom of expression by making persons reluctant to exercise it. Pp. 150-152. [***2]

(c) Obscene expression is not constitutionally protected; but this ordinance imposes an unconstitutional limitation on the public's access to constitutionally protected matter. For, if the bookseller be criminally liable without knowledge of the contents, he will tend to restrict the books he sells to those he has inspected; and thus a restriction will be imposed by the States upon the distribution of constitutionally protected as well as obscene books. Pp. 152-154.

(d) The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Hence that there may be more difficulty in enforcing a regulation against the distribution of obscene literature if booksellers may not be held to an absolute criminal liability does not require a different result here. Pp. 154-155.

COUNSEL: Stanley Fleishman and Sam Rosenwein argued the cause and filed a brief for appellant.

Roger Arnebergh argued the cause for appellee. With him on the brief was Philip E. Grey.

A. L. Wirin and Fred Okrand filed a brief for the American Civil Liberties Union, as amicus curiae, urging reversal.


OPINIONBY: BRENNAN

OPINION: [*148] [**216] MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, the proprietor of a bookstore, was convicted in a California Municipal Court under a Los Angeles City ordinance which makes it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale." n1 The offense was defined by the Municipal Court, and by the Appellate [*149] Department of the Superior Court, n2 which affirmed the Municipal Court judgment imposing a jail sentence on appellant, as consisting solely of the possession, in the appellant's bookstore, of a certain book found upon judicial investigation to be obscene. The definition included no element of scienter -- knowledge by appellant of the contents of the book -- and thus the ordinance was construed as imposing a "strict" or "absolute" criminal liability. n3 The appellant made timely objection below that if the ordinance were so construed it would be in conflict with the Constitution of the United States. This contention, [***4] together with other contentions based on the Constitution, n4 was rejected, and the case comes here on appeal. 28 U. S. C. [**217] @ 1257 (2); 358 U.S. 926.
n1 The ordinance is @ 41.01.1 of the Municipal Code of the City of Los Angeles. It provides:

"INDECENT WRITINGS, ETC. -- POSSESSION PROHIBITED:

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:

"1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;

"2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

"3. In any toilet or restroom open to the public;

"4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

"5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

n2 In this sort of proceeding, "the highest court of a State in which a decision could be had." 28 U. S. c. @ 1257. Cal. Const., Art. VI, @@ 4, 4b, 5. See Edwards v. California, 314 U.S. 160, 171.

n3 See Hall, General Principles of Criminal Law, p. 280. The Appellate Department's opinion is at 161 Cal. App. 2d Supp. 860, 327 P. 2d 636. The ordinance's elimination of scienter was, in fact, a reason assigned by that court for upholding it as permissible supplementary municipal legislation against the contention that the field was occupied by California Penal Code @ 311, a state-wide obscenity statute which requires scienter.

n4 These other contentions, which are made again here, are that evidence of a nature constitutionally required to be allowed to be given for the defense as to the obscene character of a book was not permitted to be introduced; that a constitutionally impermissible standard of obscenity was applied by the trier of the facts; and that the book was not in fact obscene. In the light of our determination as to the constitutional permissibility of a strict liability law under the circumstances presented by this case, we need not pass on these questions. For the purposes of discussion, we shall assume without deciding that the book was correctly adjudged below to be obscene.

n5 See Burstyn v. Wilson, 343 U.S. 495; Groespan v. American Press Co., 297 U.S. 233. Certainly a retail bookseller plays a most significant role in the process of the distribution of books.

California [***7] here imposed a strict or absolute criminal responsibility on appellant not to have obscene books in his shop. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500. n5 Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter -- though even where no freedom-of-expression question is involved, there is precedent in this Court that this power is not without limitations. See Lambert v. California, 355 U.S. 225. But the question here is as to the validity of this ordinance's elimination of the scienter requirement -- an elimination which may tend to work a substantial restriction on the freedom of speech and of the press. Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, [*151] which cannot be applied in settings where they have
the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise [***8] it. The States generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his entitlement to exemptions from taxation, but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application. Speiser v. Randall, 357 U.S. 513. See Near v. Minnesota, supra, at 712-713. It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. Thornhill v. Alabama, 310 U.S. 88, 97-98. Cf. Staub v. City of Baxley, 355 U.S. 313. n6

And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute [***218] having a potentially inhibiting [***49] effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 U.S. 507, 509-510, 517-518. Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in Wieman v. Updegraff, 344 U.S. 183. There an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character. The [*152] Court said of the elimination of scienter in this context: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." Id., at 191.

--- Footnotes ---

n5 See also Williams, Criminal Law -- The General Part, p. 238 et seq.

n6 See Note, 61 Harv. L. Rev. 1208.

--- End Footnotes --- [***10]

These principles guide us to our decision here. We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. Roth v. United States, 354 U.S. 476. n7 The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the [***11] imposition of the highest standard of care on distributors -- in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. Cf. United States v. Balint, 258 U.S. 250, 252-253, 254. His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the [*153] press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, n8 he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing [***12] with any requirement of [***219] scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." n9 The King v. Ewart, 25 N. Z. L. R. 709, 729 (C. A.). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's [*154] limitation in the amount
of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

Footnotes

n7 In the Roth opinion there was also decided Alberts v. California, which dealt with the power of the States in this area. [*13]

n8 The effectiveness of absolute criminal liability laws in promoting caution has been subjected to criticism. See Hall, General Principles of Criminal Law, pp. 300-301. See generally Williams, Criminal Law -- The General Part, pp. 267-274; Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55; Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043; Morissette v. United States, 342 U.S. 246.

n9 Common-law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of sciente. See the discussion in Attorney General v. Simpson, 93 Irish L. T. 33, 37-38 (Dist. Ct.). Cf. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, @ 2 (5); American Law Institute Model Penal Code @ 207.10 (7) (Tentative Draft No. 6, May 1957), and Comments, pp. 49-51. The general California obscenity statute, Penal Code @ 311, requires sciente, see note 3, and was of course sustained by us in Roth v. United States, supra. See note 7.

Inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden [*15] of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory [*15] effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime.

We have said: "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." Roth v. United States, supra, at 488. n10 [*220] This ordinance opens that door too far. The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Cf. Dean Milk [*16] Co. v. City of Madison, 340 U.S. 349. It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution.

Reversed.

CONCURBY: BLACK; FRANKFURTER; DOUGLAS; HARLAN (In Part)

CONCUR: MR. JUSTICE BLACK, concurring.

The appellant was sentenced to prison for possessing in his bookstore an "obscene" book in violation of a Los Angeles city ordinance. n1 I concur in the judgment holding that ordinance
unconstitutional, but not for the reasons given in the Court’s opinion.

--- Footnotes ---

n1 As shown by Note 1 of the Court’s opinion, the ordinance makes it unlawful to possess at places defined any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind.

--- End Footnotes --- [*17]

[*156] The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an "obscene" book, even though he is unaware of its obscenity. The grounds on which the Court draws a constitutional distinction between a law that punishes possession of a book with knowledge of its "obscenity" and a law that punishes without such knowledge are not persuasive to me. Those grounds are that conviction of a bookseller for possession of an "obscene" book when he is unaware of its obscenity "will tend to restrict the books he sells to those he has inspected," and therefore "may tend to work a substantial restriction on freedom of speech." The fact is, of course, that prison sentences for possession of "obscene" books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity. The Court’s opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of a book’s contents when he possessed it. And if the Constitution’s requirement of knowledge is so easily met, the result of this case is that one particular bookseller gains [*18] his freedom, but the way is left open for state censorship and punishment of all other booksellers by merely adding a few new words to old censorship laws. Our constitutional safeguards for speech and press therefore gain little. Their victory, if any, is a Pyrrhic one. Cf. Beauharnais v. Illinois, 343 U.S. 250, 267, at 275 (dissenting opinion).

That it is apparently intended to leave the way open for both federal and state governments to abridge speech and press (to the extent this Court approves) is also indicated by the following statements in the Court’s opinion: "The door barring federal and state intrusion into this area [freedom of speech and press] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." . . . This ordinance opens that door too far."

[*157] This statement raises a number of questions for me. What are the "more important" interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgment of speech and press goes "too far" and [*19] when [*21] it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Certainly the First Amendment’s language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean no law abridging. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach" of federal power to abridge. n2 No [*158] other provision of the Constitution purports to dilute [*22] the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power [*159] or authority to subordinate speech and press to what they think are [*20] "more important interests." The contrary notion is, in my judgment, court-made not Constitution-made.

. . .

State intrusion or abridgment of freedom of speech and press raises a different question, since the First Amendment by its terms refers only to laws passed by Congress. But I adhere to our prior decisions holding that the Fourteenth Amendment made the First applicable to the States. See cases collected in the concurring opinion in Speiser v. Randall, 357 U.S. 513, 530. It follows that I am for reversing this case because I believe that the Los Angeles ordinance sets up a censorship in violation of the First and Fourteenth Amendments.

If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the
desirability or constitutionality of this Court's becoming a Supreme Board of Censors -- reading books and viewing television performances to determine whether, if permitted, they might adversely affect the morals of the people throughout the many diversified local communities in this vast country. n3 [*160] It is true that the ordinance here is on its face only applicable to "obscene or indecent writing." It is also true that this particular kind of censorship is considered [***22] by many to be "the obnoxious thing in its mildest and least repulsive form . . . ." But "illegitimate and unconstitutional practices get their first footing in that way . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635. While it is "obscenity and indecency" before us today, the experience of mankind -- both ancient and modern -- shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow.

. . .

Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the Judiciary giving it a foothold here.

MR. JUSTICE FRANKFURTER, concurring.

The appellant was convicted of violating the city ordinance of Los Angeles prohibiting possession of obscene books in a bookshop. His conviction was affirmed by the highest court of California to which he could appeal and it is the judgment of that court that we are asked to reverse. Appellant claims three grounds of invalidity under the Due Process Clause of the Fourteenth Amendment. He urges the invalidity of the ordinance as an abridgment of the freedom of speech which the guarantee [***223] of "liberty" of the Fourteenth Amendment safeguards against state action, and this for the reason that California law holds a bookseller criminally liable for possessing an obscene book, wholly apart from any scienter on his part regarding the book's obscenity. The second constitutional infirmity urged by appellant is the exclusion of appropriately offered testimony through duly qualified witnesses regarding the prevailing literary standards [***161] and the literary and moral criteria [***24] by which books relevantly comparable to the book in controversy are deemed not obscene. This exclusion deprived the appellant, such is the claim, of important relevant testimony bearing on the issue of obscenity and therefore restricted him in making his defense. The appellant's ultimate contention is that the questioned book is not obscene and that a bookseller's possession of it could not be forbidden.

The Court does not reach, and neither do I, the issue of obscenity. The Court disposes of the case exclusively by sustaining the appellant's claim that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment precludes a State from making the dissemination of obscene books an offense merely because a book in a bookshop is found to be obscene without some proof of the bookseller's knowledge touching the obscenity of its contents.

The Court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity. Obviously the Court is not holding that a bookseller must familiarize [***25] himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day.

I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake. On the other hand, a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions [*162] beyond its particular facts. Were the Court holding that this kind of prosecution for obscenity requires proof of the guilty mind associated with the concept of crimes deemed infamous, that would be that and no further elucidation would be needed. But if the requirement of scienter in obscenity cases plays a role different from the normal role of mens rea in the definition of crime, a different problem confronts the Court. If, as I assume, the requirement [***26] of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or must substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents, then, I submit, invalidating an obscenity statute because a State dispenses altogether with the
requirement of scienter does not require some indication of the scope and quality of scienter that is required. It ought at least to be made clear, and not left for future litigation, that the Court's decision in its practical effect is not intended to nullify the conceded power of the State to prohibit booksellers from trafficking in obscene literature.

Of course there is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain. The doctrine of United States v. Balint, 258 U.S. 250, has its appropriate limits. The rule that scienter is not required in prosecutions for so-called public welfare offenses is a limitation on the general principle that [*224] awareness of what one is doing is a prerequisite for the infliction of [*27] punishment. See Morissette v. United States, 342 U.S. 246. The balance that is struck between this vital principle and the overriding public menace inherent in the trafficking in noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography. On the other hand, the constitutional [*163] protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity. It would certainly wrong them to attribute to Jefferson or Madison a doctrinaire absolutism that would bar legal restriction against obscenity as a denial of free speech. n1 [*164] We have not yet been told that all laws against defamation and against inciting crime by speech, see Fox v. Washington, 236 U.S. 273 (1915), are unconstitutional as impermissible curbs upon unrestricted utterance. We know this was not Jefferson's view, any more than it was the view of Holmes and Brandeis, J., the originating architects of our prevailing constitutional law protective of freedom of speech.

Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the Court suggests an unguiding, vague standard for establishing "awareness" by the bookseller of the contents of a challenged book in contradiction of his disclaimer of knowledge of its contents. A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, [*225] having knowledge of the book. As a practical matter therefore the exercise of the constitutional right of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally.

The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations [*29] that reinforce the right of one charged with obscenity -- a right implicit in the very nature of the legal concept of obscenity -- to enlighten the judgment of the tribunal, [*165] be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability [*30] of a controverted device.

There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, Roth v. United States, 354 U.S. 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life,
but on the basis of "contemporary community standards." Can [*166] it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community [****31] feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant "with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time." United States v. Kennerly, 209 F. 119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of "due process" to exclude the constitutionally relevant evidence proffered in this case. The importance of this type of evidence in [***226] prosecutions for obscenity has been impressively attested by the recent debates in the House of Commons dealing with the insertion of such a provision in the enactment [****32] of the Obscene Publications Act, 1959, 7 & 8 Eliz. 2, Ch. 66 n2 (see 597 Parliamentary Debates, H. Comm., No. 36 (December [*167] 16, 1958), cols. 1009-1010, 1042-1043; 604 Parliamentary Debates, H. Comm., No. 100 (April 24, 1959), col. 803), as well as by the most considered thinking on this subject in the proposed Model Penal Code of the American Law Institute. See A. L. I. Model Penal Code, Tentative Draft No. 6 (1957), @ 207.10. n3 For the reasons I have indicated, I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions.

n2 Section 4 of this Act provides:

"(1) A person shall not be convicted of an offense against . . . this Act . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

"(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground." [****33]

n3 Subsection (2) of this draft section provides in part:

". . . In any prosecution for an offense under this section evidence shall be admissible to show:

"(a) the character of the audience for which the material was designed or to which it was directed;

"(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people;

"(c) artistic, literary, scientific, educational or other merits of the material;

"(d) the degree of public acceptance of the material in this country;

"(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

. . .

"Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible."

--------End Footnotes--------

MR. JUSTICE DOUGLAS, concurring.

[omitted]

DISSENT BY: HARLAN (In Part)

DISSENT: MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The striking down of local legislation is always serious business for this Court. In my opinion in the Roth case, 354 U.S., at 503-508, I expressed the view that state power in the obscenity field has a wider scope than federal power. The question whether scienter is a constitutionally required element in a criminal obscenity statute is [*170] intimately related to the constitutional scope of the power to bar material as obscene, for the impact of such a requirement on effective prosecution may be one thing where the scope of the power to proscribe is broad and quite another where the scope is narrow. Proof of scienter may entail no great burden in the
case of obviously obscene material; it may, however, become very difficult where the character of the material is more debatable. In my view then, the scienter question involves considerations of a different order depending on whether a state or a federal statute is involved. We have here a state ordinance, and on the meagre data before us I would not reach the question whether the absence of a scienter element [***38] renders the ordinance unconstitutional. I must say, however, that the generalities in the Court's opinion striking down the ordinance leave me unconvinced.

From the point of view of the free dissemination of constitutionally protected ideas, the Court invalidates the ordinance on the ground that its effect may be to induce booksellers to restrict their offerings of nonobscene literary merchandise through fear of prosecution for unwittingly having on their shelves an obscene publication. From the point of view of the State's interest in protecting its citizens against the dissemination [***228] of obscene material, the Court in effect says that proving the state of a man's mind is little more difficult than proving the state of his digestion, but also intimates that a relaxed standard of mens rea would satisfy constitutional requirements. This is for me too rough a balancing of the competing interests at stake. Such a balancing is unavoidably required in this kind of constitutional adjudication, notwithstanding that it arises in the domain of liberty of speech and press. A more critical appraisal of both sides of the constitutional balance, not possible on the [***39] meagre material before us, [*171] seems to me required before the ordinance can be struck down on this ground. For, as the concurring opinions of my Brothers BLACK and FRANKFURTER show, the conclusion that this ordinance, but not the one embodying some element of scienter, is likely to restrict the dissemination of legitimate literature seems more dialectical than real.
MIAMI HERALD PUBLISHING CO., DIVISION OF KNIGHT NEWSPAPERS, INC. v. TORNILLO

No. 73-797

SUPREME COURT OF THE UNITED STATES

418 U.S. 241; 94 S. Ct. 2831; 1974 U.S. LEXIS 86; 41 L. Ed. 2d 730; 1 Media L. Rep. 1898

April 17, 1974, Argued
June 25, 1974, Decided

PRIOR HISTORY: [***1]

APPEAL FROM THE SUPREME COURT OF FLORIDA

DISPOSITION: 287 So. 2d 78, reversed.

SYLLABUS: After appellant newspaper had refused to print appellee's replies to editorials critical of appellee's candidacy for state office, appellee brought suit in Florida Circuit Court seeking injunctive and declaratory relief and damages, based on Florida's "right of reply" statute that grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and making it a misdemeanor for the newspaper to fail to comply. The Circuit Court held the statute unconstitutional as infringing on the freedom of the press and dismissed the action. The Florida Supreme Court reversed, holding that the statute did not violate constitutional guarantees, and that civil remedies, including damages, were available, and remanded to the trial court for further proceedings. Held:

1. The Florida Supreme Court's judgment is "final" under 28 U. S. C. @ 1257, and thus ripe for review by this Court. North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U. S. 156. Pp. 246-247.

2. The statute violates the First Amendment's guarantee of a free press. Pp. 247-258. [***2]

(a) Governmental compulsion on a newspaper to publish which "reason" tells it should not be published is unconstitutional. P. 256.

(b) The statute operates as a command by a State in the same sense as a statute or regulation forbidding appellant to publish specified matter. P. 256.

(c) The statute exacts a penalty on the basis of the content of a newspaper by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print. Pp. 256-257.

(d) Even if a newspaper would face no additional costs to comply with the statute and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the statute still fails to clear the First Amendment's barriers because of its intrusion into the function of editors in choosing what material goes into a newspaper and in deciding on the size and content of the paper and the treatment of public issues and officials. P. 258.

COUNSEL: Daniel P. S. Paul argued the cause for appellant. With him on the briefs were James W. Beasley, Jr., and Richard M. Schmidt, Jr.

Jerome A. Barron argued the cause for appellee. With him on the [***3] brief were Tobias Simon and Elizabeth duFresne. *


Briefs of amici curiae urging affirmance were filed by Albert H. Kramer and Thomas R. Asher for the National Citizens Committee for Broadcasting, and by Donald U. Sessions pro se. [***4]
JUDGES: BURGER, C. J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement, in which REHNQUIST, J., joined, post, p. 258. WHITE, J., filed a concurring opinion, post, p. 259.

OPINION BY: BURGER

OPINION: [**243] [**2832] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. n1 In [*244] response to these editorials [**2833] appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking [***5] declaratory and injunctive relief and actual and punitive damages in excess of $ 5,000. The action was premised on Florida Statute @ 104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor. n2

---Footnotes---

n1 The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"LOOK who's upholding the law!

"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Czar Tornillo calls 'violation of this law inexcusable.'

"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:

"FROM the people who brought you this -- the teacher strike of '68 -- come now instructions on how to vote for responsible government, i. e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeches say the strike is not an issue. We say maybe it wouldn't be it were not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us -- what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic proxy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our
translation reads that as more gold and more rule."

[***6]

n2 "104.38 Newspaper assailing candidate in an election; space for reply --If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in @ 775.082 or @ 775.083."

--- End Footnotes ---

[*245] Appellant sought a declaration that @ 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission [***7] of a crime, and held that @ 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. 38 Fla. Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." Id., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that @ 104.38 did not violate constitutional guarantees. 287 So. 2d 78 (1973). n3 It held that free [**2834] speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." Id., at 82. It also held that the statute is [*246] not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." Id., at 85. n4 Civil remedies, including damages, [***8] were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

--- Footnotes ---

n3 The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side took issue with that part of the Circuit Court's decision. 287 So. 2d, at 85.

n4 The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." Id., at 86.

--- End Footnotes ---

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 414 U.S. 1142 (1974). [***9]

...

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions. n7

--- Footnotes ---

n7 In its first court test the statute was declared unconstitutional. State v. News-Journal Corp., 36 Fla. Supp. 164 (Volusia County Judge's Court, 1972). In neither of the two suits, the instant action and the News-Journal action, has the Florida Attorney General defended the statute's constitutionality.

--- End Footnotes ---

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between [**2835] critical comment which is and which is not defamatory.

B
The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

n8 See generally Barron, Access to the Press -- A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).


n10 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."


Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

--- Footnotes ---

n12 Commission 15. Even in the last 20 years there has been a significant increase in the number of people likely to read newspapers. Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review 15, 16 (Sept./Oct. 1973).

n13 "Nearly half of U.S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities."


--- End Footnotes ---

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The
abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public [*15] has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

"This concentration of nationwide news organizations -- like other large institutions -- has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." Report of the Task Force in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

Appellee cites the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "[t]he right of free [*251] public expression has . . . lost its earlier reality." Commission on Freedom of the Press, A Free and Responsible Press 15 (1947).

n15 "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, The Information Machines 127 (1971).

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, n16 have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. n17 From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

n16 The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 84 Stat. 466, 15 U. S. C. @ 1801 et seq.

n17 "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, Freedom of the Press 99 n. 4 (1947) (italics omitted).

"The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom [*2837] to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)
In New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47, and n. 15 (1971), which he suggests seemed to invite experimentation by the States in right-to-access regulation of the press. n18

n18 "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[*]

"[*]Some states have adopted retraction statutes or right-of-reply statutes . . . .

"One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press -- A New First Amendment Right, 80 Harv. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

n19 The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 to provide a means for neutral examination of claims of press inaccuracy. The Council was created following the publication of the Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press. The background paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having the most interest to the United States of the European press councils.

n20 Because we hold that @ 104.38 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

n21 The Court foresaw the problems relating to government-enforced access as early as its decision in Associated Press v. United States, supra. There it carefully contrasted the private "compulsion to print" called for by the Association's bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published."
326 U.S., at 20 n. 18. In Branzburg v. Hayes, 408 U.S. 665, 681 (1972), we emphasized that the cases then [*255] before us "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117 (1973), the plurality opinion as to Part III noted:

"The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers -- and [***22] hence advertisers -- to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by other Members of this Court in their separate opinions in that case. Id., at 145 (STEWART, J., concurring); id., at 182 n. 12 (BRENNAN, J., joined by MARSHALL, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

"Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in Pittsburgh Press, MR. JUSTICE STEWART, joined by MR. JUSTICE DOUGLAS, [***23] expressed the view that no "government agency -- local, state, or federal -- can tell [***256] a newspaper in advance what it can print and what it cannot." Id., at 400. See Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (CA9 1971).

We see that beginning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction [***2839] or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "reason" tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" n21 begs the core question. Compelling editors or publishers to publish that which "reason" [***24] tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co., 297 U.S. 233, 244-245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the [***257] finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available. [***25]

---Footnotes---

n21 Brief for Appellee 5.

n22 "However, since the amount of space a newspaper can devote to 'live news' is finite, [*] if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

[***] The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint. . . ." Note, 48 Tulane L. Rev. 433, 438 (1974) (one footnote omitted).

Another factor operating against the "solution" of adding more pages to accommodate the access matter is that "increasingly subscribers complain of bulky, unwieldy papers." Bagdikian, Pat Newspapers and

--- Footnotes ---

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. [***26] Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. n23 Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," New York Times Co. v. Sullivan, 376 U.S., at 279. The Court, in Mills v. Alabama, 384 U.S. 214, 218 (1966), stated:

"[There] is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ."

--- Footnotes ---

n23 See the description of the likely effect of the Florida statute on publishers, in Lange 70-71.

--- Footnotes ---

[**258] Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. [**2840] [***27] A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. n24 The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistently with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

--- Footnotes ---

n24 "[Liberty] of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chafee, Government and Mass Communications 633 (1947).

--- Footnotes ---

It is so ordered.

CONCURBY: BRENNAN; WHITE

CONCUR: MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. [***259] See generally Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739-1747 (1967).

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. New York Times Co. v. United States, 403 U.S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental [***29] regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. Mills v. Alabama, 384 U.S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" n1 and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

"Whatever differences may exist about interpretations of the First Amendment, there is
practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of [*260] government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press ... to play an important role [*30] in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally [*2841] chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change ... muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." Mills v. Alabama, supra, at 218-219.

--- Footnotes ---


--- End Footnotes ---

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on [*31] vital matters will not be comprehensive and that all viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[where] the press is free, and every man able to read, all is safe." n2 Any other accommodation -- any other system that would supplant private control of the press with the heavy hand of government intrusion -- would make the government the censor of what the people may read and know.

--- Footnotes ---

n2 Letter to Col. Charles Yancey in 14 The Writings of Thomas Jefferson 384 (Lipscomb ed. 1904).

--- End Footnotes ---

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But [*261] prior compulsion by government in matters going to the very nerve center of a newspaper -- the decision as to what copy will or will not be included in any given edition -- collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment [*32] that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947).

The constitutionally obnoxious feature of @ 104.38 is not that the Florida Legislature may also have placed a high premium on the protection of individual reputational interests; for government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Quite the contrary, this law runs afoot of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. Whatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material, see, e. g., Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); New York Times Co. v. United States, 403 U.S., at 730 (WHITE, J., concurring), we have never thought that the First Amendment permitted public officials to dictate to the press the [*33] contents of its news columns or the slant of its editorials.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. See ibid. Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's [*262] reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he has been able to prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

Reaffirming the rule that the press cannot be forced to print an answer to a [*2842] personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. Gertz v. Robert Welch, Inc., post, p. 323, goes far toward
eviscerating the effectiveness [***34] of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under Gertz, the burden of proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. Gertz itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citizen [*263] to redeem a falsely tarnished reputation. Nor [***35] does one have to doubt the genuine decency, integrity, and good sense of the vast majority of professional journalists to support the right of any individual to have his day in court when he has been falsely maligned in the public press. The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

"In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." "Without . . . a lively sense of responsibility a free press may readily become a powerful instrument of injustice." Pennekamp v. Florida, 328 U.S. 331, 356, 365 (1946) (Frankfurter, J., concurring) (footnote omitted).
To me it is a near absurdity to so deprecate individual dignity, as the Court does in Gertz, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.
Elridge Daniel, Plaintiff, v. Dow Jones & Company, Inc. (News Retrieval Service), Defendant

[NO NUMBER IN ORIGINAL]

Civil Court of the City of New York, Special Term, New York County

137 Misc. 2d 94; 520 N.Y.S.2d 334; 14 Media L. Rep. 1995

October 13, 1987

DISPOSITION: The defendant's motion to dismiss the action is granted.

HEADNOTES: Negligence -- Liability of News Service for Negligent Misstatements -- Interactive Computerized News Service -- Special Relationship

A news service is not liable for negligent statements absent a specific duty or special relationship between the parties. Thus, in an action by plaintiff, a subscriber to defendant's premium service for instantaneous transmission of the news by computer-to-computer linkage, to recover damages for an allegedly false and misleading report regarding a stock price which plaintiff relied on to his detriment, defendant's motion to dismiss the action is granted. The relationship between the parties is the same as between any subscriber and news service; the instantaneous, interactive, computerized delivery of defendant's service does not alter the fact that plaintiff purchased defendant's news reports as did thousands of others, and the special relationship required to allow an action for negligent misstatements must be greater than that between the ordinary buyer and seller. Moreover, plaintiff's action is barred by Federal and State constitutional guarantees of freedom of the press.

COUNSEL: Gibson, Dunn & Crutcher (Robert D. Sack and Richard J. Tofel of counsel), for defendant.

Thomas J. Hanrahan for plaintiff.

JUDGES: Lewis R. Friedman, J.

OPINIONBY: FRIEDMAN

OPINION: [*94] OPINION OF THE COURT

[*94] With the inexorable march of time has come an age of technology of previously unimagined dimensions. Methods for [*95] news delivery have advanced apace with general scientific achievements. While town criers had for centuries informed the local citizenry, general circulation newspapers eventually made criers superfluous. Early in this century, news, transmitted by radio and telephone, became available to subscribers through dedicated news tickers and to the public by "extra" editions of newspapers. Widely available radio and television made news known to the public within minutes of its occurrence. In the last few years, instantaneous news has become available to subscribers with access to a microcomputer and a telephone, even at home.

Do technological advances require rethinking legal principles that have existed for previous modalities? Do modern techniques for delivering the news change the rules applicable to its providers? This case raises the question of whether the providing of a premium service for instantaneous transmission of the news by computer-to-computer linkage places the news service at greater risk to readers than does the providing of the same news by another modality.

The relevant facts in this case are not in dispute. In September 1986, plaintiff, a law student and securities investor, became 1 of the more than 200,000 subscribers to a service, Dow Jones News/Retrieval, offered by defendant. The service provides what it advertises to be "timely", "accurate" news; it can be accessed from a subscriber's computer. The subscriber telephones defendant's computer. Then, by use of a personal computer and modem, a device which converts computer signals for telephone transmission, the subscriber enters the necessary passwords and access codes to set up an instantaneous, continuous, "interactive" "on-line" linkage with defendant's computer, thus allowing access to the Dow Jones News Service. The service is "interactive" in that the subscriber describes his or her requests through a home or business computer; defendant's computer responds and, at a charge of $3 per minute, searches for the items the subscriber has requested.

Plaintiff asserts that he received a news report from defendant which was false and misleading in that it omitted a material fact. The news item, datelined Calgary, referred to a transaction involving the restructuring of Husky Oil, a Canadian corporation; it did not mention that the prices referred to were in Canadian, not United States, dollars. Plaintiff claims that he relied on the pricing in the report to his detriment.
Defendant, based on affidavits describing the events, moved to dismiss the complaint for failure to state a cause of action. This court provided written notice to both parties of its intention to treat the motion [**336] as one for summary judgment. (CPLR 3211 [c].) Additional affidavits have been submitted.

The theory of the complaint is that defendant negligently published false and misleading statements. New York has long recognized such a cause of action. Liability exists "only where there is a duty, if one speaks at all, to give the correct information."

(International Prods. Co. v Erie R. R. Co., 244 NY 331, 338 [1927].) In addition to knowledge of the possibility of detrimental reliance, "the relationship of the parties * * * must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

(International Prods. Co. v Erie R. R. Co., supra, at 338; Doyle v Chatham & Phenix Natl. Bank, 253 NY 369, 377 [1930]; see, Ultramares Corp. v Touche, 255 NY 170, 180-185 [1931] [an accountant may be liable for a negligent audit opinion but only to a circumscribed class of potential plaintiffs].) The cause of action has been severely limited over the years to avoid impinging on basic rights. (Advance Music Corp. v American Tobacco Co., 268 App Div 707, 710-711 [1st Dept 1945], revd on other grounds 296 NY 79 [1946]; Sacco v Herald Statesman, 32 Misc 2d 739.) Restatement (Second) of Torts @ 552 (2) also supports limiting the class of plaintiffs who may sue for negligent misstatements; liability "is limited to loss suffered [a] by the person or one of a limited group of persons for whose benefit and guidance" the speaker acts (emphasis added). That is, as a matter of public policy, the class of potential plaintiffs must be carefully circumscribed to avoid the potential of unlimited liability.

New York long ago held that a news service is not liable to its readers for negligent false statements. (Jaillet v Cashman, 115 Misc 383 [Sup Ct 1921], affd 202 App Div 805 [1st Dept 1922], affd 235 NY 511 [1923].) In Jaillet, the court held that Dow Jones & Company was not liable to a person who saw an erroneous item on its news ticker in a stockbroker's office. Special Term held that "the relation of the defendant association to the public is the same as that of a publisher of a newspaper, and * * * its duties and obligations are to be measured by the same standard." (Supra, 115 Misc, at 384.) The Court further concluded that, although there was "moral obligation upon everyone to say nothing that is not true", [**97] there is no liability unless there is a breach of a specific duty to the injured party. (Supra, at 384.) The rationale of the holding was that unless the scope of liability was limited, the publisher of news might become liable to an undefined, infinite class of news readers. "If liability had been upheld, the step would have been a short one to the declaration of a like liability on the part of proprietors of newspapers." (Ultramares Corp. v Touche, supra, at 185.)

The rule of Jaillet (supra) has been consistently followed even after International Prods. Co. v Erie R. R. Co. (supra). In Courtene Seed Co. v Hong Kong & Shanghai Banking Corp. (245 NY 377, 381 [1927]) the court articulated the principle that "negligent words are not actionable unless they are uttered directly * * * to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all." More recently, in Pressler v Dow Jones & Co. (88 AD2d 928 [2d Dept 1982]), the court reversed a refusal to dismiss an action for damages based on a negligent misstatement, since "no special relationship existed between the parties." (See, Roman v City of New York, 110 Misc 2d 799, 802 [Sup Ct, Queens County 1981] [no liability for misstatements in a text of general circulation].)

The Federal courts have followed the New York rule requiring a "special relationship" between the parties for liability for negligent misstatements. In Demuth Dev. Corp. v Merck & Co. (432 F Supp 990 [ED NY 1977]) the court, after surveying New York law, found no cause of action [**337] for publishing 276,500 copies of a manual that negligently stated, incorrectly, that plaintiff's chemical was poisonous. The court reasoned that the defendant had no special duty which "in morals and good conscience" should make it liable to plaintiff. (Supra, at 993.)

The "special relationship" limitation on liability for negligent statements remains despite the weakening of the rule of privity. In White v Guarente (43 NY2d 356, 361 [1977]) the court held that an accountant may be liable to persons of a "known group possessed of vested rights, marked by a definable limit and made up of certain components". (Credit Alliance Corp. v Andersen & Co., 65 NY2d 536, 548-551 [1985].) Even though the duty to make accurate statements is imposed by law, and not by contract or privity, the number of potential plaintiffs remains limited. (See, Glanzer v Shepard, 233 NY 236, 239 [1922]; Ultramares Corp. v Touche, supra,

Plaintiff here argues that he had a "special relationship" with defendant because he had contracted * for its services and, thereby, came within the permitted, limited class of plaintiffs. He also contends that summary judgment should be denied because a finder of facts must determine whether a "special relationship" exists. (AFA Protective Sys. v American Tel. & Tel. Co., 57 NY2d 912; Hutchins v Utica Mut. Ins. Co., 107 AD2d 871, 872-873; Raymond Corp. v Coopers & Lybrand, 105 AD2d 926.) No trial is needed, however, where the facts do not, and cannot, create liability. (CPLR 3212 [b]; Alvarez v Prospect Hosp., 68 NY2d 320, 324; Zuckerman v City of New York, 49 NY2d 557, 562.)

* Even though the exact nature of the "contract" cannot be definitively determined on the record here, that does not effect the disposition. For the terms of the contract plaintiff relies on advertisements for defendant's service. The documents submitted to the court include a formal printed agreement, prepared by defendant, which was received by plaintiff sometime after he commenced using the service. The agreement has unequivocal limitations of liability. It is not established that the agreement formed a part of the contract between the parties. There is also no proof whether plaintiff agreed to a limitation of defendant's liability as a part of the "on-line" signup procedure, as is common with other computerized data base services.

The relationship between the parties here is the same as between any subscriber and a news service; it is functionally identical to that of a purchaser of a newspaper. The advances of technology bring the defendant's service into the home or office of more than 200,000 persons; indeed even nonsubscribers may receive defendant's service through computerized [*99] linkages with other data base enterprises. There is no functional difference between defendant's service and the distribution of a moderate circulation newspaper or subscription newsletter. The instantaneous, interactive, computerized [*338] delivery of defendant's service does not alter the facts: plaintiff purchased defendant's news reports as did thousands of others. The "special relationship" required to allow an action for negligent misstatements must be greater than that between the ordinary buyer and seller. (See, Coolite Corp. v American Cyanamid Co., 52 AD2d 486, 488; Everson v First Trust & Deposit Co., 46 AD2d 722; Dorsey Prods. Corp. v United States Rubber Co., 21 AD2d 866, affd 16 NY2d 925; Chase Manhattan Bank v Edwards, 87 AD2d 935, 936, affd 59 NY2d 817; Mathis v Yondata Corp., 125 Misc 2d 383; cf., Walter v Bauer, 109 Misc 2d 189, 191, mod on other grounds 88 AD2d 787.) Technological advances must continually be evaluated and their relation to legal rules determined so that antiquated rules are not misapplied in modern settings. "[W]ith new conditions there must be new rules." (Cardozo, The Nature of the Legal Process, at 137 [Yale Paperbound 1960 ed.]) Yet, if the substance of a transaction has not changed, new technology does not require a new legal rule merely because of its novelty.

The New York rule in Jaillet (supra) has generally been followed in other jurisdictions. (See, Restatement [Second] of Torts 552, comment c, illustration 2; MacKown v Illinois Publ. & Print. Co., 289 Ill App 59, 6 NE2d 526 [1937]; Curry v Journal Publ. Co., 41 NM 318, 68 P2d 168 [1937]; Langworthy v Pulitzer Publ. Co., 368 SW2d 385, 390 [Mo 1963] ["(n)o action for damages lies against a newspaper for merely inaccurate reporting when the publication does not constitute libel"]; Yuhas v Mudge, 129 NJ Super 207, 210, 322 A2d 824, 825 [1974] [relying on Ultramares Corp. v Touche, supra, found that liability for negligently publishing certain advertisements "would open the doors to a liability in an indeterminate amount for an indeterminate time to an indeterminate class’"]; Cardozo v True, supra [no liability for negligently publishing a cookbook which used poisonous ingredient]; Alm v Van Nostrand Reinhold Co., 134

In Gutter v Dow Jones (supra) the court held that Dow Jones was not liable to an investor who read a misstatement in its newspaper. "In this case, we similarly conclude that a complaint alleging that a newspaper reader or a subscriber relied to his detriment in making securities investments based on a negligent and inaccurate report in a newspaper does not state a cause of action in tort against the newspaper's publisher for 'negligent misrepresentation.' In such a case, the competing public policy and constitutional concerns tilt decidedly in favor of the press where mere negligence is alleged." (Supra, 22 Ohio St 3d, at 291, 490 NE2d, at 902.) Plaintiff asserts that this case is different from one involving a newspaper; however, he provides no reason for treating a person who reads data on a computer screen differently from one who reads it on paper. The potential devastating effects of a holding of liability on the publisher is no different; the potential harm to the free dissemination of news and ideas is the same.

Even though a lesser standard protects advertisements (Posadas de Puerto Rico Assocs. v Tourism Co. of Puerto Rico, 478 U.S. 328, , 106 S Ct 2968, 2976 [1986]), liability has been denied for negligent publication of mistaken [**339] advertisements (Pressler v Dow Jones & Co., supra; Suarez v Underwood, 103 Misc 2d 445, affd 84 AD2d 787; Vaill v Oneida Dispatch Corp., 129 Misc 2d 477; Libertelli v Hoffman-LaRoche, 7 Media L Rep 1734 [SD NY 1981]; Demuth Dev. Corp. v Merck & Co., 432 F Supp 990, supra; Yuhas v Mudge, supra). The only New York case to the contrary, Blinick v Long Is. Daily News Press Publ. Co. (67 Misc 2d 254), does not correctly follow the cases finding liability for negligent misstatements, incorrectly evaluates the public policies requiring a free press to publish thousands of advertisements daily, and has been "rejected" in this State and elsewhere (Vaill v Oneida Dispatch Corp., supra, at 480; Pittman v Dow Jones & Co., supra). While there is liability for publishing advertisements with reckless abandon and for malicious or intentionally misleading advertisements (Goldstein v Garlick, 65 Misc 2d 538, 543; Suarez v Underwood, supra, 103 Misc 2d, at 447-448), Blinick's holding of liability for negligence is simply wrong.

Plaintiff's case here is also barred by the United States and [*101] New York Constitutions. The First Amendment precludes the imposition of liability for nondefamatory, negligently untruthful news. In Time, Inc. v Hill (385 U.S. 374, 387-389 [1967]) the Supreme Court held that a negligence standard opened the press to the "intolerable burden" of trying to satisfy a fact finder that its act had been reasonable in determining the accuracy of the news items portrayed. A free press must operate without the imposition of such "intolerable burdens" on reporting. The First Amendment guarantees that society will be able to receive news limited, if at all, only by the most carefully imposed, narrowly constructed, finely drawn, restraints in areas such as copyright, defamation, unfair competition, incitement and obscenity. (Gooding v Wilson, 405 U.S. 518, 521-522 [1972]; Speiser v Randall, 357 U.S. 513, 527 [1958]; Demuth Dev. Corp. v Merck & Co., 432 F Supp, supra, at 993; Gutter v Dow Jones, supra, 22 Ohio St, at 290-291, 490 NE2d, at 901-902.) "A broadly defined freedom of the press assures the maintenance of our political system and an open society." (Time, Inc. v Hill, 385 U.S., supra, at 389.)

The societal right to free and unhampere[d] dissemination of information precludes liability absent proof of knowing falsity or reckless disregard for the truth. (Gertz v Robert Welch, Inc., 418 U.S. 323, 340 [1974].) There is some authority that Gertz does not apply to those who are not "media" defendants such as providers of credit reports to a limited class of subscribers; for them there is a lesser degree of First Amendment protection. (Greenmoss Bldrs. v Dun & Bradstreet, 143 Vt 66, 73, 461 A2d 414, 417 [1983], affd 472 U.S. 749 [1985]; cf., e.g., Denny v Mertz, 160 Wis 2d 636, 318 NW2d 141, 152-153, cert denied 459 U.S. 883 [1982]; Stuemper v Parke, Davis & Co., 297 NW2d 252, 257-258 [Minn 1980]; Harley-Davidson Motorsports v Markley, 279 Ore 361, 568 P2d 1359, 1362-1365 [1977]; Rowe v Metz, 195 Colo 424, 579 P2d 83, 84 [1978].) However, the Supreme Court's plurality opinion in Dun & Bradstreet v Greenmoss Bldrs. (supra) avoided the "media"/"nonmedia" analysis; the dissent convincingly demonstrates that the distinction makes little sense since the cost of the service and the
degree of its distribution are not related to the importance of the protection needed for the statement at issue. (472 U.S., supra, at 782, n 6.) "Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled 'media' and 'nonmedia.' " (472 U.S., supra, at 783, n 7.) The New York decisions do not appear to "media"/"nonmedia" issue. Defendant here provides, in essence, a "wire service"; it should, therefore, be treated as a "media" defendant, entitled to the fullest protection of the First Amendment. (See, P.A.M. News Corp. v Butz, 514 F2d 272, 277 [DC Cir 1975].)

Plaintiff argues that at issue here is "a commercial transaction" to which the First Amendment is inapplicable. "Commercial speech" has been held to have a lesser degree of the First Amendment protection than other speech. (See, e.g., Dun & Bradstreet v Greenmoss Bldrs., supra; Posadas de Puerto Rico Assocs. v Tourism Co. of Puerto Rico, supra; Central Hudson Gas & Elec. v Public Serv. Commn., 447 U.S. 557, 566 [1980]; Ohralik v Ohio State Bar Assn., 436 U.S. 447, 456 [1978]; Virginia Pharmacy Bd. v Virginia Consumer Council, 425 U.S. 748, 771-772 [1976].) Yet that restriction applies to "speech which does 'no more than propose a commercial transaction,'" Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc." (Posadas de Puerto Rico Assocs. v Tourism Co. of Puerto Rico, supra, 478 U.S., at , 106 S Ct, at 2976; Pittsburgh Press Co. v Human Relations Commn., 413 U.S. 376, 385 [1973].) Clearly the news report at issue here is not "commercial speech" (cf., Smith v California, 361 U.S. 147, 150 [1959]). Plaintiff's argument, that the report regarding Husky Oil was not of general concern to large numbers of persons, simply misses the point. News services, whether free to the public, as are television or radio, or more expensive, specialized media, such as defendant's computerized data base, are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press.

The First Amendment's protection of defendant's news service is particularly appropriate in New York, where the State Constitution provides a broader scope of protection for speech than does the Federal Constitution. (People ex rel. Arcara v Cloud Books, 68 NY2d 553, 557-558 [1986]; People v P. J. Video, 68 NY2d 296 [1986].) The defendant's service is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news. It is entitled to the same protection as more established means of news distribution.

The court need not pass on the validity of defendant's argument that its report is literally true. Plaintiff argues that the failure to disclose the currency used in the news report made it misleading regardless of the accuracy of the remainder of the report. The Supreme Court stated in Gertz, "The First Amendment requires that we protect some falsehood in order to protect speech that matters" (418 U.S., supra, at 341; see, New York Times Co. v Sullivan, 376 U.S. 254, 279 [1964]).

The defendant's motion to dismiss the action is granted.
FEDERAL COMMUNICATIONS COMMISSION v. PACIFICA FOUNDATION ET AL.

No. 77-528

SUPREME COURT OF THE UNITED STATES


April 18, 19, 1978, Argued
July 3, 1978, Decided

SUBSEQUENT HISTORY: [***1]

Petition For Rehearing Denied October 2, 1978.

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.


SYLLABUS: A radio station of respondent Pacifica Foundation (hereinafter respondent) made an afternoon broadcast of a satiric monologue, entitled "Filthy Words," which listed and repeated a variety of colloquial uses of "words you couldn’t say on the public airwaves." A father who heard the broadcast while driving with his young son complained to the Federal Communications Commission (FCC), which, after forwarding the complaint for comment to and receiving a response from respondent, issued a declaratory order granting the complaint. While not imposing formal sanctions, the FCC stated that the order would be "associated with the station’s license file, and in the event subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." In its memorandum opinion, the FCC stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about [***2] indecent radio broadcasts, and it advanced several reasons for treating that type of speech differently from other forms of expression. The FCC found a power to regulate indecent broadcasting, inter alia, in 18 U. S. C. @ 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications." The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance where the "law generally speaks to channeling behavior rather than actually prohibiting it." The FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon "when children are undoubtedly in the audience," and concluded that the language as broadcast was indecent and prohibited by @ 1464. A three-judge panel of the Court of Appeals reversed, one judge concluding that the FCC's action was invalid either on the ground that the order constituted censorship, which was expressly forbidden by @ 326 of the Communications [***3] Act of 1934, or on the ground that the FCC's opinion was the functional equivalent of a rule, and as such was "overbroad." Another judge, who felt that @ 326's censorship provision did not apply to broadcasts forbidden by @ 1464, concluded that @ 1464, construed narrowly as it has to be, covers only language that is obscene or otherwise unprotected by the First Amendment. The third judge, dissenting, concluded that the FCC had correctly condemned the daytime broadcast as indecent. Respondent contends that the broadcast was not indecent within the meaning of the statute because of the absence of prurient appeal. Held: The judgment is reversed. Pp. 734-741; 748-750; 761-762.

MR. JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I-III and IV-C, finding:

1. The FCC's order was an adjudication under 5 U. S. C. @ 554 (e) (1976 ed.), the character of which was not changed by the general statements in the memorandum opinion; nor did the FCC's action constitute rulemaking or the promulgation of regulations. Hence, the Court's review must focus on the FCC's determination that the monologue was indecent as broadcast. Pp. 734-735.

2. Section 326 does not limit [***4] the FCC's authority to sanction licensees who engage in obscene, indecent, or profane broadcasting. Though the censorship ban precludes editing proposed broadcasts in advance, the ban does not deny the FCC the power to review the content of completed broadcasts. Pp. 735-738.

3. The FCC was warranted in concluding that indecent language within the meaning of @ 1464 was used in the challenged broadcast. The words "obscene, indecent, or profane" are in the
disjunctive, implying that each has a separate meaning. Though prurient appeal is an element of "obscene," it is not an element of "indecent," which merely refers to noncompliance with accepted standards of morality. Contrary to respondent's argument, this Court in Hamling v. United States, 418 U.S. 87, has not foreclosed a reading of @ 1464 that authorizes a proscription of "indecent" language that is not obscene, for the statute involved in that case, unlike @ 1464, focused upon the prurient, and dealt primarily with printed matter in sealed envelopes mailed from one individual to another, whereas @ 1464 deals with the content of public broadcasts. Pp. 738-741.

4. Of all forms of communication, broadcasting [**5] has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children. Pp. 748-750.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, and MR. JUSTICE REHNQUIST, concluded in Parts IV-A and IV-B:

1. The FCC's authority to proscribe this particular broadcast is not invalidated by the possibility that its construction of the statute may deter certain hypothetically protected broadcasts containing patently offensive references to sexual and excretory activities. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367. Pp. 742-743.

2. The First Amendment does not prohibit all governmental regulation that depends on the content of speech. Schenck v. United States, 249 U.S. 47, 52. The content of respondent's broadcast, which was "vulgar," "offensive," and "shocking," is not entitled to absolute constitutional protection [**6] in all contexts; it is therefore necessary to evaluate the FCC's action in light of the context of that broadcast. Pp. 744-748.

MR. JUSTICE POWELL, joined by MR. JUSTICE BLACKMUN, concluded that the FCC's holding does not violate the First Amendment, though, being of the view that Members of this Court are not free generally to decide on the basis of its content which speech protected by the First Amendment is most valuable and therefore deserving of First Amendment protection, and which is less "valuable" and hence less deserving of protection, he is unable to join Part IV-B (or IV-A) of the opinion. Pp. 761-762.

COUNSEL: Joseph A. Marino argued the cause for petitioner. With him on the briefs were Robert R. Bruce and Daniel M. Armstrong.

Harry M. Plotkin argued the cause for respondent Pacifica Foundation. With him on the brief were David Tillotson and Harry F. Cole. Louis F. Claiborne argued the cause for the United States, a respondent under this Court's Rule 21 (4). With him on the brief were Solicitor General McCree, Assistant Attorney General Civiletti, and Jerome M. Feit. *

* Briefs of amici curiae urging reversal were filed by Anthony H. Atlas for Morality in Media, Inc.; and by George E. Reed and Patrick F. Geary for the United States Catholic Conference.

Briefs of amici curiae urging affirmance were filed by J. Roger Wollenberg, Timothy B. Dyk, James A. McKenna, Jr., Carl R. Ramey, Erwin G. Krasnow, Floyd Abrams, J. Laurent Scharff, Corydon B. Dunham, and Howard Monnderer for the American Broadcasting Companies, Inc., et al.; by Henry R. Kaufman, Joel M. Gora, Charles Sims, and Bruce J. Ennis for the American Civil Liberties Union et al.; by Irwin Karp for the Authors League of America, Inc.; by James Bouras, Barbara Scott, and Fritz E. Attaway for the Motion Picture Association of America, Inc.; and by Paul P. Selvin for the Writers Guild of America, West, Inc.

Charles M. Firestone filed a brief for the Committee for Open Media as amicus curiae. [**7]

JUDGES: STEVENS, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I-III and IV-C, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Parts IV-A and IV-B of which BLACKMUN and POWELL, JJ., joined, and an opinion as to Parts IV-A and IV-B, in which BURGER, C. J., and REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, post, p. 755. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 762. STEWART, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, post, p. 777.

21024412
OPINION BY: STEVENS

OPINION: [*729] [***3030] MR. JUSTICE STEVENS delivered the opinion of the Court (Parts I, II, III, and IV-C) and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by [***8] referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica [*730] Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might [***9] be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people... Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 F. C. C. 2d 94, 99. The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."

n1

--- Footnotes ---

n1 56 F.C.C. 2d, at 99. The Commission noted:

"Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U. S. C. [@@] 312 (a), 312 (b), 503 (b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U. S. C. [@@] 307, 308." Id., at 96 n. 3.

--- End Footnotes ---

[*731] In its memorandum opinion the Commission stated that it intended to "clarify the [***3031] standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Id., at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U. S. C. @ 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," n3 and 47 U. S. C. @ 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest." n4

--- Footnotes ---

n2 "Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point
regarding the use of radio by children." Id., at 97. [***11]

n3 Title 18 U. S. C. @ 1464 (1976 ed.) provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

n4 Section 303 (g) of the Communications Act of 1934, 48 Stat. 1082, as amended, as set forth in 47 U. S. C. @ 303 (g), in relevant part, provides:

"Except as otherwise provided in this chapter, the Commission, from time to time, as public convenience, interest, or necessity requires, shall --

(g) . . . generally encourage the larger and more effective use of radio in the public interest."

---End Footnotes---

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [The] concept [*732] of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently [****12] offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F. C. C. 2d, at 98. n5

---Footnotes---

n5 Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. 56 F. C. C. 2d, at 98.

---End Footnotes---

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." Id., at 99. [***13] In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U. S. C. [@] 1464."

n6 Ibid.

... 

[*3032] After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that [*733] it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F. C. C. 2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition. n7 Id., at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." Ibid.

---Footnotes---

n7 The Commission did, however, comment:

"[In] some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing. Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F. C. C. 2d, at 893 n. 1.

---End Footnotes---[***15]

The United States Court of Appeals for the District of Columbia Circuit reversed, with each of the three judges on the panel writing separately. 181 U. S. App. D. C. 132, 556 F.2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by @ 326 of the Communications Act. n8 Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." 181 U. S. App. D. C., at 141, 556 F.2d, at 18. Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that @
326’s prohibition against censorship is inapplicable to broadcasts forbidden by @ 1464. However, he concluded that @ 1464 [*734] must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. 181 U. S. App. D. C., at 140-153, 556 F.2d, at 24-30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language "as broadcast." Id., at 154, 556 F.2d, at 31. Emphasizing the interest in protecting [***16] children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, id., at 160, and n. 18, 556 F.2d, at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

---Footnotes---

n8 "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 48 Stat. 1091, 47 U. S. C. @ 326.

---End Footnotes---

Having granted the Commission’s petition for certiorari, 434 U.S. 1008, we must decide: (1) whether the scope of judicial review encompasses more than the Commission’s determination that the monologue was indecent "as broadcast"; (2) whether the Commission’s order was a form of censorship forbidden by @ 326; (3) whether [***17] the broadcast was indecent within the meaning of @ 1464; and (4) whether the order violates the First Amendment of the United States Constitution.

II

The relevant statutory questions are whether the Commission’s action is forbidden "censorship" within the meaning of 47 U. S. C. @ 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U. S. C. @ 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

"Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." 44 Stat. 1172. [***19]

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties. n9

---Footnotes---

n9 Zechariah Chafee, defending the Commission’s authority to take into account program service in granting licenses, interpreted the restriction on "censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England -- the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, Government and Mass Communications 641 (1947).

---End Footnotes---

[*736] During the period between the original enactment of the provision in 1927 and its reenactment in the Communications Act of 1934, the courts and the Federal Radio Commission held that the section deprived the Commission [***20] of the power to subject "broadcasting matter to scrutiny prior to its release," but they concluded that the Commission’s "undoubted right" to take note of past program content when considering a licensee’s renewal application "is not censorship." n10

---Footnotes---

n10 In KFKB Broadcasting Assn. v. Federal Radio Comm’n, 60 App. D. C. 79, 47 F.2d 670 (1931), a doctor who controlled a radio station as well as a pharmaceutical association made frequent broadcasts in which he answered the medical questions of listeners. He often prescribed mixtures prepared by his pharmaceutical association. The Commission determined that renewal of the station’s license would not be in the public interest, convenience, or necessity because many of the broadcasts served the
doctor's private interests. In response to the claim that this was censorship in violation of @ 29 of the 1927 Act, the Court held:

"This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship." 60 App. D. C., at 81, 47 F.2d, at 672.

In Trinity Methodist Church, South v. Federal Radio Comm'n, 61 App. D. C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599, the station was controlled by a minister whose broadcasts contained frequent references to "pimps" and "prostitutes" as well as bitter attacks on the Roman Catholic Church. The Commission refused to renew the license, citing the nature of the broadcasts. The Court of Appeals affirmed, concluding that First Amendment concerns did not prevent the Commission from regulating broadcasts that "offend the religious susceptibilities of thousands ... or offend youth and innocence by the free use of words suggestive of sexual immorality." 61 App. D. C., at 314, 62 F.2d, at 853. The court recognized that the licensee had a right to broadcast this material free of prior restraint, but "this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it." Id., at 312, 62 F.2d, at 851.

*This would not be prohibited 'censorship,' ... any more than would the Commission's considering on a license renewal application whether a broadcaster allowed 'coarse, vulgar, suggestive, double-meaning' programming; programs containing such material are grounds for denial of a license renewal." 131 U. S. App. D. C., at 150-151, n. 3, 403 F.2d, at 173-174, n. 3. [***22] See also Office of Communication of United Church of Christ v. FCC, 123 U. S. App. D. C. 328, 359 F.2d 994 (1966).

... Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both [*738] the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of [***23] indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

... We conclude, therefore, that @ 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" [*739] monologue was indecent within the meaning of @ 1464. n13 Even that question is narrowly confined by the arguments of the parties.

... The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was
present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are [*740] written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformity with accepted standards of morality. n14

n14 Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . " Webster's Third New International Dictionary (1966).

--- Footnotes ---

--- Footnote ---

n15 Indeed, at one point, he used "indecency" as a shorthand term for "patent offensiveness," 370 U.S., at 482, a usage strikingly similar to the Commission's definition in this case. 56 F. C. C. 2d, at 98.

--- End Footnotes ---

[*741] The reasons supporting Hamling's construction of @ 1461 do not apply to @ 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted @ 1464 as encompassing more than the obscene. n16 The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter [*328] deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means. n17

--- Footnote ---


--- End Footnotes ---

n17 This conclusion is reinforced by noting the different constitutional limits on Congress' power to regulate the two different subjects. Use of the postal power to regulate material that is not fraudulent or obscene raises "grave constitutional questions." Hannegan v. Esquire, Inc., 327 U.S. 146, 156. But it is well settled that the First Amendment has a
special meaning in the broadcasting context. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94. For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported Hamling's narrow reading of @ 1461, does not support a comparable reading of @ 1464.

--- End Footnotes ---

Because neither our prior decisions nor the language or history of @ 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction [***30] of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

[*742] IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

[***3037] A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F. C. C. 2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context -- it cannot be adequately judged in the abstract. [***31]

The approach is also consistent with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367. In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program [*743] content. Radio Television News Directors Assn. v. United States, 400 F.2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

"We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, United States v. Sullivan, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise." 395 U.S., at 396.

It is true that the [***32] Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. n18 While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. Bates v. State Bar of Arizona, 433 U.S. 350, 380-381. Young v. American Mini Theatres, Inc., 427 U.S. 50, 61. The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

--- Footnotes ---

n18 A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

--- End Footnotes --- [***33]

[*744] B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.

21024412

139
n19 For if the government has any such power, this was an appropriate occasion for its exercise.

---Footnotes---

n19 Pacifica's position would, of course, deprive the Commission of any power to regulate erotic telecasts unless they were obscene under Miller v. California, 413 U.S. 15. Anything that could be sold at a newsstand for private examination could be publicly displayed on television.

We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham," 181 U. S. App. D. C., at 158, 556 F.2d, at 35; the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

---End Footnotes---

The words of the Carlin monologue [***34] are unquestionably "speech" within the meaning [***3038] of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in Schenck v. United States, 249 U.S. 47, 52:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words [***745] that may have all the effect of force. [***35] . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Other distinctions based on content have been approved in the years since Schenck. The government may forbid speech calculated to provoke a fight. See Chaplinsky v. New Hampshire, 315 U.S. 568. It may pay heed to the "commonsense differences' between commercial speech and other varieties." Bates v. State Bar of Arizona, supra, at 381. It may treat libels against private citizens more severely than libels against public officials. See Gertz v. Robert Welch, Inc., 418 U.S. 323. Obscenity may be wholly prohibited. Miller v. California, 413 U.S. 15. And only two Terms ago we refused to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." Young v. American Mini Theatres, Inc., supra, at 52.

The question in this [***36] case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. n20 Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. Roth v. United States, 354 U.S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of [*746] ideas. n21 If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words n22 — First Amendment [***3039] protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. n23 Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice [***37] Murphy when he said: "[Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S., at 572.

---Footnotes---

n20 Although neither MR. JUSTICE POWELL nor MR. JUSTICE BRENNAN directly confronts this question, both have answered it affirmatively, the latter explicitly, post, at 768 n. 3, and the former implicitly by concurring in a judgment that could not otherwise stand.

n22 The monologue does present a point of view; it attempts to show that the words it uses are "harmless" and that our attitudes toward them are "essentially silly." See supra, at 730. The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet. [***38]

n23 The Commission stated: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . . ." 56 F. C. C. 2d, at 98. Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

- - - - - - End Footnotes - - - - - - - - -

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, e. g., Hess v. Indiana, 414 U.S. 105. Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, [*747] the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. n24 It is a characteristic [***39] of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy’s term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion’s lyric is another’s vulgarity. Cf. Cohen v. California, 403 U.S. 15, 25. n25

- - - - - - Footnotes - - - - - - - - -

n24 With respect to other types of speech, the Court has tailored its protection to both the abuses and the uses to which it might be put. See, e. g., New York Times Co. v. Sullivan, 376 U.S. 254 (special scienter rules in libel suits brought by public officials); Bates v. State Bar of Arizona, 433 U.S. 350 (government may strictly regulate truthfulness in commercial speech). See also Young v. American Mini Theatres, Inc., 427 U.S. 50, 82 n. 6 (POWELL, J., concurring).

n25 The importance of context is illustrated by the Cohen case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "Fuck the Draft." After entering the courtroom, he took the jacket off and folded it. 403 U.S., at 19 n. 3. So far as the evidence showed, no one in the courthouse was offended by his jacket. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison.

In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." Id., at 22. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners. It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution. See n. 1, supra.

- - - - - - End Footnotes - - - - - - - - -[***40]

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its [*748] context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. Joseph Burstyn, [*3040] Inc. v. Wilson, 343 U.S. 495, 502-503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his
The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "[placing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from [using] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U. S. C. @ 1692d (1976 ed., Supp. II).

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U. S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. [*750] Id., at 640 and 639. n28 The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

n28 The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. Butler v. Michigan, 352 U. S. 380, 383. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that "we are often "captive" outside the sanctuary of the home and subject to objectionable speech."* 403 U.S., at 21.
justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, n29 and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise [*751] of its regulatory power does not depend [***45] on proof that the pig is obscene.

--- Footnotes ---

n29 Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And privly he caughte hire by the quynte." The Canterbury Tales, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276.

--- End Footnotes ---

The judgment of the Court of Appeals is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The following is a verbatim transcript of "Filthy Words" prepared by the Federal Communications Commission.

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, ['cause] words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington [***46] knew that his phone was taped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, ['cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You [***47] want to be a purist it [*752] doesn't really -- it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word -- the half sucker [***3042] that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty -- dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock -- three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember -- What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time [***48] she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, ['cause (laughter)
that’s based on people liking it man, yeh, that’s ah, that’s okay man. (laughter) Let’s let that go, man. I got my Grammy. I can let my hair hang down, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, [*753] will ya? I don’t want to see that shit anymore. I can’t cut that shit, buddy. I’ve had that shit up to here. I think you’re full of shit myself. (laughter) He don’t know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the [*49] Shinola people feel about that (laughter) Hi, I’m the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don’t know whether to shit or wind my watch. (laughter) Guess, I’ll shit on my watch. (laughter) Oh, the shit is going to hit de fan. (laughter) Built like a brick shithouse. (laughter) Up, he’s up shit’s creek. (laughter) He’s had it. (laughter) He hit me, I’m sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain’t worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn’t there. (murmur, laughter) All the animals -- Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) [*50] Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I’m shit-face. (laughter) Shitface, today. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that’s the one that hangs them up the most. [*]Cause in a lot of cases that’s the very act that [*754] hangs them up the most. So, it’s natural that the word would, uh, have the same effect. It’s a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One [*3043] syllable, short u. (laughter) Fuck. (Murmur) You know, it’s easy. Starts with a nice soft sound fuh ends with a kuh. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am FUCK. (laughter) FUCK [*51] OF THE MOUNTAIN. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It’s an interesting word too, [*]cause it’s got a double kind of a life -- personality -- dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We’re going to make love, yeh, we’re going to fuck, yeh, we’re going to fuck, yeh, we’re going to make love. (laughter) we’re really going to fuck, yeah, we’re going to make love. Right? And it also means the beginning of life, it’s the act that begins life, so there’s the word hanging around with words like love, and life, and yet on the other hand, it’s also a word that we really use to hurt each other with. It’s a heavy. It’s one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can’t make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we [*52] could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you’ll fuck that engine again. (laughter) The other shit one was, I don’t give a shit. Like it’s worth something, you know? (laughter) I don’t give a shit. Hey, well, I don’t take no shit, (laughter) you know what I mean? You know why I don’t take no shit? (laughter) [*755] [*]Cause I don’t give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don’t pack no shit cause I don’t give a shit. (laughter) You wouldn’t shit me, would you? (laughter) That’s a joke when you’re a kid with a worm looking out the bird’s ass. You wouldn’t shit me, would you? (laughter) It’s an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it’s harmless It’s like tis, it’s a cutie word, no problem. Turd, you can’t say but [*53] who wants to, you know? (laughter) The subject never comes up on the panel so I’m not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it’s the only one I know of, the only slang word applying to the, a part of the sexual anatomy
that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)

CONCURBY: POWELL (In Part)

CONCUR: MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part and concurring in the [*54] judgment.

I join Parts I, II, III, and IV-C of MR. JUSTICE STEVENS' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent "as broadcast" [*56] at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. Ante, at 734-735. In addition to being consistent with our settled practice of not deciding constitutional issues [*3044] unnecessarily, see ante, at 734; Ashwander v. TVA, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring), this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts. See 181 U. S. App. D. C. 132, 158-160, 556 F.2d 9, 35-37 (1977) (Leventhal, J., dissenting).

I also agree with much that is said in Part IV of MR. JUSTICE STEVENS' opinion, and with its conclusion that the Commission's holding in this case does not violate the First Amendment. Because I do not subscribe to all that is said in Part IV, however, I state my views separately.

I

It is conceded that the monologue at issue here [*55] is not obscene in the constitutional sense. See 56 F. C. C. 2d 94, 98 (1975); Brief for Petitioner 18. Nor, in this context, does its language constitute "fighting words" within the meaning of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Some of the words used have been held protected by the First Amendment in other cases and contexts. E. g., Lewis v. New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Papish v. University of Missouri Curators, 410 U.S. 667 (1973); Cohen v. California, 403 U.S. 15 (1971); see also Eaton v. Tulsa, 415 U.S. 697 (1974). I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance. See Brown v. Oklahoma, 408 U.S. 914 (1972) (POWELL, J., concurring in result). And I would assume that an adult could not constitutionally be prohibited from purchasing a recording or transcript of the monologue [*56] [*757] and playing or reading it in the privacy of his own home. Cf. Stanley v. Georgia, 394 U.S. 557 (1969).

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F. C. C. 2d, at 98. In my view, this consideration provides strong support for the Commission's holding.


The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975); see also, e. g., Miller v. California, 413 U.S. 15, 36 n. 17 (1973); Ginsberg v. New York, 390 U.S. 629, 636-641 (1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (opinion of BRENNAN, J.). This
recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, supra, at 649-650 (STEWART, J., concurring in result). Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat:

"[Constitutional] interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, [321 U.S. 158, 166 (1944)]. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Id., at 639.

The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. See id., at 634-635. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. See Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-387 (1969); Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (DC 1971), [***60] aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972); see generally Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503 (1952). In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

A second difference, not without relevance, is that broadcasting -- unlike most other forms of communication -- comes directly into the home, the one place where people ordinarily have the right not to be assaulted by unwarranted and offensive sights and sounds. Erznoznik v. Jacksonville, supra, at 209; Cohen v. California, 403 U.S. 40, at 21; Rowan v. Post Office Dept., 397 U.S. 728 (1970). Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, e.g., Erznoznik, supra, at 210-211, but cf. Rosenfeld v. New Jersey, 408 U.S. 901, 903-909 [***506] (1972) (POWELL, J., dissenting), a different order of values obtains in the home. [***51] "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." Rowan v. Post Office Dept., supra, at 738. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case. This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes. n2 Making the sensitive judgments required in these cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.

--- Footnotes ---

n2 It is true that the radio listener quickly may tune out speech that is offensive to him. In addition, broadcasters may pref ace potentially offensive programs with warnings. But such warnings do not help the unsuspecting listener who tunes in at the middle of a program. In this respect, too, broadcasting appears to differ from books and records, which may carry warnings on their face, and
from motion pictures and live performances, which may carry warnings on their marquees.

--- End Footnotes ---

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissable because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "[reducing] the adult population . . . to [hearing] only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957). This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, [*63] nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated [*761] use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

II

As the foregoing demonstrates, my views are generally in accord with what is said in Part IV-C of Mr. Justice STEVENS' opinion. See ante, at 748-750. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. Compare ante, at 744-748; Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-73 (1976) (opinion of STEVENS, J.), [*64] with id., at 73 n. 1 (POWELL, J., concurring). n3 In my view, the result in this case [*3047] does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

...  

[*762] The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. id., at 77-79 (POWELL, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

DISSENTBY: BRENAN; STEWART

DISSENT: MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with MR. JUSTICE STEWART that, under Hamling v. United States, 418 U.S. 87 (1974), and United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1974), the word "indecent" in 18 U. S. C. @ 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this [*66] case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

For the second time in two years, see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First [*763] Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. See opinion of MR. JUSTICE POWELL,
Moreover, as do all parties, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), or obscenity, Roth v. United States, 354 U.S. 476 (1957), that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of [***67] the words found condemnable here are fully protected by the First Amendment in other contexts. See Eaton v. Tulsa, 415 U.S. 697 (1974); Papish v. University of Missouri Curators, 410 U.S. 667 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 [***3048] (1972); Cohen v. California, 403 U.S. 15 (1971). Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court n1 nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Kovacs v. Cooper, 336 U.S. 77 (1949). [***68] Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, [*764] and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications -- if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme -- that the Court today permits.

n1 Where I refer without differentiation to the actions of "the Court," my reference is to this majority, which consists of my Brothers POWELL and STEVENS and those Members of the Court joining their separate opinions.

---Footnotes---

A

Without question, the privacy interests of an individual [***69] in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many -- including the FCC and this Court -- might find offensive.

*The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." Cohen v. California, supra, at 21. I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within [***70] the "substantial privacy interests" to which Mr. Justice Harlan referred in Cohen, and is entitled to the greatest solicitude. Stanley v. Georgia, 394 U.S. 557 (1969). However, I believe that an individual's actions in switching on [*765] and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. See Note, Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity, 61 Va. L. Rev. 579, 618 (1975). Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into [***3049] his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in Cohen who bore witness to the words [***71] "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.
Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," Cohen v. California, supra, at 21, the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," Lehman v. Shaker Heights, 418 U.S. 298, 302 (1974) -- and with a minimum of effort. As Chief Judge Bazelon aptly observed below, "having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in Cohen and Erznoznik [v. Jacksonville, 422 U.S. 205 (1975)]; he can avert his attention by changing channels or turning off the set." 181 U. S. App. D. C. 132, 149, 556 F.2d 9, 26 (1977). [***72] Whatever the minimal discomfort suffered by a [*766] listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow MR. JUSTICE STEVENS' reliance on animal metaphors, ante, at 750-751, "to burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957).

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of [***73] speech on privacy grounds. Cf. Lehman v. Shaker Heights, supra. Rowan v. Post Office Dept., 397 U.S. 728 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In Rowan, the Court upheld a statute, 39 U. S. C. @ 4009 (1964 ed., Supp. IV), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness vel non under the statute involved in Rowan was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernible here.

[*767] B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. [***74] Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to [*3050] youths than on those available to adults," Erznoznik v. Jacksonvillle, 422 U.S. 205, 212 (1975); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106-107 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. Ginsberg v. New York, 390 U.S. 629 (1968). It is true that the obscenity standard the Ginsberg Court adopted for such materials was based on the then-applicable obscenity standard of Roth v. United States, 354 U.S. 476 (1957), and Memoirs v. Massachusetts, 383 U.S. 413 (1966), and that "[w]e have not had occasion to decide what effect Miller v. [*775] California, 413 U.S. 15 (1973)] will have on the Ginsberg formulation." Erznoznik v. Jacksonvillle, supra, at 213 n. 10. Nevertheless, we have made it abundantly clear that "under any test of obscenity as to minors . . . to be obscene 'such expression must be, in some significant way, erotic.'" 422 U.S., at 213 n. 10, quoting Cohen v. California, 403 U.S., at 20.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. n2 It thus ignores our recent admonition [*768] that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative
body thinks unsuitable for them." 422 U.S., at 213-214. n3 The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of Butler v. Michigan, supra. Butler involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." 352 U.S., at 381. Although Roth v. United States, supra, had not yet been decided, it is at least arguable that the material the statute in Butler was designed to suppress could have been constitutionally denied to children. Nevertheless, this Court [*769] found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

"The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those [*3051] liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable [*77] conditions for the maintenance and progress of a free society." 352 U.S., at 383-384.

Where, as here, the government may not prevent the exposure of minors to the suppressed material, the principle of Butler applies a fortiori. The opinion of my Brother POWELL acknowledges that there lurks in today's decision a potential for "[reducing] the adult population . . . to [hearing] only what is fit for children," ante, at 760, but expresses faith that the FCC will vigilantly prevent this potential from ever becoming a reality. I am far less certain than my Brother POWELL that such faith in the Commission is warranted, see Illinois Citizens Committee for Broadcasting v. FCC, 169 U. S. App. D. C. 166, 187-190, 515 F.2d 397, 418-421 (1975) (statement of Bazelon, C. J., as to why he voted to grant rehearing en banc); and even if I shared it, I could not so easily shirk the responsibility assumed by each Member of this Court jealously to guard against encroachments on First Amendment freedoms.

n2 Even if the monologue appealed to the prurient interest of minors, it would not be obscene as to them unless, as to them, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U. S. 15, 24 (1973). [***78]

n3 It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate [proscriptions]" alluded to in Erznoznik. This is so both because of the difficulties inherent in adapting the Miller formulation to communications received by young children, and because such children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." Ginsberg v. New York, 390 U. S. 629, 649-650 (1968) (STEWART, J., concurring). I doubt, as my Brother STEVENS suggests, ante, at 745 n. 20, that such a limited regulation amounts to a regulation of speech based on its content, since, by hypothesis, the only persons at whom the regulated communication is directed are incapable of evaluating its content. To the extent that such a regulation is viewed as a regulation based on content, it marks the outermost limits to which content regulation is permissible.

--- Footnotes ---

In concluding that the presence of children in the [*79] listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, ante, at 757-758, and my Brother STEVENS, ante, at 749-750, both stress the timehonored right of a parent to raise his child as he sees fit -- a right this Court has consistently been vigilant to protect. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Yet this principle supports a [*77] result directly contrary to that reached by the Court. Yoder and Pierce hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unashamed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right [*80] to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that. n4
The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." 181 U. S. App. D. C., at 152, 556 F.2d, at 29 (emphasis in original). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS -- the intrusive nature of radio and the presence of children in the listening audience -- can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: [***81] the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public [*771] radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible. n5

n5 See, e. g., I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that pertain to him by the morning light any that pisseth against the wall"; II Kings 18:27 and Isaiah 36:12: "[Hath] he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"; Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."; Ezekiel 23:21: "Then thou calledst to remembrance the lewdness of thy youth, in bruising thy teats by the Egyptians for the paps of thy youth." The Holy Bible (King James Version) (Oxford 1897).

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." Brief for Petitioner 45. The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment," opinion of MR. JUSTICE POWELL, ante, at 757, involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the [*772] Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. n6 [***83] For my own part, even accepting that this case is limited to its facts, n7 I would place the responsibility and the right to weed worthless and offensive communications from the public airwaves where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

The absence of any hesitancy in the opinions of my Brothers POWELL and STEVENS to approve the FCC's censorship of the Carlin monologue on the basis of two demonstrably inadequate grounds is a function of their perception that the decision will result in little, if any, curtailment of communicative exchanges protected by the First Amendment. Although the extent to [*773] which the Court stands ready to countenance FCC censorship of protected speech is unclear from today's decision, I find the reasoning by which my Brethren conclude [***3053] that the FCC censorship they approve will not significantly infringe on First Amendment values

21024412
both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow, ante, at 750, takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," ante, at 743 n. 18, and finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." Ibid. The idea that the content [*85] of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker’s choice of words cannot surgically be separated from the ideas he desires to express when he warned that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Cohen v. California, 403 U.S., at 26. Moreover, even if an alternative phrasing may communicate a speaker’s abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. This, too, was apparent to Mr. Justice Harlan and the Court in Cohen.

"[We] cannot overlook the fact, because it is well [*86] illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys [*77] not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." Id., at 25-26.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[adults] who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." Ante, at 750 n. 28. My Brother POWELL agrees: "The Commission’s holding does not prevent willing adults from purchasing Carlin’s record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court’s opinion." Ante, at 760. The opinions of my Brethren display both a sad insensitivity [*87] to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin’s message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message.

The Court apparently believes that the FCC’s actions here can be analogized to the zoning ordinances upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). For two reasons, it is wrong. First, the zoning ordinances found to pass constitutional muster in Young had valid goals other than the channeling of protected speech. Id., at 71 n. 34 (opinion of STEVENS, J.); id., at 80 (POWELL, J., concurring). No such goals are present here. Second, and crucial to the opinions of my Brothers POWELL and STEVENS in Young -- opinions, which, as they do in this case, supply the bare five-person majority of the Court -- the ordinances did not restrict the access of distributors or exhibitors to the market or impair [*72] the viewing public’s access to the regulated material. Id., at 62, 71 n. 35 (opinion of STEVENS, J.); id., at 77 [*3054] (POWELL, J., concurring). Again, this is not the situation here. Both those desiring to receive Carlin’s message over the radio and those wishing to send it to them are prevented from doing so by the Commission’s actions. Although, as my Brethren point out, Carlin’s message may be disseminated or received by other means, this is of little consolation to those broadcasters and listeners who, for a host of reasons, not least among them financial, do not have access to, or cannot take advantage of, these other means.

Moreover, it is doubtful that even those frustrated listeners in a position to follow my Brother POWELL’s gratuitous advice and attend one of Carlin’s performances or purchase one of his records would receive precisely the same message Pacifica’s radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A satirist’s monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.
It is quite evident that I find the Court's attempt to unstick the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

[*776] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.). The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research [*90] indicates that this is indeed the case. See B. Jackson, "Get Your Ass in the Water and Swim Like Me" (1974); J. Dillard, Black English (1972); W. Labov, Language in the Inner City: Studies in the Black English Vernacular (1972). As one researcher concluded, "[words] generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, p. 82 (Georgetown Univ. Press 1972). Cf. Keefe v. Geanakos, 418 F.2d 359, 361 (CA1 1969) (finding the use of the word "motherfucker" commonplace among young radicals and protesters).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those [*91] from different socio-economic backgrounds. n8 [*777] In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the [*3055] dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. See Moore v. East Cleveland, 431 U.S. 494, 506-511 (1977) (BRENNAN, J., concurring).

n8 Under the approach taken by my Brother POWELL, the availability of broadcasts about groups whose members constitute such audiences might also be affected. Both news broadcasts about activities involving these groups and public affairs broadcasts about their concerns are apt to contain interviews, statements, or remarks by group leaders and members which may contain offensive language to an extent my Brother POWELL finds unacceptable.

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "the words you couldn't say on the public . . . airways," explained [*92] that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F. C. C. 2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evidences an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court today recognizes the wise admonition that we should "avoid the unnecessary decision of [constitutional] issues." Ante, at 734. But it disregards one important application of this salutary principle -- the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality. n1 It is apparent that the constitutional questions raised by the order of the Commission in this case are substantial. n2 Before deciding them, we should be certain that it is necessary to do so.

[*778] The statute pursuant to which the Commission acted, 18 U. S. C. @ 1464 (1976 ed.),
n3 makes it a federal offense to utter "any obscene, indecent, or profane language by means of radio communication." The Commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in Miller v. California, 413 U.S. 15, [***94] because language can be "indecent" although it has social, political, or artistic value and lacks prurient appeal. 56 F. C. C. 2d 94, 97-98. n4 But this construction of @ 1464, while perhaps plausible, is by no means compelled. To the contrary, I think that "indecent" should properly be read as meaning no more than "obscene. [***3056] " Since the Carlin monologue conceded was not "obscene," I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that [*779] would be constitutionally protected outside the context of electronic broadcasting.

This Court has recently decided the meaning of the term "indecent" in a closely related statutory context. In Hamling v. United States, 418 U.S. 87, the petitioner was convicted of violating 18 U. S. C. @ 1461, which prohibits the mailing of "[e]very] obscene, lewd, lascivious, indecent, filthy or vile article." The Court ["construed the generic terms in [@ 1461] to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California." 418 U.S., at 114, quoting United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7. Thus, the clear holding of Hamling is that "indecent" as used in @ 1461 has the same meaning as "obscene" as that term was defined in the Miller case. See also Marks v. United States, 430 U.S. 188, 190 (18 U. S. C. @ 1465). [***96]

Nothing requires the conclusion that the word "indecent" has any meaning in @ 1464 other than that ascribed to the same word in @ 1461. n5 Indeed, although the legislative history is largely silent, n6 such indications as there are support the view that @@ 1461 and 1464 should be construed similarly. The view that "indecent" means no more than "obscene" in @ 1461 and similar statutes long antedated Hamling. See United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (CC SDNY 1879); Dunlop v. United States, 165 U.S. 486, 500-501; [*780] Manual Enterprises v. Day, 370 U.S. 478, 482-484, 487 (opinion of Harlan, J.). n7 And although @@ 1461 and 1464 were originally enacted separately, they were codified together in the Criminal Code of 1948 as part of a chapter entitled "Obscenity." There is nothing in the legislative history to suggest that Congress intended that the same word in two closely related sections should have different meanings. See H. R. Rep. No. 304, 80th Cong., 1st Sess., A104-A106 (1947).
SABLE COMMUNICATIONS OF CALIFORNIA, INC. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.

Nos. 88-515, 88-525

SUPREME COURT OF THE UNITED STATES


April 19, 1989, Argued
June 23, 1989, Decided *
* Together with No. 88-525, Federal Communications Commission et al. v. Sable Communications of California, Inc., also on appeal from the same court.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.


SYLLABUS: [***1] Section 223(b) of the Communications Act of 1934, as amended, bans indecent as well as obscene interstate commercial telephone messages, commonly known as "dial-a-porn." Under its predecessor provision --which sought to restrict minors' access to dial-a-porn -- the Federal Communications Commission (FCC), after lengthy court proceedings, had promulgated regulations laying out means by which dial-a-porn sponsors could screen out underage callers. Sable Communications of California, which offers sexually oriented prerecorded telephone messages to callers both in and outside the Los Angeles metropolitan area, brought suit in the District Court, claiming that @ 223(b)'s obscenity and indecency provisions were unconstitutional, chiefly under the First and Fourteenth Amendments, and seeking an injunction enjoining the FCC and the Justice Department from initiating any criminal investigation or prosecution, civil action, or administrative proceeding under the statute and a declaratory judgment. The court denied Sable's request for a preliminary injunction against enforcement of the ban on obscene telephone [***2] messages, rejecting the argument that the statute was unconstitutional because it created a national standard of obscenity. However, it issued the injunction with regard to the indecent speech provision, holding that the provision was overbroad and unconstitutional because it was not narrowly drawn to achieve the legitimate state interest of protecting children from exposure to indecent dial-a-porn messages.

Held:

1. Section 223(b) does not unconstitutionally prohibit the interstate transmission of obscene commercial telephone messages. The protection of the First Amendment does not extend to obscene speech. In addition, @ 223(b) does not contravene the "contemporary community standards" requirement of Miller v. California, 413 U.S. 15, since it no more establishes a "national standard" of obscenity than do federal statutes prohibiting the mailing of obscene materials or the broadcasting of obscene messages. There is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. Sable, which has the burden of complying with the prohibition, is free to tailor its messages, [***3] on a selective basis, to the communities it chooses to serve. Pp. 124-126.

2. Section 223(b)'s ban on indecent telephone messages violates the First Amendment since the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages. FCC v. Pacifica Foundation, 438 U.S. 726, an emphatically narrow ruling giving the FCC power to regulate an indecent radio broadcast, is readily distinguishable from this case. Pacifica, which did not involve a total ban on broadcasting indecent material, relied on the "unique" attributes of broadcasting, which can intrude on the privacy of the home without prior warning of content and which is uniquely accessible to children. In contrast, the dial-it medium requires the listener to take affirmative steps to receive the communications. The Government's argument that nothing less than a total ban could prevent children from gaining access to the messages and that this Court should defer to Congress' conclusions and factual findings to that effect is unpersuasive. There is no evidence to show that children would have evaded the rules that the FCC, [***4] after prolonged proceedings, had determined would keep the messages out of their reach. Moreover, deference to Congress' legislative findings cannot limit judicial inquiry where First Amendment rights are at stake. Here, the congressional record contains no legislative findings that would justify a conclusion that there are no constitutionally acceptable less restrictive means to

COUNSEL: Richard G. Taranto argued the cause for appellees in No. 88-515 and for appellants in No. 88-525. With him on the briefs were Acting Solicitor General Bryson, Assistant Attorney General Bolton, Deputy Solicitor General Wallace, Barbara L. Herwig, Jacob M. Lewis, and Diane S. Killory.

Laurence H. Tribe argued the cause for appellant in No. 88-515 and for appellee in No. 88-515. With him on the brief were Brian Stuart Koukoutchos, Lawrence E. Abelman, Norman S. Beier, Richard K. Simon, and Lee L. Blackman.


JUDGES: White, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which Rehnquist, C. J., and Blackmun, O'Connor, Scalia, and Kennedy, JJ., joined. Scalia, J., filed a concurring opinion, post, p. 131. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined, post, p. 133.

OPINIONBY: WHITE

OPINION: [*117] [***2832] JUSTICE WHITE delivered the opinion of the Court.

The issue before us is the constitutionality of @ 223(b) of the Communications Act of 1934. 47 U. S. C. @ 223(b). The statute, as amended in 1988, imposes an outright ban on indecent as well as obscene interstate [*118] commercial telephone messages. The District Court upheld the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages. We affirm the District Court in both respects.

I

In 1983, Sable Communications, Inc., a Los Angeles-based affiliate of Carlin Communications, Inc., began offering sexually [*118] oriented prerecorded telephone messages n1 (popularly known as "dial-a-porn") through the Pacific Bell telephone network. In order to provide the messages, Sable arranged with Pacific Bell to use special telephone lines, designed to handle large volumes of calls simultaneously. Those who called the adult message number were charged a special fee. The fee was collected by Pacific Bell and divided between the phone company and the message provider. Callers outside the Los Angeles metropolitan area could reach the number by means of a long-distance toll call to the Los Angeles area code.

n1 A typical prerecorded message lasts anywhere from 30 seconds to two minutes and may be called by up to 50,000 people hourly through a single telephone number. Comment, Telephones, Sex, and the First Amendment, 33 UCLA L. Rev. 1221, 1223 (1986).

In 1988, Sable brought suit in District Court seeking declaratory and injunctive relief against enforcement of the recently amended @ 223(b). The 1988 amendments to the statute imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. Sable brought this action to enjoin the FCC and the Justice Department from initiating any criminal investigation or prosecution, civil action or administrative proceeding under the statute. Sable also sought a declaratory judgment, challenging the indecency and the obscenity provisions of the amended @ 223(b) as unconstitutional, chiefly under the First and Fourteenth Amendments to the Constitution.
The District Court found that a concrete controversy existed and that Sable met the irreparable injury requirement for issuance of a preliminary injunction under Elrod v. Burns, 427 U.S. 347, 373 (1976). 692 F.Supp. 1208, 1209 (CD Cal. 1988). The District Court denied Sable's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages, rejecting the argument that the statute was unconstitutional because it created a national standard of obscenity. The District [*119] Court, however, [*119] struck down the "indecent speech" provision of @ 223(b), holding that in this respect the statute was overbroad and unconstitutional and that this result was consistent with FCC v. Pacifica [*2833] Foundation, 438 U.S. 726 (1978). "While the government unquestionably has a legitimate interest in, e. g., protecting children from exposure to indecent dial-a-porn messages, @ 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment." 692 F.Supp., at 1209. Therefore, the Court issued a preliminary injunction prohibiting enforcement of @ 223(b) with respect to any communication alleged to be "indecent."

II

While dial-a-porn services are a creature of this decade, the medium, in its brief history, has been the subject of much litigation and the object of a series of attempts at regulation. n3 [*120] The first litigation involving dial-a-porn was brought under 82 Stat. 112, 47 U. S. C. @ 223, which proscribed knowingly "permitting a telephone under [one's] control" to be used to make "any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent." However, the FCC concluded in an administrative action that the existing law did not cover dial-a-porn. In re Application for Review of Complaint Filed by Peter F. Cohalan, FCC File No. E-83-14 (memorandum opinions and orders adopted May 13, 1983).

n3 Dial-a-porn is big business. The dial-a-porn service in New York City alone received six to seven million calls a month for the 6-month period ending in April 1985. Carlin Communications, Inc. v. FCC, 787 F.2d 846, 848 (CA2 1986).

In reaction to that FCC determination, Congress made its first effort explicitly to address "dial-a-porn" when it added a subsection 223(b) to the 1934 Communications Act. The provision, which was the predecessor to the amendment [*2834] at issue in this case, pertained directly to sexually oriented commercial telephone messages and sought to restrict the access of minors to dial-a-porn. The relevant provision of the Act, Federal Communications Commission Authorization Act of 1983, Pub. L. 98-214, @ 8(b), 97 Stat. 1470, made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." 47 U. S. C. @ 223(b)(1)(A) (1982 ed., Supp. IV). The statute criminalized commercial transmission of sexually oriented communications to minors and required the FCC to promulgate regulations laying out the means by which dial-a-porn sponsors could screen out underage callers. @ 223(b)(2). The enactment provided that it would be a defense to prosecution that the defendant restricted access to adults only, in accordance with procedures established by the FCC. The statute did not criminalize [*121] sexually oriented messages to adults, whether the messages were obscene or indecent.

[*2834] The FCC initially promulgated regulations that would have established a defense to message providers [*109] operating only between the hours of 9 p.m. and 8 a.m. Eastern Time (time channeling) and to providers requiring payment by credit card (screening) before transmission of the dial-a-porn message. Restrictions on Obscene or Indecent Telephone Message Services, 47 CFR @ 64.201 (1988). In Carlin Communications, Inc. v. FCC, 749 F.2d 113 (CA2 1984) (Carlin I), the Court of Appeals for the Second Circuit set aside the time channeling regulations and remanded to the FCC to examine other alternatives, concluding that the operating hours requirement was "both overinclusive and underinclusive" because it denied "access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours." Id., at 121. The Court of Appeals did not reach the constitutionality of the underlying legislation.

In 1985, the FCC promulgated new regulations which continued to permit credit card payment as a defense to prosecution. Instead of time restrictions, however, the Commission added a defense based on
use of access codes (user identification codes). Thus, it would be a defense to prosecution under @ 223(b) if the defendant, [***11] before transmission of the message, restricted customer access by requiring either payment by credit card or authorization by access or identification code. 50 Fed. Reg. 42699, 42705 (1985). The regulations required each dial-a-porn vendor to develop an identification code data base and implementation scheme. Callers would be required to provide an access number for identification (or a credit card) before receiving the message. The access code would be received through the mail after the message provider reviewed the application and concluded through a written age ascertainment procedure that the applicant [*122] was at least 18 years of age. The FCC rejected a proposal for "exchange blocking" which would block or screen telephone numbers at the customer's premises or at the telephone company offices. In Carlin Communications, Inc. v. FCC, 787 F.2d 846 (CA2 1986) (Carlin II), the Court of Appeals set aside the new regulations because of the FCC's failure adequately to consider customer premises blocking. Again, the constitutionality of the underlying legislation was not addressed.

The FCC then promulgated a third set of regulations, which again rejected customer premises blocking [***12] but added to the prior defenses of credit card payment and access code use a third defense: message scrambling. 52 Fed. Reg. 17760 (1987). Under this system, providers would scramble the message, which would then be unintelligible without the use of a descrambler, the sale of which would be limited to adults. On January 15, 1988, in Carlin Communications, Inc. v. FCC, 837 F.2d 546 (Carlin III), cert. denied, 488 U.S. 924 (1988), the Court of Appeals for the Second Circuit held that the new regulations, which made access codes, along with credit card payments and scrambled messages, defenses to prosecution under @ 223(b) for dial-a-porn providers, were supported by the evidence, had been properly arrived at, and were a "feasible and effective way to serve" the "compelling state interest" in protecting minors, 837 F.2d, at 555; but the Court directed the FCC to reopen proceedings if a less restrictive technology became available. The Court of Appeals, however, this time reaching the constitutionality of the statute, invalidated @ 223(b) insofar as it sought to apply to nonobscene speech. Id., at 560, 561.

Thereafter, in April 1988, Congress amended @ 223(b) of the Communications [***13] Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. The amended statute, which took effect on July 1, 1988, also eliminated the requirement that the FCC promulgate regulations for restricting [*123] access to minors since a total ban was imposed on dial-a-porn, [***2835] making it illegal for adults, as well as children, to have access to the sexually explicit messages, Pub. L. 100-297, 102 Stat. 424. n4 It was this version of the statute that was in effect when Sable commenced this action. n5

--- Footnotes ---

n4 "(b)(1) Whoever knowingly --

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

"shall be fined not more than $ 50,000 or imprisoned not more than six months, or both."

n5 After Sable and the federal parties filed their jurisdictional statements with this Court, but before we noted probable jurisdiction, @ 223(b) was again revised by Congress in @ 7524 of the Child Protection and Obscenity Enforcement Act of 1988, @ 7524, 102 Stat. 4502, which was enacted as Title VII, Subtitle N, of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690. (to be codified at 47 U. S. C. @ 223(b)). This most recent legislation, signed into law on November 18, 1988, places the prohibition against obscene commercial telephone messages in a subsection separate from that containing the prohibition against indecent messages. In addition, under the new law, the prohibition against obscene or indecent telephone messages is enforceable only through criminal penalties and no longer through administrative proceedings by the FCC.

Section 223(b) of the Communications Act of 1934, as amended by Section 7524 of the Child Protection and Obscenity Enforcement Act of 1988, states in pertinent part:

"(b)(1) Whoever knowingly --
"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.

"(2) Whoever knowingly --

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both." 102 Stat. 4502.

Since the substantive prohibitions under this amendment remain the same, this case is not moot.

--- End Footnotes---

[*124]  III

In the ruling at issue in No. 88-515, the District Court upheld @ 223(b)’s prohibition of obscene telephone messages as constitutional. We agree with that judgment. In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). The cases before us today do not require us to decide what is obscene or what is indecent but rather to determine whether Congress is empowered to prohibit transmission of obscene telephonic communications.

In its facial challenge to the statute, Sable argues that the legislation creates an impermissible national standard of obscenity, and that it places message senders in a "double bind" by compelling them to tailor all their messages to the least tolerant community. n6

--- Footnotes---

n6 In its jurisdictional statement, Sable also argued that the prohibition on obscene calls is not severable from the ban on indecent messages. This last claim was not renewed in Sable’s brief on the merits, presumably as a result of the subsequent modification of the statute in which Congress specifically placed the ban on obscene commercial telephone messages in a subsection separate from the prohibition against indecent messages. Thus, the severability question is no longer before us.

--- End Footnotes---

[***15]

We do not read @ 223(b) as contravening the "contemporary community standards" requirement of Miller v. California, 413 U.S. 15 [**2836] (1973). Section 223(b) no more establishes a "national standard" of obscenity than do federal statutes [*125] prohibiting the mailing of obscene materials, 18 U. S. C. @ 1461, see Hamling v. United States, 418 U.S. 87 (1974), or the broadcasting of obscene messages, 18 U. S. C. @ 1464. In United States v. Reidel, 402 U.S. 351 (1971), we said that Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene, even though those materials were being distributed to willing adults who stated that they were adults. Similarly, we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings.

We stated in United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973), that the Miller standards, including the "contemporary community standards" formulation, apply to federal legislation. As we have said before, the fact that "distributors of allegedly obscene materials may be subjected to varying community standards in the [***16] various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Hamling v. United States, supra, at 106.
Furthermore, Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make. There is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable’s audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.

IV

In No. 88-525, the District Court concluded that while the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, @ 223(b) was not sufficiently narrowly drawn to serve that purpose and thus violated the First Amendment. We agree.

Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. Ginsberg v. New York, 390 U.S. 629, 639-640 (1968); New York v. Ferber, 458 U.S. 747, 756-757 (1982). The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. Hynes v. Mayor of Oradell, 425 U.S., at 620; First National Bank of Boston v. Bellotti, 435 U.S. 763, 786 (1978)."

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.

In Butler v. Michigan, 352 U.S. 380 (1957), a unanimous Court reversed a conviction under a statute which made it an offense to make available to the general public materials [*127] found to have a potentially harmful influence on minors. The Court found the law to be insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children. As Justice Frankfurter said in that case, "Surely this is to burn the house to roast the pig." Id., at 383. In our judgment, this case, like Butler, presents us with "legislation not reasonably restricted to the evil with which it is said to deal." Ibid.

In attempting to justify the complete ban and criminalization of the indecent [*19] commercial telephone communications with adults as well as minors, the federal parties rely on FCC v. Pacifica Foundation, 438 U.S. 726 (1978), a case in which the Court considered whether the FCC has the power to regulate a radio broadcast that is indecent but not obscene. In an emphatically narrow holding, the Pacifica Court concluded that special treatment of indecent broadcasting was justified.

Pacifica is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not "intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." Pacifica, supra, at 733, quoting Pacifica Foundation, 59 F. C. C. 2d 892 (1976). The issue of a total ban was not before the Court. 438 U.S., at 750, n. 28.

The Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." Id., at [***20] 748-749. The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it [*128] medium requires the listener to take affirmative steps to
receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

The Court in Pacifica was careful "to emphasize the narrowness of [its] holding." Id., at 750. As we did in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), we distinguish [***21] Pacifica from the cases before us and reiterate that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" 463 U.S., at 73, quoting Butler v. Michigan, supra, at 383.

[***2838] The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a "feasible and effective" way to serve the Government's compelling interest in protecting children. 837 F.2d, at 555.

The federal parties now insist that the rules would not be effective enough -- that enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded. There is no evidence in the record before us to that effect, nor could there be since [*129] the FCC's implementation of @ 223(b) prior [***22] to its 1988 amendment has never been tested over time. In this respect, the federal parties assert that in amending @ 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The federal parties claim that we must give deference to that judgment.

There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debates by proponents of the bill, n7 as well as similar assertions in hearings on [*130] a substantially identical bill the year before, H. R. 1786, n8 that under the FCC regulations minors could still have access to dial-a-porn messages, the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be. It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system. The bill that was enacted, however, was introduced on the floor; nor was there a committee report on the bill from which the [***24] [***2839] language of the enacted bill was taken. No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages. On the other hand, in the hearings on H. R. 1786, the Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice. n9 Furthermore, at the conclusion of the hearing, the Chairman of the Subcommittee suggested consultation looking toward "drafting a piece of legislation that will pass constitutional muster, while at the same time providing for the practical relief which families and groups are looking for." Hearings, at 235. The bill never emerged from Committee.

"For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. n10 If this is the case, [*131] it seems to us that @ 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Under our precedents, @ 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of "burn[ing] up the house to roast the pig." Butler v. Michigan, 352 U.S., at 383.

Because the statute's denial of adult access to telephone messages which are indecent but not
obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.

Accordingly, we affirm the judgment of the District Court in Nos. 88-515 and 88-525.

It is so ordered.

CONCURBY: SCALIA; BRENNAN (In Part)

CONCUR: JUSTICE SCALIA, concurring.

I join the Court's opinion because I think it correct that a wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternate proposal could be circumvented by as few children as the evidence suggests. But where a reasonable person draws the line in this balancing process -- that is, how few children render the risk unacceptable -- depends in part upon what mere "indecency" (as opposed to "obscenity") includes. The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors. So while the Court is unanimous on the reasoning of Part IV, I am not sure it is unanimous on the assumptions [*30] underlying that reasoning. I do not believe, for example, that any sort of sexual activity portrayed or enacted over the phone lines would fall outside of the obscenity portion of the statute that we uphold, and within the indecency portion that we strike down, so long as it appeals only to "normal, healthy sexual desires" as opposed to "shameful or morbid" ones. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

Finally, I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it.

DISSENTBY: BRENNAN (In Part)

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree that a statute imposing criminal penalties for making, or for allowing others to use a telephone under one's control to make, any indecent telephonic communication for a commercial purpose is patently unconstitutional. I therefore join Parts I, II, and IV of the Court's opinion.

In my view, however, 47 U. S. C. @ 223(b)(1)(A)'s parallel criminal prohibition with regard to obscene commercial communications likewise violates the First Amendment. I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable. In my judgment, "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the [***30] attempt [*134] to suppress unprotected speech, and to avoid very costly institutional harms." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973) (BRENNAN, J., dissenting). To be sure, the Government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them. New York v. Ferber, 458 U.S. 747, 775-777 (1982) (BRENNAN, J., concurring in judgment); Ginsberg v. New York, 390 U.S. 629 (1968). But a [*284] complete criminal ban on obscene telephonic messages for profit is "unconstitutionally overbroad, and therefore invalid on its face," as a means for achieving this end. Miller v. California, 413 U.S. 15, 47 (1973) (BRENNAN, J., dissenting).

The very evidence the Court adduces to show that denying adults access to all indecent commercial messages "far exceeds that which is necessary to limit the access of minors to such messages," ante, at 131, also demonstrates that forbidding the transmission of all obscene messages is unduly heavyhanded. After painstaking scrutiny, both the FCC and the Second Circuit found that "a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way to serve this compelling [*31] state interest" in safeguarding children. Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555, cert. denied, 488 U.S. 924 (1988). And during the 1987 Hearings on H. R. 1786, a United States attorney speaking on behalf of the Justice Department described the FCC's proposed regulations as "very effective," because they would "dramatically reduc[e] the number of calls from minors in the United States, almost eliminating them." Telephone Decency Act of 1987: Hearings on H. R. 1786 before the
Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 231 (1987). In addition, as the Court notes, ante, at 129-130, no contrary evidence was before Congress when it voted to impose a total prohibition on obscene telephonic messages for profit. Hence, the federal parties cannot plausibly claim that their legitimate interest [*135] in protecting children warrants this Draconian restriction on the First Amendment rights of adults who seek to hear the messages that Sable and others provide.

Section 223(b)(1)(A) unambiguously proscribes all obscene commercial messages, and thus admits of no construction that would render it constitutionally permissible. [**32] Because this criminal statute curtails freedom of speech far more radically than the Government’s interest in preventing harm to minors could possibly license on the record before us, I would reverse the District Court’s decision in No. 88-515 and strike down the statute on its face. Accordingly, I dissent from Part III of the Court’s opinion.
WOOLEY, CHIEF OF POLICE OF LEBANON, ET AL. v. MAYNARD ET UX.

No. 75-1453

SUPREME COURT OF THE UNITED STATES

430 U.S. 705; 97 S. Ct. 1428; 1977 U.S. LEXIS 75; 51 L. Ed. 2d 752

Argued November 29, 1976
April 20, 1977

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

SYLLABUS: [***1]

New Hampshire statutes require that noncommercial motor vehicles bear license plates embossed with the state motto, "Live Free or Die," and make it a misdemeanor to obscure the motto. Appellees, Maynard and his wife, who are followers of the Jehovah's Witnesses faith, view the motto as repugnant to their moral, religious, and political beliefs, and accordingly they covered up the motto on the license plates of their jointly owned family automobiles. Appellee Maynard was subsequently found guilty in state court of violating the misdemeanor statute on three separate charges and upon refusing to pay the fines imposed was sentenced to, and served, 15 days in jail. Appellees then brought this action in Federal District Court pursuant to 42 U.S.C. @ 1983, seeking injunctive and declaratory relief against enforcement of the New Hampshire statutes; a three-judge court enjoined the State from arresting and prosecuting appellees in the future for covering the motto on their license plates. Held:


(a) When a [***2] genuine threat of state prosecutions exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights, and, aside from Younger principles, may seek such redress under 42 U.S.C. @ 1983. Pp. 709-710.

(b) When the relief sought is wholly prospective, i.e., to preclude further prosecution under a statute alleged to violate constitutional rights, failure to seek state appellate review of criminal convictions does not bar relief in federal court. Huffman v.Pursue, Ltd., 420 U.S. 592, distinguished. Pp. 710-711.

(c) The threat of repeated prosecutions in the future against both appellees, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life that require an automobile, are sufficient to justify injunctive relief, and hence the District Court was not limited to granting declaratory relief. Pp. 711-712.

2. The State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. Pp. 714-717. [***3]

(a) New Hampshire's statute, by forcing an individual, as part of his daily life - indeed constantly while his automobile is in public view - to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment... to reserve from all official control," Board of Education v.Barnette, 319 U.S. 624, 642. Pp. 714-715.

(b) The State's claimed interests in requiring display of the state motto on license plates (1) so as to facilitate the identification of passenger vehicles, and (2) so as to promote appreciation of history, individualism, and state pride, are not sufficiently compelling to justify infringement of appellees' First Amendment rights. The purpose of the first interest could be achieved by less drastic means, and the second interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for the State's ideological message. Pp. 715-717.

406 F. Supp. 1381, affirmed.

BURGER, C.J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in which WHITE, [***4] J., joined, except insofar as it affirms the District Court's issuance of an injunction. WHITE, J., filed an opinion dissenting in part, in which BLACKMUN and REHNQUIST, JJ., joined, post, p. 717. REHNQUIST, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 719.
COUNSEL: Robert V. Johnson II, Assistant Attorney General of New Hampshire, argued the cause for appellants. With him on the brief was David H. Souter, Attorney General.

Richard S. Kohn argued the cause for appellees. With him on the brief were Jack B. Middleton, R. David DePuy, Melvin L. Wulf, and Joel M. Gora.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

OPINIONBY: BURGER

OPINION: [*706]

[**1431] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against [*707] persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

(1)


                                       -Footnotes-  

n1 License plates are issued without the state motto for trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the state legislature, sheriffs, and others.

                                       -End Footnotes-  

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, n2 and therefore assert [***6] it objectionable to disseminate this message by displaying it on their automobiles. n3 Pursuant to [**1432] these beliefs, the [**708] Maynards began early in 1974 to cover up the motto on their license plates. n4

                                       -Footnotes-  

n4 In May or June 1974 Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutilating them.

                                       -End Footnotes-  

[***7]

On November 27, 1974, Mr. Maynard was issued a citation for violating @ 262:27-c. On December 6, 1974, he appeared pro se in Lebanon, N. H. District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for Mr. Maynard's situation, but considered himself bound by the authority of State v. Hoskin, supra, to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

                                       -End Footnotes-  

(2)

On March 4, 1975, appellees brought the present action pursuant to 42 U.S.C. @ 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of N.H. Rev. Stat. Ann. @ @ 262:27-c, 263:1, insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto. n5 On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. Because the appellees sought an injunction against a state statute on grounds of its unconstitutionality, a three-judge District Court was convened pursuant to 28 U.S.C. @ 2281. Following a hearing on the merits, n6 the District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future [***9] for covering over that portion of their license plates that contains the motto "Live Free or Die."" n7 406 F. Supp. 1381 (1976). We noted probable jurisdiction of the appeal. 426 U.S. 946 (1976).
We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See Board of Education v. Barnette, 319 U.S. 624, 633-634 (1943); id., at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." Id., at 637. This is illustrated by the recent case of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers [*17] to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit: S

"Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,' New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)." Id., at 257 (footnote omitted).

New Hampshire’s statute in effect requires that appellees use their private property as a "mobile billboard" for the State’s ideological message - or suffer a penalty, as Maynard already has. As a condition to driving an automobile - a virtual necessity for most Americans - the Maynards must display "Live Free or Die" to hundreds of people each day. n11 The fact [*19] that most individuals agree with the thrust of New Hampshire’s motto is not the test; most Americans also find the flag salute [*1436] acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

[**1435] manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

[*714] A
Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. [*716] We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto [***20] on their license plates. See, e.g., United States v. O'Brien, 391 U.S. 367, 376-377 (1968). The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, n12 and (2) promotes appreciation of history, individualism, and state pride.

n12 The Chief of Police of Lebanon, N.H., testified that "enforcement of the motor vehicle laws is facilitated by the State Motto appearing on noncommercial license plates, the benefits being the ease of distinguishing New Hampshire license plates from those of similar colors of other states and the ease of discovering misuse of license plates, for instance, the use of 'trailer' license plate on a non-commercial vehicle." Brief for Appellants 20.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying [***21] the proper plates. . .

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message. n14

n14 Appellants do not explain why advocacy of these values is enhanced by display on private citizens' cars but not on the cars of officials such as the Governor, Supreme Court Justices, Members of Congress, and sheriffs. See n. 1, supra.

We conclude that the State of New Hampshire may not require appellees to display the state motto n15 upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

n15 It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

[***23]

Affirmed.

DISSENTBY: WHITE (Dissenting In Part);
REHNQUIST

DISSENT: [**1437] MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join in part, dissenting in part.

[omitted]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court holds that a State is barred by the Federal Constitution from requiring [**1438] that the state motto be displayed on a state license plate. The path that the Court travels to reach this result demonstrates the difficulty in supporting it. The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief." The District Court, however, expressly refused to consider this contention, and noted that, in an analogous case, a decision of the Supreme Court of New Hampshire had reached precisely the opposite result. See State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972) [*720] . The District Court found for appellees on the ground that the obscuring of the motto was protected "symbolic speech." This Court, in relying upon a ground expressly [***27] avoided by the District Court, appears to disagree with the ground adopted by the District Court; indeed
it points out that appellees' claim of symbolic expression has been "substantially undermined" by their very complaint in this action. Ante, at 713 n. 10.

I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that all noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

* See ante, at 707 n. 1 for de minimis exceptions.

[***28]

In Part 4-A, the Court relies almost solely on Board of Education v. Barnette, 319 U.S. 624 (1943). The Court cites Barnette for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." Ante, at 714. What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The Court also relies upon the "right to decline to foster [religious, political, and ideological] concepts," ibid., and treats the state law in this case as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, uncontroverted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from Barnette, in which schoolchildren were forced to recite the pledge of allegiance while giving the flag salute. Ante, at 714-715. However, the Court states "the difference is essentially [***29] one of degree." Ante, at 715. But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Ibid. But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of Barnette. In that case, as in this case, there is no affirmation of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of Barnette, and clearly distinguishes this case from that one.

[***1439] In holding that the New Hampshire [*30] statute does not run afoul of our holding in Barnette, the New Hampshire Supreme Court in Hoskin, supra, at 336, 295 A. 2d, at 457, aptly articulated why there is no required affirmation of belief in this case:

"The defendants' membership in a class of persons required to display plates bearing the State motto carries [*722] no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief."

As found by the New Hampshire Supreme Court in Hoskin, there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die" and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to [*31] affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes,
see 18 U.S.C. §§ 331 and 333, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

I would reverse the judgment of the District Court.
LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. ET AL.

No. 81-244

SUPREME COURT OF THE UNITED STATES


March 30, 1982, Argued
June 30, 1982, Decided

PRIOR HISTORY: [***1]

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.


SYLLABUS: A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, inter alia, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation. Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened. Upholding the New York statute, the [***2] trial court granted summary judgment to appellees. The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property.

Held: The New York statute works a taking of a portion of appellant's property for which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. Pp. 425-441.

(a) When the "character of the governmental action," Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, is a permanent physical occupation of [***3] real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Pp. 426-435.

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a stranger invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the use of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Pp. 435-438.

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall. There is no constitutional difference between [***4] a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property. The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property. Physical occupation of one type of property but not another is no less a physical occupation. The New York statute does not purport to give the tenant any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance.
to his leasehold. Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes. Pp. 438-440.

COUNSEL: Michael S. Gruen argued the cause and filed briefs for appellant.

Erwin N. Griswold argued the cause for appellees. With him on the brief for appellees Teleprompter Manhattan CATV Corp. et al. was Michael Lesch. Frederick A. O. Schwarz, Jr., and [***5] Leonard Koerner filed a brief for appellee City of New York.

* * *

* Michael D. Botwin and James J. Bierbower filed a brief for the National Satellite Cable Association et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed by Robert Abrams, Attorney General, pro se, Shirley Adelson Siegel, Solicitor General, and Lawrence J. Logan, Assistant Attorney General, for the Attorney General of New York; by Brenda L. Fox, James H. Ewalt, and Robert St. John Roper for the National Cable Television Association, Inc.; and by Stuart Robinowitz and Richard A. Rosen for the New York State Cable Television Association.

JUDGES: MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, post, p. 442.

OPINIONBY: MARSHALL

OPINION: [*421] [***3168] JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth [***6] Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N. Y. Exec. Law @ 828(1) (McKinney Supp. 1981-1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) n1 permission to install a cable on the building and the exclusive privilege of furnishing cable [*422] television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

"On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch [***3169] in diameter and of approximately 30 feet in length along the length [***7] of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." Id., at 135, 423 N. E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

--- -Footnotes---

n1 Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corp.

--- -End Footnotes---

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such [***8] a network is the use of so-called "crossovers" -- cable lines extending from one building to another in order to reach a new group of tenants. n2 Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line -- i. e., one that provided CATV service to appellant's own tenants --
by dropping a line to the first floor down the front of appellant's building.

n2 The Court of Appeals defined a "crossover" more comprehensively as occurring:

"[When] (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing service to an adjoining or adjacent building." 53 N. Y. 2d, at 133, n. 6, 423 N. E. 2d, at 323, n. 6.

-------------------End Footnotes-------------------

[*423] Prior to 1973, Teleprompter [*429] routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted @ 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable." n3 The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to @ 828(1)(b), the State Commission has ruled that a one-time $1 payment [*424] is the normal fee to which a landlord is entitled. In the Matter of Implementation of Section 828 of the Executive Law, No. 90004, Statement of General Policy (New York State Commission on Cable Television, Jan. [*10] 15, 1976) (Statement of [*3170] General Policy), App. 51-52; Clarification of General Policy (Aug. 27, 1976), App. 68-69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

-------------------End Footnotes-------------------

n3 New York Exec. Law @ 828 (McKinney Supp. 1981-1982) provides in part:

"1. No landlord shall

"a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

"i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

"ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

"iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

"b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

"c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not."

-------------------End Footnotes-------------------

[*11]

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on @ 828, a taking without just compensation. She requested damages and injunctive relief. n4 Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of @ 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N. Y. S. 2d 180 (1979). The Appellate Division affirmed

4 Class-action status was granted in accordance with appellant's request, except that owners of single-family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to [*425] request payment from the CATV company under @ 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose — eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that @ 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing [*13] analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the $ 1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $ 1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction. 454 U.S. 938 (1981).

The Court of Appeals determined that @ 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N. Y. 2d, at 143-144, 423 N. E. 2d, at 329, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See Penn Central Transportation [*426] Co. v. New York City, 438 U.S. 104, 127-128 [*3171] (1978); [*14] Delaware, L. & W. R. Co. v. Morristown, 276 U.S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In Penn Central Transportation Co. v. New York City, supra, the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." Id., at 124. But the inquiry is not standarless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when [*15] interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Ibid. (citation omitted).

As Penn Central affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.
More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely [*323] restricts the use of property. In United States v. Causby, 328 U.S. 256 (1946), the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such overflights to the quintessential form of a taking:

"If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." Id., at 261 (footnote omitted).

[*31] As the Court further explained,

"We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." Id., at 264-265.

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

[*34] Another recent case underscores the constitutional distinction between a permanent occupation and a [*29] temporary physical invasion. In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the State Constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." Id., at 84. n11

[*42] The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENTBY: BLACKMUN

DISSENT: JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[there] is no set formula to determine where regulation ends and taking begins." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). n1

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid per se takings [*3180] rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Ante, at 426. To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "[takeings] without regard to other factors that a court might ordinarily examine." Ante, at 432.

I

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion
upon the landlord's interest, which "consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." Ibid., citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K. Jones 207 (1970). [***46]

Second, the court concluded that the statute's economic impact on appellant was de minimis because @ 828 did not affect the fair return on her property. 53 N. Y. 2d, at 148-150, 423 N. E. 2d, at 332-333. Third, the statute did not interfere with appellant's [***47] reasonable investment-backed expectations. Id., at 150-151, 423 N. E. 2d, at 333-334. When appellant purchased the building, she was unaware of the existence of the cable. See n. 2, supra. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive. 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336.

[***46] II

The Court argues that a per se rule based on "permanent physical occupation" is both historically rooted, see ante, at 426-435, and jurisprudentially sound, see ante, at 435-438. I disagree in both respects. The 19th-century precedents [***48] relied on by the Court lack any vitality outside the agrarian context in which they [***3182] were decided. n5 But if, by chance, they [***447] have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that @ 828 must be analyzed under a per se rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," ante, at 435.

The Court's recent Takings Clause decisions teach that nonphysical government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." Ante, at 426. See, e. g., Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124-125 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided per se takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on [***50] such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today -- between "temporary physical invasions" and "permanent [***448] physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. Ante, at 426. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," ante, at 435, n. 12, the Court presumably describes [***3183] [***51] a government intrusion that lasts forever. But as the Court itself concedes, @ 828 does not require appellant to permit
the cable installation forever, but only "[so] long as the property remains residential and a CATV company wishes to retain the installation." Ante, at 439. This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Ante, at 440. Thus, @ 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship. n6 If @ 828 authorizes a "permanent" occupation, [*449] and thus works a taking "without regard to the public interests that it may serve," [***52] then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety. n7

n6 In my view, the fact that @ 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see ante, at 422, n. 2, does not affect @ 828’s fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, ante, at 422, crossovers are crucial links in the cable "highway," and represent the simplest and most economical way to provide service to tenants in a group of buildings in close proximity. Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," ante, at 438. Even assuming, arguendo, that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that 4- to 6-foot wire, which occupies the cubic volume of a child’s building block, is a de minimis deprivation entitled to no compensation. [***53]

n7 See, e. g., N. Y. Mult. Dwell. Law @ 35 (McKinney 1974) (requiring entrance doors and lights); @ 36 (windows and skylights for public halls and stairs); @ 50-a (Supp. 1982) (locks and intercommunication systems); @ 50-c (lobby attendants); @ 51-a (peepholes); @ 51-b (elevator mirrors); @ 53 (fire escapes); @ 57 (bells and mail receptacles); @ 67(3) (fire sprinklers). See also Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (upholding constitutionality of New York fire sprinkler provision).

These statutes specify in far greater detail than @ 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them. See, e. g., N. Y. Mult. Dwell. Law @ 75 (McKinney 1974) (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); @ 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one hundred fifty watts or equivalent illumination"); @ 50-a(2) (Supp. 1981-1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby").

Apartment building rooftops are not exempted. See @ 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area").

Third, the Court’s talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "temporary" [*451] physical invasions of considerable economic magnitude. See, e. g., Block v. Hirsh, 256 U.S. 135 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases). Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner’s enjoyment of property far more deeply than did Teleprompter’s long-unnoticed cable. See, e. g., Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980) (leafletting and demonstrating in busy shopping center); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (public easement of passage to private pond); United States v. Causby, 328 U.S. 256 (1946) (noisy airplane flights over private land). While, under the [***57]
Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible per se rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. ante, at 430-431, 432-435.

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. See Brief [***65] for New York State Cable Television Association as Amicus Curiae 6-7 (about 25% of American homes with televisions -- approximately 20 million families -- currently subscribe to cable television, with the penetration rate expected to double by 1990). The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. See nn. 3 and 4, supra. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

[*456] This Court now reaches back in time for a per se rule that disrupts that legislative [***3187] determination. n12 Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." United States v. Causby, 328 U.S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

21024472

The Court also suggests that @ 828 unconstitutionally alters appellant's right to control the use of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly [***60] larger portions of common space for their tenants' use, but also compel the landlord -- rather than the tenants or the private installers -- to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. See Tr. of Oral Arg. 42-43, citing N. Y. Mult. Dwell. Law @ 57 (McKinney 1974). If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, filled at another's expense, so that those same tenants can receive television signals.

B
PERRY EDUCATION ASSOCIATION v. PERRY LOCAL EDUCATORS' ASSOCIATION ET AL.

No. 81-896

SUPREME COURT OF THE UNITED STATES

460 U.S. 37; 103 S. Ct. 948; 1983 U.S. LEXIS 130; 74 L. Ed. 2d 794; 51 U.S.L.W. 4165; 112 L.R.R.M. 2766

October 13, 1982, Argued
February 23, 1983, Decided

PRIOR HISTORY: [*31]

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: Appeal dismissed and certiorari granted; 652 F.2d 1286, reversed.

SYLLABUS: Under a collective-bargaining agreement between the Board of Education of Perry Township, Ind., and Perry Education Association (PEA) as the exclusive bargaining representative for the School District's teachers, PEA was granted access to the interschool mail system and teacher mailboxes in the Perry Township schools. The bargaining agreement also provided that access rights to the mail facilities were not available to any rival union, such as Perry Local Educators' Association (PLEA). PLEA and two of its members filed suit in Federal District Court against PEA and individual members of the School Board, contending that PEA's preferential access to the internal mail system violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court entered summary judgment for the defendants, but the Court of Appeals reversed.

Held:

1. The appeal is not proper under 28 U. S. C. @ 1254(2), which grants this Court appellate jurisdiction over federal court of appeals' decisions holding a state statute [*32] repugnant to the Federal Constitution. Here, only certain provisions of the collective-bargaining agreement, not the Indiana statute authorizing such agreements, were held to be constitutionally invalid, and the bargaining agreement cannot be considered to be in essence a legislative act. However, regarding the jurisdictional statement as a petition for a writ of certiorari, certiorari is granted because the constitutional issues presented are important and the decision below conflicts with the judgments of other federal and state courts. Pp. 42-44.

2. The First Amendment is not violated by the preferential access to the interschool mail system granted to PEA. Pp. 44-54.

(a) With respect to public property that is not by tradition or government designation a forum for public communication, a State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. The school mail facilities were not a "limited public forum" merely because the system had been opened for periodic use by civic and church organizations, [*33] or because PLEA was allowed to use the school mail facilities on an equal footing with PEA prior to PEA's certification as the teachers' exclusive bargaining representative. Pp. 45-49.

(b) The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the School District's legitimate interest in preserving the property for the use to which it was lawfully dedicated. Use of school mail facilities enables PEA to perform effectively its statutory obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. The reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. Moreover, under Indiana law, PLEA is assured of equal access to all modes of communication while a representation election is in progress. Pp. 50-54.

3. The differential access provided the rival unions does not constitute impermissible content discrimination [*34] in violation of the Equal Protection Clause. Since the grant of exclusive access to PEA does not burden a fundamental right of PLEA, the School District's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative. Police Department of Chicago v. Mosley, 408 U.S. 92, and

COUNSEL: Robert H. Chanin argued the cause for appellant. With him on the briefs were Michael H. Gottesman, Robert M. Weinberg, and Richard J. Darko.

Richard L. Zweig argued the cause for appellees. With him on the brief was Lawrence M. Reuben. *

* Edwin Vieira, Jr., filed a brief for the Public Service Research Council as amicus curiae urging affirmance.

Solicitor General Lee filed a memorandum for the United States Postal Service as amicus curiae.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, POWELL, and STEVENS, JJ., joined, post, p. 55.

OPINION BY: WHITE


Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropolitan [*39] School District of Perry Township, Ind. A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mailboxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

I

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the District. n1 [***952] The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages, and individual school building principals [****6] have allowed delivery of messages from various private organizations. n2

... Prior [***7] to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the School District and apparently had equal access to the interschool mail system. In 1977, PLEA [*40] challenged PEA's status as de facto bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law. Ind. Code @ 20-7.5-1-2(1) (1982).

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions. n3 Following the election, PEA and the School District negotiated a labor contract in which the School Board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the School District incurred no extra expense by such use. The labor agreement noted that these access [****8] rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization" -- a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees [*41] in dealing with their school employer." n4 The PEA contract with these provisions was renewed in 1980 and is presently in force.

... The exclusive-access policy applies only to use of the mailboxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers
by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the [**953] preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. Ind. Code @ 20-7.5-1-10(c)(4) (1982). While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action under 42 U. S. C. @ 1983 against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA's preferential access to the internal mail system violates the First Amendment [***10] and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon cross-motions for summary judgment, the District Court entered judgment for the defendants. Perry Local Educators' Assn. v. Hohlt, IP 79-189-C (SD Ind., Feb. 25, 1980).

The Court of Appeals for the Seventh Circuit reversed. Perry Local Educators' Assn. v. Hohlt, 652 F.2d 1286 (1981). The court held that once the School District "opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment." Id., at 1290. It acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but reasoned [**42] that "[w]ithout an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." Id., at 1300.

PEA now seeks review of this judgment by way of appeal. We postponed consideration of our jurisdiction to the hearing of the case on the merits. 454 U.S. 1140 (1982). [***11]

III

The primary question presented is whether the First Amendment, applicable to the States by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969); Healy v. James, 408 U.S. 169 (1972). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, Tinker v. Des Moines School District, supra, and on sidewalks outside, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some [***15] form of communicative activity occurs. *[Nowhere] [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." Grayned v. City of Rockford, 408 U.S. 104, 117-118 (1972). The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

[*45] A

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have [**955] immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion [***16] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Carey v. Brown, 447 U.S. 455, 461 (1980). The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. United States Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-536 (1980); Grayned v. City of Rockford, supra, at 115; Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

A second category consists of public property which the State has opened for use by the public as

Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Widmar v. Vincent, supra, at 269-270.

--- Footnotes ---

n7 A public forum may be created for a limited purpose such as use by certain groups, e.g., Widmar v. Vincent (student groups), or for the discussion of certain subjects, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n (school board business).

--- End Footnotes ---

Public property [***18] which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Service v. Council of Greenburgh Civic Assns., supra, at 129. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. 453 U.S., at 131, n. 7. As we have stated on several occasions, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Id., at 129-130, quoting Greer v. Spock, 424 U.S. 828, 836 (1976), in turn quoting Adderley v. Florida, 385 U.S. 39, 47 (1966).

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized [***19] that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is [***956] a public forum in the sense that a school board may not close it to all but official business if it chooses." 652 F.2d, at 1301. On this point the parties agree. n8 Nor do the parties dispute that, as the District Court observed, the [***47] "normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers." Perry Local Educators' Assn. v. Hohlt, IP 79-189-C (SD Ind., Feb. 25, 1980), p. 4. The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

--- Footnotes ---

n8 See Brief for Appellees 9 and Tr. of Oral Arg. 41.

--- End Footnotes ---

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In Greer v. Spock, supra, at 838, n. 10, the fact that other civilian speakers [***21] and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum. And in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

[***48] Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and
parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

Because the school mail system is not a public forum, the School District had no "constitutional obligation per se to let any organization use the school [*49] mail boxes." Connecticut State Federation of Teachers v. Board of Ed. Members, 538 F.2d 471, 481 (CA2 1976). In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves. n9

Reversed.

DISSENT BY: BRENNAN

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE STEVENS join, dissenting.

[omitted]

21024472

13.
CUBBY, INC., a Corporation d/b/a Skuttlebut, and Robert G. Blanchard,

Plaintiffs,

v.

COMPUSERVE INC., d/b/a Rumorville, and Don Fitzpatrick,
individually,

Defendants.

No. 90 Civ. 6571 (PKL).
United States District Court,
S.D. New York.

Kayser & Jaffe, New York City (Leo Kayser, of counsel), for plaintiffs.

Jones, Day, Reavis & Pogue, New York City (Leslie Mullady, of counsel), for defendants.

LEISURE, District Judge

This is a diversity action for libel, business disparagement, and unfair competition, based on allegedly defamatory statements made in a publication carried on a computerized database. Defendant CompuServe Inc. ("CompuServe") has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated below, CompuServe's motion is granted in its entirety.

Background

CompuServe develops and provides computer-related products and services, including CompuServe Information Service ("CIS"), an on-line general information service or "electronic library" that subscribers may access from a personal computer or terminal. Subscribers to CIS pay a membership fee and online time usage fees, in return for which they have access to the thousands of information sources available on CIS. Subscribers may also obtain access to over 150 special interest "forums," which are comprised of electronic bulletin boards, interactive online conferences, and topical databases.

One forum available is the Journalism Forum, which focuses on the journalism industry. Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe." Affidavit of Jim Cameron, sworn to on April 4, 1991 ("Cameron Aff."), Exhibit A.

One publication available as part of the Journalism Forum is Rumorville USA ("Rumorville"), a daily newsletter that provides reports about broadcast journalism and journalists. Rumorville is published by Don Fitzpatrick Associates of San Francisco ("DFA"), which is headed by defendant Don Fitzpatrick. CompuServe has no employment, contractual, or other direct relationship with either
DFA or Fitzpatrick; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that DFA "accepts total responsibility for the contents" of Rumorville. Cameron Aff., Exhibit B. The contract also requires CCI to limit access to Rumorville to those CIS subscribers who have previously made membership arrangements directly with DFA.

CompuServe has no opportunity to review Rumorville's contents before DFA uploads it into CompuServe's computer banks, from which it is immediately available to approved CIS subscribers. CompuServe receives no part of any fees that DFA charges for access to Rumorville, nor does CompuServe compensate DFA for providing Rumorville to the Journalism Forum; the compensation CompuServe receives for making Rumorville available to its subscribers is the standard online time usage and membership fees charged to all CIS subscribers, regardless of the information services they use. CompuServe maintains that, before this action was filed, it had no notice of any complaints about the contents of the Rumorville publication or about DFA.

In 1990, plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") (collectively, "plaintiffs") developed Skuttlebut, a computer database designed to publish and distribute electronically news and gossip in the television news and radio industries. Plaintiffs intended to compete with Rumorville; subscribers gained access to Skuttlebut through their personal computers after completing subscription agreements with plaintiffs.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that Blanchard was "bounced" from his previous employer, WABC; and a description of Skuttlebut as a "new start-up scam." Affidavit of Robert G. Blanchard, sworn to on July 11, 1991 ("Blanchard Aff.")., PP 5-9.

Plaintiffs have asserted claims against CompuServe and Fitzpatrick under New York law for libel of Blanchard, business disparagement of Skuttlebut, and unfair competition as to Skuttlebut, based largely upon the allegedly defamatory statements contained in Rumorville. CompuServe has moved, pursuant to Fed.R.Civ.P. 56, for summary judgment on all claims against it. CompuServe does not dispute, solely for the purposes of this motion, that the statements relating to Skuttlebut and Blanchard were defamatory; rather, it argues that it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements. Plaintiffs oppose CompuServe's motion for summary judgment, claiming that genuine issues of material fact exist and that little in the way of discovery has been undertaken thus far.

Discussion

[Summary judgment standards omitted]
A. The Applicable Standard of Liability

Plaintiffs base their libel claim on the allegedly defamatory statements contained in the Rumorville publication that CompuServe carried as part of the Journalism Forum. CompuServe argues that, based on the undisputed facts, it was a distributor of Rumorville, as opposed to a publisher of the Rumorville statements. CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements. Plaintiffs, on the other hand, argue that the Court should conclude that CompuServe is a publisher of the statements and hold it to a higher standard of liability.

Ordinarily, "'one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.'" Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir.1980) (Friendly, J.) (quoting Restatement (Second) of Torts § 578 (1977)). With respect to entities such as news vendors, book stores, and libraries, however, "New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." Lerman v. Chuckleberry Publishing, Inc., 521 F.Supp. 228, 235 (S.D.N.Y.1981); accord Macaluso v. Mondadori Publishing Co., 527 F.Supp. 1017, 1019 (E.D.N.Y.1981).

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment. "[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry. Smith v. California, 361 U.S. 147, 152-53, 80 S.Ct. 215, 218-19, 4 L.Ed.2d 205 (1959). In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents. The Court reasoned that "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.

Id. at 153, 80 S.Ct. at 219 (citation and footnote omitted). Although Smith involved criminal liability, the First Amendment's guarantees are no less relevant to the instant action: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, 376 U.S. 254, 277, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964) (citation omitted).
CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.

With respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. [FN1] CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications.... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985); see also Daniel v. Dow Jones & Co., 137 Misc.2d 94, 102, 520 N.Y.S.2d 334, 40 (N.Y.Civ.Ct.1987) (computerized database service "is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news" and "is entitled to the same protection as more established means of news distribution").

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

B. CompuServe's Liability as a Distributor CompuServe contends that it is undisputed that it had neither knowledge nor reason to know of the allegedly defamatory Rumorville statements, especially given the large number of publications it carries and the speed with which DFA uploads Rumorville into its computer banks and makes the publication available to CIS subscribers. Affidavit of Eben L. Kent, sworn to on April 4, 1991 ("Kent Aff."), PP 7-9; Cameron Aff., PP 6-7. The burden is thus shifted to plaintiffs, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (quoting Fed.R.Civ.P. 56(e)). Plaintiffs have not set forth anything other than conclusory allegations as to whether CompuServe knew or had
reason to know of the Rumorville statements, and have failed to meet their burden on this issue. Plaintiffs do contend that CompuServe was informed that persons affiliated with Skuttlebut might be "hacking" in order to obtain unauthorized access to Rumorville, but that claim is wholly irrelevant to the issue of whether CompuServe was put on notice that the Rumorville publication contained statements accusing the Skuttlebut principals of engaging in "hacking."

Plaintiffs have not set forth any specific facts showing that there is a genuine issue as to whether CompuServe knew or had reason to know of Rumorville's contents. Because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements, summary judgment in favor of CompuServe on the libel claim is granted.

III. Business Disparagement Claim

Plaintiffs base the claim for business disparagement of Skuttlebut on statements published in Rumorville in April 1990. Plaintiffs' contention is that "defendants made statements intentionally designed to discourage its [sic] own subscribers and others in the news business from associating with Skuttlebut, thus disparaging Skuttlebut's business." Complaint, P 20. These statements include, inter alia, the allegedly defamatory remarks suggesting that plaintiffs inappropriately accessed information from Rumorville "through some back door" and describing Skuttlebut as a "new start-up scam." Blanchard Aff., PP 5, 8.

New York courts rarely use the term "business disparagement" and have not articulated the elements of such a claim. New York's highest court, although not using the "business disparagement" label, has recognized a cause of action for tortious conduct similar to that alleged by plaintiffs. See Ruder & Finn Inc. v. Seaboard Surety Co., 52 N.Y.2d 663, 670-71, 422 N.E.2d 518, 522, 439 N.Y.S.2d 858, 862 (1981) ("[w]here a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies"). [FN2] New York courts have applied other labels to similar conduct: "The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment." Waste Distillation Technology, Inc. v. Blasland & Bouck Engineers, P.C., 136 A.D.2d 633, 633, 523 N.Y.S.2d 875, 876 (2d Dep't 1988).

Regardless of the label used, the substance of plaintiffs' "business disparagement" claim is similar to the action for defamation recognized in Ruder & Finn, as well as the action for trade libel or injurious falsehood recognized in Waste Distillation Technology. Under either formulation, plaintiffs would have to prove that CompuServe had knowledge or reason to know of Rumorville's publication of the allegedly disparaging statements in order to hold CompuServe liable for business disparagement. As discussed with respect to the libel claim, supra, plaintiffs have failed to meet their burden of setting forth specific facts showing that there is a genuine issue as to whether CompuServe had knowledge or reason to know of the April 1990 Rumorville statements. Summary judgment in favor of CompuServe on the business disparagement claim is therefore granted. [FN3]
IV. Unfair Competition Claim


Because the utterance of a disparaging statement must be intentional in order to give rise to an unfair competition claim based on disparagement, CompuServe may not be held liable on plaintiffs' unfair competition claim if it did not know or have reason to know of the Rumorville statements. As discussed with respect to the libel claim, supra, plaintiffs have failed to meet their burden of setting forth specific facts showing that there is a genuine issue as to whether CompuServe had knowledge or reason to know of the April 1990 Rumorville statements. Summary judgment in favor of CompuServe on the unfair competition claim is therefore granted.

V. Vicarious Liability

Plaintiffs also argue that CompuServe may be held vicariously liable for the allegedly defamatory Rumorville statements, based on an agency relationship between CompuServe, CCI, and DFA. CompuServe contends that the undisputed facts demonstrate that, at most, DFA is an independent contractor of CCI and CCI is an independent contractor of CompuServe, so that it may not be held vicariously liable for the statements that appeared in Rumorville.

"An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control." In re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir.1984). In contrast, an independent contractor is "'one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work.'" Murray Hill Films, Inc. v. Martinair Holland, N.V., 1987 WL 14918, * 3, 1987 U.S. Dist. LEXIS 6500, * 7-* 8 (S.D.N.Y. July 17, 1987) (quoting Dorkin v. American Express Co., 74 Misc.2d 673, 675, 345 N.Y.S.2d 891, 894 (Sup.Ct.1973), aff'd, 43 A.D.2d 877, 351 N.Y.S.2d 190 (3d Dep't 1974)); accord Spiro v. Pence, 566 N.Y.S.2d 10, 1012 (City Ct. Albany County 1991). In order for an employer to be held vicariously liable for the tort of an independent contractor, the employer must have directed the act from which the injury resulted or have taken an affirmative, active part in its

Based on the undisputed facts, the Court concludes that neither CCI nor DFA should be considered an agent of CompuServe. CompuServe, CCI, and DFA are independent of one another. CompuServe has simply contracted with CCI for CCI to manage the Journalism Forum; under the contract, CCI "agrees to manage, review, create, delete, edit and otherwise control the contents of the [Journalism Forum], in accordance with editorial and technical standards and conventions of style as established by CompuServe." Cameron Aff., Exhibit A. CompuServe has thereby delegated control over the assembly of the contents of the Journalism Forum to CCI. CompuServe's ultimate right under the contract to remove text from its system for noncompliance with its standards merely constitutes control over the result of CCI's independent work. This level of control over the Journalism Forum is insufficient to rise to the level of an agency relationship. Similarly, the contractual provisions calling for CompuServe to provide CCI with training necessary to manage the Journalism Forum and to indemnify CCI from claims resulting from information appearing in the Journalism Forum do not give CompuServe sufficient control over CCI and its management of the Journalism Forum to render CCI an agent of CompuServe.

As for DFA, the original publisher of Rumorville, CompuServe has no direct contractual relationship with DFA; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that "DFA accepts total responsibility for the contents of" Rumorville; that DFA "agrees to maintain the [Rumorville] files in a timely fashion including uploading and merging into availability to the members of [Rumorville]"; and that "DFA maintains total responsibility for communicating with its members, billing them for any membership fees and collecting same." Cameron Aff., Exhibit B. DFA is therefore largely independent of CompuServe in its publication of Rumorville, and the tenuous relationship between DFA and CompuServe is, at most, that of an independent contractor of an independent contractor. The parties cannot be seen as standing in any sort of agency relationship with one another, and CompuServe may not be held liable for any of plaintiffs' claims on a theory of vicarious liability. Cf. McNally v. Yarnall, 764 F.Supp. 838, 852-53 (S.D.N.Y.1991).

VI. Need for Additional Discovery

Plaintiffs also suggest, in their memorandum of law in opposition to CompuServe's summary judgment motion, that additional discovery is needed and should preclude the grant of summary judgment. Fed.R.Civ.P. 56(f) provides that when the party opposing a motion for summary judgment cannot "present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit ... discovery to be had." In order to persuade the Court to grant a request for additional discovery, plaintiffs would have to "file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 422 (2d Cir.1989) (citing Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 912, 926
The Court may reject a request for further discovery pursuant to Rule 56(I) if no affidavit is filed or if the request is based on pure speculation as to what would be discovered. Burlington Coat Factory, 769 F.2d at 926-927.

In the instant action, plaintiffs have failed to fulfill the requirements enumerated by the Second Circuit in Hudson River Sloop Clearwater and Burlington Coat Factory. Plaintiffs have simply asserted, not in an affidavit but in their memorandum of law, that "[l]ittle in the way of discovery has been undertaken and that 'CompuServe has produced documents in response to the plaintiff's First Document Request, but no depositions or the parties have taken place.'" Memorandum of Law in Opposition to Defendant CompuServe's Motion for Summary Judgment at 2. Plaintiffs have not specified what facts they wish to discover through depositions or other means and how these are to be obtained, how these are reasonably expected to create a genuine issue of material fact, what efforts they have made to obtain these facts, or why they have been unsuccessful in their efforts. Plaintiffs have therefore not made a showing sufficient to persuade the Court to deny CompuServe's motion for summary judgment or to order a continuance to allow further discovery to take place.

Conclusion

For the reasons stated above, CompuServe's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is granted on all claims asserted against it.

SO ORDERED

Footnotes

1. Civil Rule 3(g) of the Local Rules of this District requires that a party moving for summary judgment provide a statement of the material facts as to which it contends there is no genuine issue to be tried. Rule 3(g) further requires that the non-movant file a statement of the material facts as to which it contends there is a genuine issue to be tried, and provides that facts set forth in the movant's 3(g) statement that are uncontroverted by the non-movant's statement are deemed to be admitted. CompuServe's 3(g) statement contends that there is no genuine issue to be tried as to the fact that "CompuServe has no opportunity to review Rumorville's contents before DPA 'uploads' it into CompuServe's computer banks, from which it is instantaneously available to approved CIS subscribers." Plaintiffs do not, in their 3(g) statement or elsewhere, controvert this material fact; therefore, it is deemed admitted pursuant to Rule 3(g). See General Electric Co. v. New York State Department of Labor, 936 F.2d 1448, 1452 (2d Cir.1991); Dusanenko v. Maloney, 726 F.2d 82, 84 (2d Cir.1984).

2. The New York Court of Appeals distinguished this type of defamation in the commercial context from "product disparagement," which involves a false statement that "is confined to denigrating the quality of the business' goods or services" and requires that malice and special damages be proven. Ruder & Finn, 52 N.Y.2d at 70-71, 422 N.E.2d at 521-22, 439 N.Y.S.2d at 861-62.

3. Plaintiffs also contend, as part of the business disparagement
claim, that (unspecified) "defendants ... took affirmative action to initiate telephone calls to other data base systems and inform these systems that plaintiffs were 'computer hackers' and ran a scam operation." Complaint, P 19. These alleged telephone calls do not, however, have any bearing on CompuServe's liability for statements contained in the Rumorville publication. Moreover, plaintiffs have not contested CompuServe's denial of any involvement on the part of its agents or employees in the alleged phone calls. See Kent Aff., sworn to on April 4, 1991, P 9. Therefore, even if some person or persons did make the alleged phone calls, that fact does not prevent CompuServe from prevailing on its summary judgment motion.
839 F.Supp. 1552

PLAYBOY ENTERPRISES, INC., Plaintiff,

v.

George Frena, d/b/a Techs Warehouse BBS Systems and Consulting,
and Mark Dyess, Defendants.

No. 93-489-Civ-J-20.

United States District Court,
M.D. Florida,
Jacksonville Division.
Dec. 9, 1993.

George E. Schulz, Jr., Chad S. Roberts, Jacksonville, FL, David
P. Peterson, John D. Vadenberg, Garth A. Winn Portland, OR, for
plaintiff.
David M. Wiesenfeld, Carl D. Dawson, Jacksonville, FL, for
defendants.

ORDER

SCHLESINGER, District Judge.

This cause is before the Court on Plaintiff's First Motion for
Partial Summary Judgment (Copyright Infringement) as to Defendant
Frena (Doc. No. S-1, filed July 26, 1993), and Plaintiff's Second and
Third Motions for Partial Summary Judgment (Trademark Infringement and
Lanham Act Violations) as to Defendant Frena (Doc. No. S-3, filed July
29, 1993). In its First Motion for Partial Summary Judgment,
Plaintiff requests that the Court grant partial summary judgment that
Defendant Frena infringed Plaintiff's copyrights and specifically that
the 170 image files in question in Exhibit C to the Tesnakis Affidavit
infringed Plaintiff's copyrights in 50 of Plaintiff's copyrighted
magazines. In the Second and Third Motions for Partial Summary
Judgment, Plaintiff requests that the Court grant partial summary
judgment that Defendant Frena infringed Plaintiff's federally
registered trademarks PLAYBOY (R) and PLAYMATE (R); specifically that
Defendant Frena infringed United States Trademark registration numbers
600,018 and 721,987 and that Defendant Frena competed unfairly with
Plaintiff, violating 15 U.S.C. § 1125(a). Furthermore, Plaintiff asks
for oral argument on its Motions. Defendant Frena has filed responses
to these Motions. (Doc. Nos. S-5 and S-6, filed August 4, 1993).

Defendant George Frena operates a subscription computer bulletin
board service, Techs Warehouse BBS ("BBS"), that distributed
unauthorized copies of Plaintiff Playbo)' Enterprises, Inc.'s ("PEI")
copyrighted photographs. BBS is accessible via telephone modem to
customers. For a fee, or to those who purchase certain products from
Defendant Frena, anyone with an appropriately equipped computer can
log onto BBS. Once logged on subscribers may browse through different
BBS directories to look at the pictures and customers may also
download [FN1] the high quality computerized copies of the photographs
and then store the copied image from Frena's computer onto their home
computer. Many of the images found on BBS include adult subject
matter. One hundred and seventy of the images that were available on
BBS were copies of photographs taken from PEI's copyrighted materials.

FN1. The process of transferring the image from the
bulletin board to one's personal computer is known as
downloading.
Defendant Frena admits that these materials were displayed on his BBS, see Answer at P 23; Defendant's Admissions, Response No. 8, that he never obtained authorization or consent from PEI, see Answer at PP 38, 39 and 40, and that each of the accused computer graphic files on BBS is substantially similar to copyrighted PEI photographs, see Defendant's Admissions, Response No. 5. Defendant Frena also admits that each of the files in question has been downloaded [FN2] by one of his customers. See Defendant's Admissions, Response No. 11.

FN2. See note 1.

Subscribers can upload [FN3] material onto the bulletin board so that any other subscriber, by accessing their computer, can see that material. Defendant Frena states in his Affidavit filed August 4, 1993, that he never uploaded any of PEI's photographs onto BBS and that subscribers to BBS uploaded the photographs. See Affidavit of George Frena at P 6 (Doc. No. 5-7). Defendant Frena states that as soon as he was served with a summons and made aware of this matter, he removed the photographs from BBS and has since that time monitored BBS to prevent additional photographs of PEI from being uploaded. See Affidavit of George Frena at P 6.

FN3. The process of transferring the image from one's personal computer to the bulletin board is known as uploading.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325, 106 S.Ct. at 2554. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. Id. When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Id. at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, 987 F.2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989). The nonmovant need not be given the benefit of every inference, but only of every "reasonable" inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n. 12 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard: In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference
reasonably can be drawn, it is for the trier of fact to determine the proper one. WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248, 106 S.Ct. at 2510. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury of whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52, 106 S.Ct. at 2511-12.

I. COPYRIGHT INFRINGEMENT

The Copyright Act of 1976 gives copyright owners control over most, if not all, activities of conceivable commercial value. The statute provides that the owner of a copyright ... has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies ...; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies ... of the copyrighted work to the public ... and (5) in the case of ... pictorial ... works ... to display the copyrighted work publicly. 17 U.S.C. § 106. Engaging in or authorizing any of these categories without the copyright owner's permission violates the exclusive rights of the copyright owner and constitutes infringement of the copyright. See 17 U.S.C. § 501(a).

To establish copyright infringement, PEI must show ownership of the copyright and "copying" by Defendant Frena, see Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); Southern Bell Tel. & Tel. v. Assoc. Telephone Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

There is no dispute that PEI owns the copyrights on the photographs in question. PEI owns copyright registrations for each of the 50 issues of Playboy publications that contain the photographs on BBS. See Tesnakis Affidavit at P 9. The copyright registration certificate constitutes prima facie evidence in favor of Plaintiff. See Southern Bell Tel., 756 F.2d at 811. Once the plaintiff has established his prima facie ownership, the burden then shifts to the defendant to counter this evidence. See 3 MELVILLE B. NIMMER, Nimmer on Copyright § 13.01[A], at 13-7 (1993). Defendant Frena, however, failed to rebut the appropriate inference of validity.

Next, PEI must demonstrate copying by Defendant Frena. Since direct evidence of copying is rarely available in a copyright infringement action, copying may be inferentially proven by showing that Defendant Frena had access to the allegedly infringed work, that the allegedly infringing work is substantially similar to the copyrighted work, see Howard v. Sterchi, 974 F.2d 1272 (11th Cir. 1992), and that one of the rights statutorily guaranteed to copyright owners is implicated by Frena's actions. See Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 291 (3d Cir. 1991), cert. denied, --- U.S. ----, 112 S.Ct. 373, 116 L.Ed.2d 324.

Access to the copyrighted work is not at issue. Access is essentially undeniable because every month PEI sells over 3.4 million copies of Playboy magazine throughout the United States. See Kent Affidavit at P 4.

Substantial similarity is also a non-issue in this case.
Defendant Frena has admitted that every one of the accused images is substantially similar to the PEI copyrighted photograph from which the accused image was produced. See Defendant's Admissions at ¶ 5.

Moreover, not only are the accused works substantially similar to the copyrighted work, but the infringing photographs are essentially exact copies. See Exhibits A and B in the Tesnakis Affidavit. In many cases, the only difference is that PEI's written text appearing on the same page of the photograph has been removed from the infringing copy.

The next step is to determine whether Defendant Frena violated one of the rights statutorily guaranteed to copyright owners under 17 U.S.C. § 106. See 17 U.S.C. § 501(a).

Public distribution of a copyrighted work is a right reserved to the copyright owner, and usurpation of that right constitutes infringement. See Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 843 (11th Cir. 1990). PEI's right under 17 U.S.C. § 106(3) to distribute copies to the public has been implicated by Defendant Frena. Section 106(3) grants the copyright owner "the exclusive right to sell, give away, rent or lend any material embodiment of his work." 2 MELVILLE B. NIMMER, Nimmer on Copyright § 8.11[A], at 8-124.1 (1993). There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself. See JAY DRATLER, JR., Intellectual Property Law: Commercial, Creative and Industrial Property § 6.01[3], at 6-15 (1991).

Furthermore, the "display" rights of PEI have been infringed upon by Defendant Frena. See 17 U.S.C. § 106(5). The concept of display is broad. See 17 U.S.C. § 101. It covers "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." H.R.Rep. No. 1476, 94th Cong., 2d Sess. 64 (Sept. 3, 1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5677.


"Display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image or any other device or process." 17 U.S.C. § 101. However, in order for there to be copyright infringement, the display must be public. A "public display" is a display "at a place open to the public or ... where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered." 2 MELVILLE B. NIMMER, Nimmer on Copyright § 8.14[C], at 8-169 (1993). A place is "open to the public" in this sense even if access is limited to paying customers. 2 MELVILLE B. NIMMER, Nimmer on Copyright § 8.14[C], at 8-169 n. 36 (1993); see Columbia Pictures Indus., Inc. v. Redd Horne Inc., 749 F.2d 154 (3d Cir. 1984).

Defendant's display of PEI's copyrighted photographs to subscribers was a public display. Though limited to subscribers, the audience consisted of "a substantial number of persons outside of a normal circle of family and its social acquaintances." 2 MELVILLE B. NIMMER, Nimmer on Copyright § 8.14[C], at 8-169 (1993). See also Thomas v. Fansy Ellen Products, 672 F.Supp. 237, 240 (W.D. North Carolina 1987) (display at a trade show was public even though limited to members); Ackee Music, Inc. v. Williams, 650 F.Supp. 653 (D.Kan. 1986) (performance of copyrighted songs at defendant's private club constituted a public performance).

Defendant Frena argues that the affirmative defense of fair use precludes a finding of copyright infringement. "Fair use" describes
"limited and useful forms of copying and distribution that are
tolerated as exceptions to copyright protection." Cable/Home
Communications Corp., 902 F.2d at 843 (citing Pacific & Southern Co.
v. Duncan, 744 F.2d 1490, 1494 (11th Cir. 1984), cert. denied, 471
U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985)).

The question of fair use constitutes a mixed issue of law and
may be addressed on summary judgment. See Cable/Home Communications
Corp., 902 F.2d at 843-45 (affirming summary judgment holding that
fair use doctrine did not apply).

The Copyright Act mandates four nonexclusive factors which courts
shall consider case by case in determining fair use. Cable/Home
Communications Corp., 902 F.2d at 843; see 17 U.S.C. § 107. Section
107 does not attempt to define "fair use." It merely lists the
factors to be considered in determining whether a use made of a work
in a particular case is fair. Section 107 states: [T]he fair use of a
copyrighted work ... for purposes such as criticism, comment, news
reporting, teaching (including multiple copies for classroom use),
scholarship or research, is not an infringement of copyright. In
determining whether the use made of a work in any particular case is a
fair use the factors to be considered shall include-- (1) the purpose
and character of the use, including whether such use is of a
commercial nature or is for nonprofit educational purposes; (2) the
nature of the copyrighted work; (3) the amount and substance of the
portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the

With respect to the first factor, "every commercial use of
copyrighted material is presumptively an unfair exploitation of the
monopoly privilege that belongs to the owner of the copyright ..."
(quotating Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417,
451, 104 S.Ct. 774, 793, 78 L.Ed.2d 574 (1984)), so that "any
commercial use tends to cut against a fair use defense." Triangle
Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171,
1175 (5th Cir. 1980).

Defendant Frena's use was clearly commercial. BBS was provided
to those paying twenty-five dollars ($25) per month or to those who
purchased products from Defendant Frena. One who distributes
copyrighted material for profit is engaged in a commercial use even if
the customers supplied with such material themselves use it for
personal use. See Pacific & Southern Co. v. Duncan, 572 F.Supp. 1186
(N.D.Ga. 1983), affirmed, 744 F.2d 1490 (11th Cir. 1984), cert.

Implicit in the presumption that every commercial use is
presumptively unfair is "some meaningful likelihood that future market
harm exists." Cable/Home Communications Corp., 902 F.2d at 844
(citing Sony, 464 U.S. at 451, 104 S.Ct. at 793). It is clear that
future market harm exists to PEI due to Frena's activities, as will be
discussed in more detail under factor four.

The second factor is the "nature of the copyrighted work." 17
U.S.C. § 107. "Copyright protection is narrower, and the
 corresponding application of fair use defense greater, in the case of
factual works than in the case of works of fiction or fantasy." 3
MELVILLE B. NIMMER, Nimmer on Copyright § 13.05[A], at 13-102.57
(1993). If a work is more appropriately characterized as
entertainment, it is less likely that a claim of fair use will be
accepted. See In New Era Publications Intern., ApS v. Carol
Publishing Group, 904 F.2d 152 (2d Cir.), cert. denied, 498 U.S. 921,
111 S.Ct. 297, 112 L.Ed.2d 251 (1990). The copyrighted works involved
in this case are in the category of fantasy and entertainment.
Therefore, the second factor works against Frena's fair use defense.
Regarding the third factor, the amount and substantiality of the portion of the copyrighted work used, the Supreme Court has directed a qualitative evaluation of the copying of the copyrighted work. Cable/Home Communications Corp., 902 F.2d at 844 (citing Harper & Row, 471 U.S. at 564-65, 105 S.Ct. at 2232-33). That is, "a small degree of taking is sufficient to transgress fair use if the copying is the essential part of the copyrighted work." Id. See, e.g., Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977) (although copyrighted letters were less than 1% of the infringing work, they were displayed prominently), cert. denied, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978); Roy Export Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broadcasting Sys., Inc., 503 F.Supp. 1137, 1145 (S.D.N.Y. 1980) (fifty-five seconds taken from a one-hour and twenty-nine-minute film deemed qualitatively substantial for copyright infringement), aff'd, 672 F.2d 1095 (2d Cir.), cert. denied, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir.) ("[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate."), cert. denied, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392 (1936).

There is no doubt that the photographs in Playboy magazine are an essential part of the copyrighted work. The Court is not implying that people do not read the articles in PEI's magazine. However, a major factor to PEI's success is the photographs in its magazine. By pirating the photographs for which PEI has become famous, Defendant Frena has taken a very important part of PEI's copyrighted publications.

The fourth factor, the "effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), is "undoubtedly the single most important element of fair use, since a proper application of fair use does not impair materially the marketability of the copied work." Cable/Home Communications Corp., 902 F.2d at 845. This factor poses the issue of "whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work." 3 MELVILLE B. NIMMER, Nimmer on Copyright § 13.05[A], at 13.102.61-62 (1993). "[P]otential market means either an immediate or delayed market, and includes harm to derivative works." Cable/Home Communications Corp., 902 F.2d at 845.

Obviously, if this type of conduct became widespread, it would adversely affect the potential market for the copyrighted work. Such conduct would deny PEI considerable revenue to which it is entitled for the service it provides.

There is irrefutable evidence of direct copyright infringement in this case. It does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement; rather, innocence is significant to a trial court when it fixes statutory damages, which is a remedy equitable in nature. See D.C. Comics Inc. v. Mini Gift Shop, 912 F.2d 29 (2d Cir. 1990).

Frena argues that his commercial use was so insignificant as to justify holding for him under the principle de minimis non curat lex. The Court disagrees. The detrimental market effects coupled with the commercial-use presumption negates the fair use defense. Defendant Frena infringed Plaintiff's copyrights; specifically, the 170 image files in question in Exhibit C to the Tesnakis Affidavit infringed Plaintiff's copyrights in 50 of Plaintiff's copyrighted magazines. The Court finds that the undisputed facts mandate partial summary judgment that Defendant Frena's unauthorized display and distribution of PEI's copyrighted material is copyright infringement under 17 U.S.C. § 501.
II. TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114

In addition to the use of PEI's copyrighted photographs on BBS, PEI's registered trademarks, PLAYBOY (R) and PLAYMATE (R), were used to identify many of the files containing the photographs. Furthermore, PEI's text was removed from the photographs and Defendant Frena's name, Techs Warehouse BBS, and telephone number were placed on PEI's copyrighted photographs. This is uncontested. Therefore, Plaintiff has moved for partial summary judgment on the issues of trademark infringement under 15 U.S.C. § 1114 and unfair competition under 15 U.S.C. § 1125(a).

Defendant Frena admits that the registered trademarks PLAYBOY (R) and PLAYMATE (R) were used in file descriptors for 170 of the images found on BBS and that such file descriptors were displayed to his customers. See Answer at PP 51 and 52. Defendant Frena contends that when a subscriber uploads the material onto BBS, the same subscriber provides a description of the uploaded material for the BBS index. Defendant Frena contends that he himself has never placed the words "Playboy" or "Playmate" onto BBS. Defendant Frena further alleges that he, innocently and without malice, allowed subscribers to upload whatever they wanted onto BBS.


There are four categories of distinctiveness in which a mark may be classified. "In ascending order they are: (1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful." Investacorp, Inc. v. Arabian Investment Banking Corp., 931 F.2d 1519, 1522-23 (11th Cir. 1991), cert. denied, --- U.S. ----, 112 S.Ct. 639, 116 L.Ed.2d 657 (1991). The categorization of a term as generic, descriptive, suggestive or arbitrary typically resolves the issue of whether a mark is protectable, with generic marks getting the least protection and arbitrary or fanciful marks receiving the highest degree of protection.

PLAYBOY (R) and PLAYMATE (R) are suggestive marks since they implicitly refer to their products qualities. See PEI v. P.K. Sorren Export Co. Inc. of Florida, 546 F.Supp. 987, 995 (S.D.Fl. 1982). They are well known marks and widely associated with PEI's products. These marks have acquired great distinctiveness among consumers, and are therefore entitled to a high degree of protection. See Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 486 F.Supp. 414, 419 (S.D.N.Y. 1980).

Once the threshold question of whether the mark is distinctive enough to deserve protection is answered affirmatively, the Court must turn to the central inquiry of whether there is a "likelihood of confusion." See Freedom Sav. and Loan Ass'n, 757 F.2d at 1179; Ice Cold Auto Air, 828 F.Supp. at 934.

The following factors are highly relevant in deciding whether there is a likelihood of confusion: "(1) the type of mark at issue; (2) similarity of marks; (3) similarity of product or services; (4) identity of purchasers and similarity of retail outlets; .... (6) the defendant's intent; and (7) actual confusion." Ice Cold Auto Air, 828 F.Supp. at 935 (citing Freedom Sav. and Loan Ass'n, 757 F.2d at 1182-83). The Court, however, is not required to specifically mention each of these factors in making its decision. See Univ. of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535, 1542 (11th Cir. 1985) (analyzing the factors in the context of a claim of unfair
competition).

Rather than simply determining whether a majority of these factors indicate a likelihood of confusion, a court must "evaluate the weight to be accorded the individual factors and then make its ultimate decision." AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1538 (11th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 822 (1987). An analysis of fewer than all seven factors may support a finding of likelihood of confusion. See Univ. of Georgia Athletic Ass'n, 756 F.2d at 1543. In the Eleventh Circuit, the type of mark and evidence of actual confusion are the most important factors. Dieter v. B & H Industries of Southwest Florida, Inc., 880 F.2d 322, 326 (11th Cir. 1989), cert. denied, 498 U.S. 950, 111 S.Ct. 369, 112 L.Ed.2d 332 (1990).

In analyzing the type of mark, the Court must determine whether the mark is strong or weak in order to determine the level of protection to be extended to the mark. See Ice Cold Auto Air, 828 F.Supp. at 935. The more distinctive a plaintiff's servicemark, the greater the likelihood that consumers will associate the registered trademark and all similar marks with the registered owner. The law therefore provides the greatest protection to strong and distinctive servicemarks; the strength of a mark depends on the extent of third party usage and the relationship between the name and the service or good it describes. Freedom Sav. and Loan Assoc., 757 F.2d at 1182.

In analyzing the relationship between the name and the service or good it describes, the Court again considers the proper categorization of the mark. At this stage of the analysis, the goal is to determine the degree of distinctiveness of the mark. See AmBrit, Inc., 812 F.2d at 1539 n. 36. Suggestive and arbitrary marks are considered to be the most distinctive marks, and, as relatively strong marks, entitled to the strongest protection. See Ice Cold Auto Air, 828 F.Supp. at 935. The Court previously categorized the marks involved as suggestive marks which are, therefore, entitled to the strongest protection.

There is no issue as to the similarity of the marks in the instant case. Not only are the marks similar, they are exactly the same.

The greater the similarity between products and services, the greater the likelihood of confusion. See Exxon Corp. v. Texas Motor Exchange of Houston, Inc., 628 F.2d 500, 505 (5th Cir. 1980).

Defendant Frena's product consisted of computer images of nude women. Of course, this is the core of FBI's business. Even though Defendant Frena's photographs were available in a different medium than Plaintiff's, the services both parties provided were virtually identical.

A finding that Defendant adopted a mark with the intent of deriving benefit from the reputation of Plaintiff's service or product may alone be strong enough to justify an inference that there is confusing similarity. See AmBrit, Inc., 812 F.2d at 1542. Defendant contends that he did not intend to use Plaintiff's mark. However, a showing of intent or bad faith is unnecessary to establish a violation of § 1141(a). See Chanel, Inc. v. Italian Activewear of Florida, Inc., 931 F.2d 1472, 1476 (11th Cir. 1991). Intent is just one of the factors to consider in evaluating whether the infringing use is likely to cause confusion. See Chanel, Inc., 931 F.2d at 1472, 1476 n. 4 (citing Original Appalachian Artworks, Inc. v. The Toy Loft, 684 F.2d 821, 831-32 (11th Cir. 1982)).

Even though a guilty state of mind is relevant evidence of trademark infringement, an innocent state of mind is irrelevant on the issue of likelihood of confusion since the lack of intent to deceive does nothing to alleviate the confusion precipitated by similarity of trademarks. See 3A RUDOLF CALLMAN, The Law of Unfair Competition, Trademarks and Monopolies § 20.49, at 385 (4th ed. 1993).

"Although evidence of actual confusion is not necessary to a finding of likelihood of confusion, it is nevertheless the best
evidence of likelihood of confusion." John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 978 (11th Cir. 1983) (quoting Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263 (5th Cir.), cert. denied, 449 U.S. 899, 101 S.Ct. 268, 66 L.Ed.2d 129 (1980)). Actual confusion by a few customers is evidence of likelihood of confusion by many customers. See Freedom Sav. and Loan Ass'n, 757 F.2d at 1185. Therefore, a plaintiff usually will not have to prove more than a few incidents of actual confusion. See id.

In its Motion for Summary Judgment, Plaintiff has not shown any evidence of actual confusion among consumers. However, it is not necessary to prove actual confusion on the part of customers. It is just that if evidence of actual confusion is available, it is so highly probative of likelihood of confusion that it can rarely be ignored.

An examination of the factors mentioned above indicates that Defendant Frena's use of PEI's marks is likely to confuse consumers. Defendant Frena is not merely using marks similar to those of Plaintiff, Defendant Frena is using the exact marks registered to Plaintiff.

This case involves a suggestive mark entitled to the strongest protection, Defendant Frena used the identical mark of Plaintiff and the services involved were virtually identical. Each of these elements tends to show a likelihood of confusion. It is likely that customers of Defendant Frena would believe that PEI was the source of Defendant Frena's images and that PEI either sponsored, endorsed or approved Defendant Frena's use of PEI's images.

It is well established that "falsely suggesting affiliation with the trademark owner in a manner likely to cause confusion as to source of sponsorship constitutes infringement." Burger King v. Mason, 710 F.2d 1480, 1492 (11th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984). Further, "the law is established that falsely suggesting the existence of affiliation with a well-known business by usurping the latter's good-will constitutes both trademark infringement and unfair competition." Showtime/The Movie Channel v. Covered Bridge Condominium Assoc., Inc., 693 F.Supp. 1080, 1089 (S.D.Fla. 1988) (quoting Volkswagenwerk Aktiengesellschaft v. Tatum, 344 F.Supp. 235, 237 (S.D.Fla. 1972)).

The Court finds that Defendant Frena infringed Plaintiff's federally registered trademarks PLAYBOY (R) and PLAYMATE (R). More specifically, Defendant Frena infringed United States Trademark registration numbers 600,018 and 721,987.

III. UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides:
(a)(1) Any person who, or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which—(A) is likely to cause confusion or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. 15 U.S.C. § 1125(a). This statutory provision provides a federal cause of action for unfair competition. There are similarities between the analysis required for trademark infringement and for unfair competition. However, the unfair competition claim is broader. See Ice Cold Auto Air, 828 F.Supp. at

15 U.S.C. § 1125(a) is designed to protect against a broader range of deceptive or unfair trade practices than 15 U.S.C. § 1114. In addition, both sections require the same test to determine whether the particular actions complained of are violative of their terms. See Showtime/The Movie Channel v. Covered Bridge Condo, 693 F.Supp. 1080, 1090 (S.D.Fla. 1988). Thus, as a general rule, the same set of facts which support an action for trademark infringement also support an action for unfair competition. See Babbit Electronics Inc. v. Dynascan Corp., 828 F.Supp. 944, 957 (S.D.Fla. 1993); Marathon Mrg. Co. v. Enerlite Products Corp., 767 F.2d 214, 217 (5th Cir. 1985). Therefore, it appears that Defendant Frena violated 15 U.S.C. § 1125(a).


PEI's trademarks were obliterated from the photographs, and then Defendant Frena attempted to take credit for Plaintiff's work by placing its own advertisement with its phone number on some of the photographs. Thus, PEI has been denied the right to public credit for the success and quality of its goods. Reverse passing off is a violation of § 43(a) of the Lanham Act. See Roho, Inc. v. Marquis, 902 F.2d 356 (5th Cir. 1990); Debs v. Meliopoulos, 1991 U.S.Dist. LEXIS 19864 (N.D.Ga. 1991).

There is no liability for reverse passing off when a defendant modifies a product to such an extent that the defendant converts it into something different in kind from the original product. Defendant Frena, however, did not convert PEI's product to such an extent that it could be considered different in kind from PEI's product.

In Roho, the defendant purchased the plaintiff's wheelchair cushions on the open market, removed plaintiff's labels therefrom, and fastened them together to make bed mattresses. It was held that the two products were commercially distinct, and that therefore defendant was not simply reselling the product of plaintiff. In the instant case, however, Defendant Frena is simply reselling the product of PEI stripped of its original identity.

Defendant Frena's actions of deleting Plaintiff's text from the photographs, adding his own text to some of the photographs and appropriating PEI's photographs without attribution to the copyright owner violated Section 43(a) of the Lanham Act. Defendant Frena competed unfairly with Plaintiff, violating 15 U.S.C. § 1125(a).

Accordingly,

1. Plaintiff's Request for Oral Argument on its Motion for Partial Summary Judgment (Doc. No. S-1) is DENIED,
2. Plaintiff's Request for Oral Argument on its Second and Third Motions for Partial Summary Judgment (Doc. No. S-3) is DENIED,
3. Plaintiff's First Motion for Partial Summary Judgment (Copyright Infringement) as to Defendant Frena (Doc. No. S-1) is GRANTED,
4. Plaintiff's Second and Third Motions for Partial Summary Judgment (Trademark Infringement and Lanham Act Violations) as to Defendant Frena (Doc. No. S-3) are GRANTED and
5. The remaining issues of the injunction and damages are still remaining for the Court to decide.

DONE AND ORDERED.
FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION, AND CONFIRMATION OF SEIZURE

WILKEN, District Judge.

This is an action for copyright infringement (under 17 U.S.C. § 101 et seq.), federal trademark infringement (under 15 U.S.C. § 1051 et seq.), federal unfair competition/false designation of origin (under 15 U.S.C. § 1125(a)), California trade name infringement (under California Business & Professions Code § 14400 et seq.), and California unfair competition law (under California Business and Professions Code § 14210, 17200-17203) against Defendant Chad Scherman and several other individuals operating on-line computer bulletin boards, and the MAPHIA and other bulletin boards as businesses of unknown origin. On December 9, 1993, the Court, the Honorable Fern M. Smith presiding, issued an ex parte Temporary Restraining Order, Seizure Order, and Order to Show Cause Re Why a Preliminary Injunction Should Not Issue enjoining Defendants' use of Plaintiffs' SEGA trademark and the direct and/or contributory infringement of Plaintiffs' copyrights.

A hearing was held before Judge Smith on December 17, 1993, on Plaintiffs' motion for a preliminary injunction, pursuant to the order to show cause. At that hearing, Judge Smith continued the temporary restraining order in effect until further order of the Court. Thereafter, Defendant Paolo Rizzi, individually, filed a written stipulation to a preliminary injunction and confirmation of the seizure. Defendants Scherman and MAPHIA filed an opposition.

Following reassignment of this action to the undersigned, a further hearing was held on February 25, 1994. The Court now determines, having considered the pleadings, all papers filed by the parties, and the parties' oral arguments, that a preliminary injunction should issue against Defendants Scherman and MAPHIA as ordered separately. Pursuant to F.R.C.P. 65(d), the Court makes the following Findings of Fact and Conclusions of Law in support of the preliminary injunction and confirmation of the seizure order:

Marilyn C. Siegel, Siegel and Siegel, Baltimore, MA, for defendants.
Neil A. Smith, Limbach & Limbach, San Francisco, CA, for plaintiffs.
FINDINGS OF FACT

I. FINDINGS SUPPORTING PRELIMINARY INJUNCTIVE RELIEF

A. The parties and their activities

1. Plaintiff Sega Enterprises, Ltd. ("SEL"), is a corporation organized and existing under the laws of Japan. Compl. ¶ 1.
2. Plaintiff Sega of America, Inc. ("SOA"), is a California corporation with a principal place of business in this district in San Mateo, California. SOA is a wholly-owned subsidiary of SEL. SOA and SEL are hereinafter sometimes collectively referred to as "Sega" or "Plaintiffs." Compl. ¶ 2.
3. Defendant MAPHIA is a business of unknown structure doing business and located in San Francisco, California, within this District, engaged in the business of running a computer bulletin board and related activities. Yang Decl. ¶ 12.
4. Defendant Chad Scherman (aka Chad Sherman, aka "Bruijo Digital") is an individual residing in this district in San Francisco, California. Chad Scherman is in possession and/or control of the MAPHIA Bulletin Board, which is run from his residence where the computer and memory comprising the bulletin board are located, and does business as MAPHIA or Maphia Trading Company on such bulletin board. He is also one of the "system operators" of the MAPHIA bulletin board. Keene Decl. PP 2, 11.

B. The Business of Plaintiffs

5. Sega is a major manufacturer and distributor of computer video game systems and computer video games which are sold under the SEGA trademark, a registered trademark of Sega Enterprises, Ltd. (Federal Registration No. 1,566,116, issued November 14, 1989) owned by Sega. Yang Decl. ¶ 3, Exh. A.
6. Sega's computer video game programs are the subject of copyright under the laws of the United States. Yang Decl. ¶ 5; Compl. Exh. B.
7. Sega creates and develops its games and ensures the quality and reliability of the video game programs and products sold under SEGA trademarks. Yang Decl. ¶ 4.
8. The Sega game system consists of two major components sold by Sega: the game console and software programs stored on video game cartridges which are inserted into the base unit. Each cartridge contains a single game program. The base unit contains a microcomputer which, when connected to a television, permits individuals to play the video game stored on the inserted cartridge. Yang Decl. ¶ 6.
9. The computer programs for the Sega video games are stored on a cartridge in a Read-Only Memory ("ROM") chip. Sega's video games cannot be copied using the game console. However, as noted below, running devices, called "copiers," are designed to copy the video game programs from a Sega game cartridge onto other magnetic media such as hard and floppy disks. Yang Decl. PP 6, 21, 23.

C. Defendants' Activities on the MAPHIA Bulletin Board

10. An electronic bulletin board consists of electronic storage media, such as computer memories or hard disks, which is attached to telephone lines via modem devices, and controlled by a computer. Yang Decl. ¶ 12.
11. Third parties, known as "users," of electronic bulletin boards can transfer information over the telephone lines from their own computers to the storage media on the bulletin board by a process known as "uploading." Uploaded information is thereby recorded on the storage media. Third party users can also retrieve information from
the electronic bulletin board to their own computer memories by a process known as "downloading." Video game programs, such as Sega's video game programs, are one kind of computer programs or information which can be transferred by means of electronic bulletin boards. Yang Decl. PP 18-19.

12. Defendants MAPHIA and Chad Scherman operate an electronic bulletin board called MAPHIA (hereinafter "the MAPHIA bulletin board"). The MAPHIA bulletin board is open to the public and, according to Defendant Scherman's Opposition Memorandum, has approximately 400 users. Users of the MAPHIA bulletin board communicate using aliases or pseudonyms. "Brujo Digital" appears as the alias used by Defendant Chad Scherman as the system operator of the MAPHIA bulletin board, and in communicating with others. Keene Decl. PP 2, 11; Yang Decl. P 33.

13. Data from the MAPHIA bulletin board indicates that the MAPHIA bulletin board is economically linked to another electronic bulletin board called PSYCHOSIS. This data also indicates that Defendant Scherman and the MAPHIA bulletin board are part of or linked to a network of bulletin boards, called PARSEC, for business purposes. Keene Decl. PP 12-16, Exh. 5A.

14. The evidence establishes that Sega's copyrighted video games are available on and transferred to and from the MAPHIA bulletin board by users who upload and download games. Once a game is uploaded to the MAPHIA bulletin board it may be downloaded in its entirety by an unlimited number of users: Keene Decl. PP 7, 9; Yang Decl. PP 18, 24.

15. It appears that the copies of Sega's video game programs on Defendants' bulletin board are unauthorized copies of Sega's copyrighted video games, having been uploaded there by users of Defendant's bulletin board. Keene Decl. P 9.

16. It has been shown by evidence in the form of printouts from the data on Defendant's bulletin board which was seized pursuant to this Court's Order and on-line data captured from Defendant's bulletin board, that the uploading and downloading of unauthorized copies of Sega's copyrighted video games is particularly known to Defendant Scherman and the MAPHIA bulletin board. This evidence also indicates that Defendant specifically solicited this copying and expressed the desire that these video game programs be placed on the MAPHIA bulletin board for downloading purposes. Keene Decl. PP 7-16.

17. Notwithstanding contrary assertions of Defendant Scherman, there is evidence that MAPHIA directly or through an affiliate sometimes charges a direct fee for downloading privileges, or barter for the privilege of downloading Sega's games. Information on the MAPHIA bulletin board includes the following passage: Thank you for purchasing a Console Back Up Unit [copier] from PARSEC TRADING. As a free bonus for ordering from Dark Age, you receive a COMPLEMENTARY Free Download Ratio on our Customer Support BBS. This is if you cannot get a hold of SuperNintendo or Sega Genesis games. You can download up to 10 megabytes, which is equal to approximately 20 normal-sized SuperNintendo or Genesis games. After your 10 megabytes is used, you can purchase full months of credit for only $35/month. You can also prepay and order either 1 year of free downloads for $200/year, or a lifetime of free downloads for only $500. Keene Decl. Exh. 5B at 2.

18. Defendant thus provides downloading privileges for Sega games to users in exchange for the uploading of Sega games or other programs or information or in exchange for payment for other goods, such as copiers, or services, such as the provision of credit card numbers to users. See Keene Decl. PP 7-21.

19. By utilizing the MAPHIA bulletin board, users are able to make and distribute one or more copies of Sega video game programs from a single copy of a Sega video game program, and thereby obtain unauthorized copies of Sega's copyrighted video game programs. Yang Decl. P 24.
20. This unauthorized copying of Sega video game programs works to decrease Sega's sales of video game cartridges. This unauthorized copying and distribution further deprives Sega of control over the quality of video games bearing its SEGA and other trademarks. The effect on Sega's reputation and market for video game cartridges may be substantial and immeasurable. See Yang Decl. PP 4-6, 17, 30-32.

21. Defendant has challenged the preliminary injunction on the basis that he has not profited from the distribution of Sega's programs. However, it appears Defendant profits from the operation of the MAPHIA bulletin board through direct payment and/or barter. There are also several ways Defendant indirectly profits. First, the existence of this distribution network for Sega video game programs increases the prestige of the MAPHIA bulletin board, and Defendant's distribution of Sega games naturally leads to an increased market for the video game copiers and other goods or services sold by Defendant. Keene Decl. P 9.

22. Defendant further profits from the distribution of Sega programs on the MAPHIA bulletin board because the bulletin board gives rise to a need for telephone communications which naturally leads to an increased market for telephone calling card numbers sold by the Defendant Scherman. Keene Decl. PP 10-21.

23. The copies of Sega's programs uploaded to and downloaded from the MAPHIA Bulletin board are substantially similar to Sega's video game programs as stored in the cartridges sold by Sega. Yang Decl. P 17.

24. Plaintiffs' SEGA trademark appears on the screen whenever a Sega game which has been downloaded from the MAPHIA bulletin board is subsequently played, and Sega's trademark is used on the file descriptors by the MAPHIA bulletin board with the knowledge and consent of Defendant Scherman. Yang Decl. PP 18-19, 29.

25. The copies of Sega's video game programs downloaded by users from the MAPHIA bulletin board, according to instructions and facilitated by Defendant Scherman, are further unauthorized copies of Sega's copyrighted video games, which, in addition bear unauthorized use of Sega's registered trademarks.

26. The Sega game programs maintained and distributed through the MAPHIA bulletin board include "pre-release" versions of games which are not available to the public. Yang Decl. P 30.

27. The directory of video game programs available on MAPHIA also contain numerous references to video game programs containing "patches," "fixes," and problems which may have been introduced in the copying process. Yang Decl. P 31.

28. Bulletin board users and/or parties who may receive copies of Sega games from bulletin board users are likely to confuse the unauthorized copies downloaded and transferred from the MAPHIA bulletin board with genuine Sega video game programs.

29. Because Sega is unable to control the quality of the games distributed under its trademarks on the MAPHIA bulletin board as the MAPHIA has altered or may have the opportunity to alter such game programs, and the copies distributed by the MAPHIA bulletin board do not contain the packaging and instruction used by Sega, the Defendants' operation of the MAPHIA bulletin board is likely to damage Sega's reputation and the substantial goodwill which Sega has built up in its trademarks.

D. Infringing Sales and Distribution of "Copiers"

30. There is substantial evidence that Defendant Scherman and the MAPHIA bulletin board are engaged in advertising, distribution and selling video game copiers, such as the so-called "Super Magic Drive" and/or "Multi Game Hunter." See generally, Keene Decl.

31. Defendant's business plan as described by Defendant Scherman's alias "Brujjo Digital," states: As you know we have PARSEC
TRADING CO. as our business that sells everything from Copiers to Modems to Hard Drives to Calling Cards (off the record, hehe), and even Pentium Chips now. So, the next step is a MEDIA BLITZ! Time to post advertisements ASCIIIs on every bbs you log onto! I'll have some Advertisements ready ... Also, we are selling Super Wild Cards, Pro Fighter Q's and Super Magic Drives for AKIRA and that part of PARSEC will be dedicated for him but me and CAFFEINE will handle all the business side of that and paying him the money and dealing with the customers, etc. Keene Decl. P 15, Exh. 5A at 3.

32. These copiers by Defendant's own admission are used for the making of unauthorized copies of Sega's video game programs and some purchasers thereof use them so as to avoid purchasing Sega's game cartridges from Sega. See generally, Def.'s Mem. in Opp. to Prelim. Injunction. Users or others who receive copies of the Sega video games on disk do not need to purchase any genuine Sega games, but can play the games directly from the disks using the copiers.

33. The copiers sold and advertised by Defendant come with downloading privileges to the purchaser, giving the purchaser free Sega video game copyrighted programs, so as to be able to duplicate, distribute and play the games without purchase of Sega game cartridges. Keene Decl.Exh. 5B.

34. The copiers thus supplant the need to purchase the genuine Sega video games.

35. Defendant states without support that the copiers are also capable of being used for other purposes, such as game development or making back-up copies, but such incidental capabilities have not been shown to be the primary use of such copiers.

36. There is no need to make archival copies of ROM game cartridges. This is because the ROM cartridge format is not susceptible to breakdown and because defective cartridges are replaced by Sega. Yang Decl. 25-28.

37. The copiers are advertised and sold by Defendant's MAPHIA bulletin board for $350. Keene Decl. Exh. 3. The video game programs advertised by Sega sell for between $30 and $70. Compl. P 15. It is unlikely that customers would purchase a copier to back-up games, which are on reliable cartridges, for this price.

38. The only substantial use of video game copiers is to avoid having to buy video game cartridges from Sega by copying the video game program.

II. FINDINGS SUPPORTING COLLECTION AND SEIZURE OF EVIDENCE

39. Sega undertook to collect evidence of the above activities by having a Sega employee gain access the MAPHIA bulletin board under a pseudonym, as individuals generally do on the bulletin board, using information supplied by an authorized user who was an informant. Yang Decl. PP 11-13.

40. Pursuant to the ex parte Temporary Restraining Order and Seizure Order issued by Judge Smith on December 9, 1993, a search of Defendant Scherman's premises, where the computer and memory were located, was conducted. Pursuant to the Order, Defendant Scherman's computer and memory devices were seized, the memory copied and returned to Defendant Scherman, with the Sega games deleted. Keene Decl. PP 1-6.

41. The Court made substantial findings in its Order of December 9, 1993, in support of the restraining and seizure order, which appear to have been verified by the program copies and evidence obtained from the memory devices comprising the "MAPIA" bulletin board, thus confirming the seizure of such evidence. Keene Decl. PP 7-21.

CONCLUSIONS OF LAW

1. To the extent facts are included in this portion of the order,
they are also deemed the Court's findings of fact, and visa versa.


3. This Court has jurisdiction of the causes of action arising under California trade name law (under California Business & Professions Code § 14400 et seq.), and California unfair competition law (under California Business and Professions Code § 14210, 17200-17203) pursuant to 28 U.S.C. 1338(b).

4. Venue is proper in the federal district court where certain Defendants reside and where acts of trademark and copyright infringement occur. 28 U.S.C. 1391(b) and (c). Venue in the instant suit is proper in the Northern District of California.

I. PRELIMINARY INJUNCTION

A. Legal standard

5. Plaintiffs must demonstrate the following to be entitled to preliminary injunctive relief: (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that there exist serious questions regarding the merits and the balance of hardships tips sharply in their favor. Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987); Apple Computer, Inc. v. Formula Intern., Inc., 735 F.2d 521, 523 (9th Cir. 1984).

B. Probable Success on the Merits

Copyright Infringement

6. To establish a prima facie case of copyright infringement, Plaintiffs must prove (1) ownership of a valid copyright in the infringed work, and (2) "copying" by the Defendants. See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 824 (11th Cir. 1982); 3 Nimmer on Copyright, § 13.01 (1985).

7. Sega's certificates of registration establish a prima facie valid copyright in its video game programs. 17 U.S.C. § 410(c); Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 523 (9th Cir. 1984). Although the complaint and declaration of Jack Yang list specific copyrights infringed by Defendants, Plaintiffs seek and are entitled to an order with respect to all of their copyrighted video games. See Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156, 1187-88 & n. 2 (W.D.N.Y. 1982).

8. The unauthorized copying of copyrighted computer programs is prima facie an infringement of the copyright. See MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993), cert. dismissed, --- U.S. ----, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994).

9. Sega has established a prima facie case of direct copyright infringement under 17 U.S.C. § 501. Sega has established that unauthorized copies of its games are made when such games are uploaded to the MAPHIA bulletin board, here with the knowledge of Defendant Scherman. These copied games are thereby placed on the storage media of the electronic bulletin board by unknown users.

10. Sega has established that unauthorized copies of these games are also made when they are downloaded to make additional copies by users, which copying is facilitated and encouraged by the MAPHIA bulletin board. See MAI Systems, supra, 991 F.2d at 519.

11. "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of
another," may be held liable as a contributory infringer. Casella v. Morris, 820 F.2d 362, 365 (11th Cir. 1987) (quoting Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

12. Even if Defendants do not know exactly when games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement. Id.; see also Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552, 1555-56 (M.D.Fla. 1993).

13. Sega has established a likelihood of success on the merits of showing a prima facie case of direct and contributory infringement by Defendants' operation of the MAPHIA bulletin board.

14. Sega has also established a strong likelihood of success on the merits of showing a prima facie case of contributory infringement by Defendants' advertising, sale and distribution, directly or through its affiliated PARSEC bulletin board network, of video game copiers. See Atari, Inc. v. JS & A Group, Inc., 597 F.Supp. 5 (N.D.Ill. 1983).

15. Because of the large number of users of the MAPHIA bulletin board, and the potential of each user to download an unknown number of copies of Sega video game programs through the MAPHIA bulletin board, Defendants' infringement cannot be viewed as a de minimus circumstance. See Fisher v. Dees, 794 F.2d 432, 434-35 (9th Cir. 1986); Playboy v. Frena, supra, 839 F.Supp. at 1557-58.

16. Defendants raise fair use as a defense to copyright infringement. 17 U.S.C. § 107 states: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-- (1) the purpose and character of the use ...; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or the value of the copyrighted work.

17. "To invoke the fair use exception, an individual must possess an authorized copy of a literary work." Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832, 843 (Fed. Cir. 1992). Defendant Scherman has stated that he does not own any Sega game cartridges. Scherman Decl. at 1.

18. When copying is for the purpose of making multiple copies of the original, and thereby saving users the expense of purchasing additional authorized copies, this militates against a finding of fair use under the purpose of the use factor. American Geophysical Union v. Texaco, Inc., 802 F.Supp. 1, 14-16 (S.D.N.Y. 1992).

19. Because users of the MAPHIA bulletin board are likely and encouraged to download Sega games therefrom to avoid having to buy video game cartridges from Sega, by which avoidance such users and Defendants both profit, the commercial purpose and character of the unauthorized copying weighs against a finding of fair use. See Atari, Inc. v. JS & A Group, Inc., 597 F.Supp. 5, 8 (N.D.Ill. 1983); c.f. Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965, 971 (9th Cir. 1992), cert. denied, --- U.S. ----, 113 S.Ct. 1582, 123 L.Ed.2d 149 (1993).


21. Because it appears that the entire game programs are copied
when Sega video game programs are transferred over the MAPHIA bulletin board, consideration of the amount and substantiality of the portion copied weighs against a finding of fair use. Id. at 1557-58; 3 Nimmer □ 13.05[A][3]; see also American Geophysical Union, supra, 802 F.Supp. at 17.

22. "The fourth factor, the effect of the use upon the market for or value of the copyrighted work, 'is undoubtedly the single most important element of fair use.'" Los Angeles News Service v. Tullo, 973 F.2d 791, 798 (9th Cir. 1992) (quoting Harper & Row, supra, 471 U.S. at 566, 105 S.Ct. at 2233).


24. Based on Defendants' own statement that 45,000 bulletin boards like MAPHIA operate in this country, it is obvious that should the unauthorized copying of Sega's video games by Defendants and others become widespread, there would be a substantial and immeasurable adverse effect on the market for Sega's copyrighted video game programs. Consideration of the effect on the market for Sega's copyrighted works weighs heavily against a finding of fair use. See Def.'s Opp. at 7.

25. Accordingly, it is unlikely that Defendants will be able to establish a fair use defense at trial, and Sega is likely to succeed in establishing that Defendant's MAPHIA bulletin board activities represent direct and contributory infringement under the Copyright Law.

Federal Trademark Infringement

26. A prima facie case for trademark infringement under the Lanham Act is established by a showing that (1) the mark is owned by or associated with a particular plaintiff and (2) that the Defendants' use of the mark is likely to cause confusion or mistake among the public. See Jockey Club, Inc. v. Jockey Club of Las Vegas, 595 F.2d 1167 (9th Cir. 1979).

27. There is no question that the trademarks at issue are owned by Sega. See Compl.Exhs. A, F. Sega's federal trademark registration is conclusive evidence of Sega's exclusive right to use the registered marks in commerce. 15 U.S.C. □ 1115(a).

28. Plaintiffs need not prove that any person actually has been mistaken because of Defendants' use; all that is required is "likelihood" of confusion, mistake or deception. New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201-02 (9th Cir. 1979). Plaintiffs need not show that users of the bulletin boards are likely to be confused. Once a product is put into commerce, confusion, mistake, or deception occurring at some future time is sufficient to establish liability for trademark infringement. Rolex Watch, U.S.A., Inc. v. Canner, 645 F.Supp. 484, 492 (S.D.Fla. 1986).

29. When a game copied from Defendants' bulletin board is played, that game begins with a screen showing the federally registered SEGA trademark and the Sega logo. Confusion, if not on the part of bulletin board users, is inevitable on the part of third parties who may see the copied games after they enter the stream of commerce.

30. Accordingly, Sega is likely to prevail on the merits in establishing that Defendant's use of Sega's trademark on its files sections and file descriptors, and on programs made available and encouraged for downloading from Defendant's MAPHIA bulletin board,
constitutes trademark infringement under the Lanham Act.

False Designation of Origin

31. To prevail on its unfair competition claims under the Lanham Act, Sega must similarly establish that the public is likely to be deceived or confused by the similarity of the marks. New West Corp., supra, 595 F.2d at 1201.

32. Sega has established a prima facie case of federal unfair competition and false designation of origin. 15 U.S.C. § 1125(a).

C. Irreparable Harm

33. A showing of reasonable likelihood of success on the merits of a copyright infringement claim raises a presumption of irreparable harm. Apple Computer, supra, 725 F.2d at 525.

34. Damages occasioned by trademark infringement are by their very nature irreparable and not susceptible of adequate measurement for remedy at law. International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 827 (9th Cir. 1993); Processed Plastic Co. v. Warner Communications, 675 F.2d 852, 858 (7th Cir. 1982).

35. Accordingly, Plaintiffs need not make a detailed showing of irreparable injury since they have demonstrated a prima facie case of copyright and trademark infringement. Apple Computer, supra, 725 F.2d at 525; Processed Plastic, supra, 675 F.2d at 858.


37. Accordingly, Sega has established that Defendants' operation of the MAPHIA bulletin board and sale of video game copiers as above described have caused and are likely to continue to cause irreparable harm to Sega.

D. Conclusion

38. Sega has shown a high probability of success on the merits at trial, and a likelihood of irreparable injury to Plaintiffs, Plaintiffs' market and reputation.

39. Accordingly, Sega has established that it is entitled to preliminary injunctive relief under 15 U.S.C. § 1116 and under principles of equity.

II. COLLECTION AND SEIZURE OF EVIDENCE

40. Defendants allege that Sega's access to the MAPHIA bulletin board through use of a pseudonym constituted a violation of the Electronic Communications and Transactional Records Act, and maintains that the Seizure Order was thereby inappropriate. The Electronic Communications and Transactional Records Act makes it illegal to "intentionally access without authorization a facility through which an electronic communication service is provided." 18 U.S.C. § 2701(a).

41. Because the MAPHIA bulletin board is open to the public, and normally accessed by use of an alias or pseudonym, it would appear that Sega's employee's pseudonymous access was authorized. Furthermore, the Act contains an exception for access which is authorized by a user of an electronic service with respect to a
Lynne Harrison writes:

> I just subscribed to this list and just began receiving posts yesterday
> evening. If the info was initially posted, please forgive the > question, but is the Stratton case posted somewhere on the Net? If so, > I would appreciate someone providing the site.

Since it seems particularly relevant, here is the text of the opinion:

------------------------------------------------------------------------
Edward Cavazos, Attorney at Law       polekat@well.sf.ca.us
Andrews & Kurth, LLP                  ecavazos@blkbox.com
4200 Texas Commerce Tower            (713) 220-4195 (v)
Houston, TX 77002                    (713) 220-4285 (f)

------------------------------------------------------------------------

SUPREME COURT - STATE OF NEW YORK

STRATTON OAKMONT, INC. and DANIEL PORUSH,
Plaintiff(s),

-against-

PRODIGY SERVICES COMPANY, a Partnership of Joint Venture with IBM CORPORATION and SEARS-ROEBUCK & COMPANY, "JOHN DOE" AND "MARY DOE", Defendant(S).
The following papers read on this motion:

Plaintiffs' Notice of Motion & Exhibits 1
Plaintiff's Supporting Exhibits P & O (filed separately under seal pursuant to a confidentiality agreement) 1A
Plaintiffs' Memo of Law in Support 2
Appendix to Plaintiffs' Memo of Law 3
Defendant's Opposing Affidavit and Exhibits 4
Defendant's Memo of Law in Opposition 5
Reply Affidavit 6
Reply Memo of Law 7

Upon the foregoing papers, it is ordered that this motion by Plaintiffs for partial summary judgment against Defendant PRODIGY SERVICE COMPANY ("PRODIGY") is granted and this Court determines, as a matter of law, the following two disputed issues as follows:

(i) that PRODIGY was a "publisher" of statements concerning Plaintiffs on its "Money Talk" computer bulletin board for the purposes of Plaintiffs' libel claims; and,

(ii) that Charles Epstein, the Board Leader of PRODIGY's "Money Talk" computer bulletin board, acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

At issue in this case are statements about Plaintiffs made by an unidentified bulletin board user or "poster" on PRODIGY's "Money Talk" computer bulletin board on October 23rd and 25th of 1994. These statements included the following:

(a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIKI PORUSH, STRATTON's president, committed criminal and fraudulent acts inconnection with the initial public offering of stock of Solomon-Page Ltd.,

(b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";

(c) PORUSH was "seen to be proven criminal"; and,

(d) STRATTON was a "cult of brokers who either lie fora living or get fired."

Plaintiffs commenced this action against PRODIGY, the owner and operator of the computer network on which the statements appeared, and the unidentified party who posted the aforementioned statement. The second amended complaint alleges ten (10) causes of action,
including claims for per se libel. On this motion, "in order to materially advance the outcome of this litigation" (Zamansky affidavit, par.4), Plaintiffs seek partial summary judgment on two issues, namely: (1) whether PRODIGY may be considered "publisher" of the aforementioned statements; and, (2) whether Epstein, the Board Leader for the computer bulletin board on which the statements were posted, acted with actual and apparent authority as PRODIGY's "agent" for the purpose of the claims in this action.

By way of background, it is undisputed that PRODIGY's computer network has at least two million subscribers who communicate with each other and with the general subscriber population on PRODIGY's bulletin boards. "Money Talk" the board on which the aforementioned statements appeared, in allegedly the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments and other financial matters. PRODIGY contracts with bulletin Board Leaders, who, among other things, participate in board discussions and undertake promotional efforts to encourage usage and increase users. The Board Leader for "Money Talk" at the time the alleged libelous statements were posted was Charles Epstein.

PRODIGY commenced operations in 1990. Plaintiffs base their claims that PRODIGY is a publisher in large measure on PRODIGY's stated policy, starting in 1990, that it was a family oriented computer network. In various national newspaper articles written by Geoffrey Moore, PRODIGY's Director of Market Programs and Communications, PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper. (see, Exhibits I and J to Plaintiffs' moving papers.) In one article PRODIGY stated:

"We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it carries the type of advertising it published, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate." (Exhibit J.)

Plaintiffs characterize the aforementioned articles by PRODIGY as admissions (see, Dettner v Pokoik, 81 AD2d 572, app. demd. 54 NY2d 750) and argue that, together with certain documentation and deposition testimony, these articles establish Plaintiffs' prima facie case. In opposition, PRODIGY insists that its policies have changed and evolved since 1990 and that the latest article on the subject, dated February, 1993, did not reflect PRODIGY's policies in October, 1994, when the allegedly libelous statements were posted. Although the eighteen month lapse of time between the last article and the aforementioned statements is not insignificant, and the Court is wary of interpreting statements and admissions out of context, these considerations go solely to the weight of this evidence.

Plaintiffs further rely upon the following additional evidence in support of their claim that PRODIGY is a publisher:

(A) promulgation of "content guidelines" (the "Guidelines" found at Plaintiff's Exhibit F) in which, inter alia, users are requested to refrain from posting notes that are "insulting" and
are advised that "notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY's attention"; the Guidelines all expressly state that although "Prodigy is committed to open debate and discussion on the bulletin boards, ... this doesn't mean that 'anything goes'";

(B) use of a software screening program which automatically prescreens all bulletin board postings for offensive language;

(C) the use of Board Leaders such as Epstein whose duties include enforcement of the Guidelines, according to Jennifer Ambrozek, the Manager of PRODIGY's bulletin boards and the person at Prodigy responsible for supervising the Board Leaders (see Plaintiffs' Exhibit R, Ambrozek deposition transcript. at p. 191) and

(D) testimony by Epstein as to a tool for Board Leaders known as an "emergency delete function" pursuant to which a Board Leader could remove a note and send a previously prepared message of explanation "ranging from solicitation, bad advice, insulting, wrong topic, off topic, bad taste, etcetera." (Epstein deposition Transcript, p. 52).

A finding that PRODIGY is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault. However, a newspaper, for example, is more than a passive receptacle or conduit for news, comment and advertising. [as to the content of the paper constitute Miami Herald Publishing Co. v Tornillo, 418 US 241, 258.] The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the exercise of editorial control and judgment.(Id.), and with this editorial control comes increased liability. (See Cubby, supra.) In short, the critical issue to be determined by this Court is whether the foregoing evidence established a prime facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.

Again, PRODIGY insists that its former policy of manually reviewing all messages prior to posting was changed "long before the messages complained of by Plaintiffs were posted". (Schneck affidavit, par. 4.) However, no documentation or detailed explanation of such a change, and the dissemination of news of such a change, has been submitted. In addition, PRODIGY argues that in terms of sheer volume--currently 60,000 messages a day are posted on PRODIGY bulletin boards--manual review of messages is not feasible. While PRODIGY admits that Board Leaders may remove messages that violate its Guidelines, it claims in conclusory manner that Board Leaders do not function as "editors". Furthermore, PRODIGY argues generally that this Court should not decide issues that can directly impact this developing communications medium without the benefit of a full record, although it fails to describe what further facts remain to be developed on this issue of whether it is a publisher.
As for legal authority, PRODIGY relies on the Cubby case, supra. There the defendant CompuServe was a computer network providing subscribers with computer related services or forums including an online general information service or "electronic library". One of the publications available on the Journalism Forum carried defamatory statements about the Plaintiff, an electronic newsletter. Interestingly, an independent entity named Cameron Communications, Inc. ("CCI") had "contracted to manage, review, create, delete, edit and otherwise control the contents of the Journalism Forum in accordance with editorial and technical standards and conventions of style as established by CompuServe". The Court noted that CompuServe had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe's computer banks. Consequently, the Court found that CompuServe's product was, "in essence, an electronic for-profit library" that carried a vast number of publications, and that CompuServe had "little or no editorial control" over the contents of those publications. In granting CompuServe's motion for summary judgment, the Cubby court held:

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. (776 F. Supp. 135, 140.)

The key distinction between CompuServe and PRODIGY is two-fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content (see, Miami Herald Publishing Co. v Tornillo, supra), and such decisions constitute editorial control. (Id.) That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in the action, PRODIGY is a publisher rather than a distributor.

An interesting comparison may be found in Auvil v. CBS 60 Minutes (supra), where apple growers sued a television network and local affiliates because of an allegedly defamatory investigative report generated by the network and broadcast by the affiliates. The record established that the affiliates exercised no editorial control over the broadcast although they had the power to do so by virtue of their contract with CBS, they had the opportunity to do so by virtue of a three-hour hiatus for the west coast differential, they had the technical capability to do so, and they in fact had occasionally censored network programming in the past, albeit never in connection with "60 Minutes". The Auvil court found:

It is argued that these features, coupled with the power to censor, triggered the duty to censor. That is a leap which the Court is not prepared to join in.
... plaintiffs' construction would force the creation of full time editorial boards at local
stations throughout the country which possess sufficient knowledge, legal acumen and access
to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary
calls or face $75 million dollar lawsuits at every turn. That is not realistic.

... More than merely unrealistic in economic terms, it is difficult to imagine a scenario
more chilling on the media's right of expression and the public's right to know. (ACO F. Supp.
at 931-932.)

Consequently, the court dismissed all claims against the affiliates on the basis of "conduit
liability", which could not be established therein absent fault, which was not shown.

In contrast, here PRODIGY has virtually created an editorial staff of Board Leaders who
have the ability to continually monitor incoming transmissions and in fact do spend time
censoring notes. Indeed, it could be said that PRODIGY's current system of automatic
scanning, Guidelines and Board Leaders may have a chilling effect on freedom of
communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY
wants, but for the legal liability that attaches to such censorship.

Let it be clear that this Court is in full agreement with Cubby and Auvil, Computer
bulletin boards should generally be regarded in the same context as bookstores, libraries and
network affiliates. [See Edward V. DiLello, Functional Equivalency and the application to
Freedom of Speech on Computer Bulletin Boards, 26 Colum. J. Law & Soc. Probs. 199,
210-213 (1993).] It is PRODIGY's own policies, technology and staffing decisions which have
altered the scenario and mandated the finding that it is a publisher.

PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up
to a greater liability than CompuServe and other computer networks that make no such choice.
For the record, the fear that this Court's finding of publisher status for PRODIGY will compel
all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the
market will refuse to compensate a network for its increased control and the resulting increased
exposure. [See, Eric Schlachter, Cyberspace, The Free Market and The Free Marketplace of
Ideas: Recognizing Legal
Differences in Computer Bulletin Board Functions, 16 Hastings Communication and
Entertainment L.J., 87, 138-139.)

Presumably PRODIGY's decision to regulate the content of its bulletin boards was in
part influenced by its desire to attract a market it perceived to exist consisting of users seeking
a "family-oriented" computer service. This decision simply required that to the extent computer
networks provide such services, they must also accept the concomitant legal consequences. In
addition, the Court also notes that the issues addressed herein may ultimately be preempted by
federal law if the Communications Decency Act of 1995, several versions of which are pending
in Congress, is enacted. [See, Congressional Quarterly US S 652, Congressional Quarterly US

216
The Court now turns to the second issue presented here, of whether Epstein was PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint. Agency is a legal relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act. [Maurille v. Park Slope U-Mall, 194 AD2d 142; Restatement (Second) of agency *1.] The starting point for an agency analysis in this case is the "Bulletin Board Leader Agreement" ("the Agreement" found at Exhibit A to Opposition Affidavit of William C. Schneek) between PRODIGY and Epstein. This Agreement sets forth eleven specific responsibilities expected of a Board Leader including (I) the posting of a minimum of 120 notes on the bulletin board each month; (II) working with member Representatives; (III) providing monthly reports and (IV) following any additional procedures provided by PRODIGY. The Agreement also requires prior PRODIGY approval of all promotional efforts. In addition, the Agreement contains the following language:

Although you will not be a PRODIGY representative, your actions as Board Leader will still reflect on PRODIGY. You will be solely responsible for all of your actions as a Board Leader. While PRODIGY will certainly support your actions as a Board Leader as a general matter (so long as they are not in breach of this Agreement), we will not assume any liability for anything you do (or fail to do) as a Board Leader. You hereby indemnify and agree to hold PRODIGY harmless from and against all claims cost, liabilities judgments ... arising out of or in connection with anything you do ...

Being a Board Leader does not make you a PRODIGY Services Company employee, representative or agent, and you agree not to claim or suggest that you are one.

PRODIGY relies on this language to extricate itself from any alleged agency relationship with Epstein. However, talismanic language does not determine an agency relationship. [Matter of Shulman Transport Enterprises, Inc., 33 B.R. 383, 365, aff'd 744 Fzd 293.] The Court must look to the substance of the relationship. (fd.) Where one party retains a sufficient degree of direction and control over another, a principal-agent relationship exists. [Garcia v Herald Tribune Fresh Air Fund, Inc., 51 Ad2d *97.] In addition, whether one is an independent contractor is not determinative of whether one is an agent. [Columbia Broadcasting System, Inc. v Stokely-Van Camp, Inc., 522 F2d 369, Ackert v ********, 29 Misc2d 962, aff'd 20 AD2d *50.]

As to the substance of the relationship between PRODIGY and its Board Leaders, PRODIGY Security Officer McDowell testified that Board Leaders are required to follow the Guidelines and the PRODIGY performs a "management function" with respect to the activities of the Board Leaders. (McDowell deposition transcript p. 78 found at Exhibit S to the moving papers.) Furthermore, Epstein's Supervisor, Jennifer Ambrozek, testified that PRODIGY reviews the Guidelines with Board Leaders, who are then required to enforce the Guidelines. (Ambrozek deposition transcript pp. 23 and 191, found at Exhibit R to the moving papers.) Board Leaders are also given a 28 page "Bulletin Board Leader Survival Guide" (Exhibit Q
to the moving papers), dated October 1994, wherein many technical terms and procedures are explained, and the following caveat is given:

IF YOU DON'T KNOW WHAT SOMETHING IS OR WHAT IT'S SUPPOSED TO DO, LEAVE IT ALONE UNTIL YOU CAN ASK.

Where the facts are not disputed the question of agency should be resolved by the court. [Plymouth Rock Fuel Corp. v Leucedia Inc., 100 AD2d 842.] This is such a case. The aforementioned testimony by PRODIGY employees and documentation generated by PRODIGY, together with the Guidelines themselves, cannot be disputed by PRODIGY and leave no doubt that at least for the limited purpose of monitoring and editing the "Money Talk" computer bulletin board, PRODIGY directed and controlled Epstein's actions. In reaching this conclusion the Court has taken care not to rely on any testimony by Epstein, inasmuch as it is the conduct of the principal which must create the impression of authority, not the conduct of the agent. [See, Ford v Unity Hosp., 32 NY2d 464, 273.] Based on the foregoing, the Court holds that Epstein acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

Dated: May 24, 1995
Mineola, New York
The 1st Amendment Is Safe at Prodigy

By GEOFFREY MOORE

"I'm thinking of killing myself. Which is less painful: hanging or slashing my wrists?"

"My neighbor, William, embezzled $10,000 from his company and is still stealing to this day."

"Little girls in tight jeans and T-shirts are a real turn-on to guys like me. Write to me at P.O. Box ...

"Here's how to avoid paying for HBO: Climb the telephone pole outside your house and ..."

These are examples (fortunately not typical) of electronic submissions to the Prodigy Services Company for publication on Prodigy, an information service sent through telephone lines for display on home computers. The company, using its editorial discretion, chose not to publish these submissions and other similar material.

Yet some authors have made the bizarre suggestion that Prodigy is required to publish whatever is submitted and that failure to do so is censorship in violation of their Constitutional rights of free speech. Prominent newspapers, including The New York Times, have taken the bait, suggesting that a new area of First Amendment law is emerging. They should know better.

The First Amendment protects private publishers, like The New York Times and Prodigy, from Government interference in what we publish. The Constitution bestows no rights on readers to have their views published in someone else's private medium. What the Constitution does give readers is the right to become publishers themselves.

The issue here is not the law — that was decided 200 years ago. Nor is it public access — Prodigy is not a common carrier. The real issue is freedom of choice. If consumers want to read un inhibited, titillating conversation, they can find it on hundreds of wide-open electronic bulletin boards. But if some of them want to subscribe to a family service, confident that what appears on their screen is appropriate for any family member, should they not have that option too?

Is the home computer screen conceptually different from the home television screen? If the Disney Channel chooses to exclude certain types of raw movies, does that make them guilty of censorship? For my children's sake, I hope not.

One of the blessings of our society is its diversity, letting citizens choose anything from Disney to X-rated movies, from Prodigy to "adult" computer bulletin boards. If that makes Prodigy "the Disney of on-line companies," that's fine with us.

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsup-

Readers have no constitutional right to publish their views in a private medium.

Ported gossip its editors tolerate.

In discussing this matter, some people confuse private messages with public editorial features published by Prodigy. Private messages sent between Prodigy members through our network are just that, strictly private. The content is a personal matter between sender and receiver, who are the only ones to see it. So the question of censorship does not apply.

But separately, Prodigy — like a large newspa-
ISA's Filing in Prodigy's Stratton Oakmont Case

MEMORANDUM OF LAW OF INTERACTIVE SERVICES ASSOCIATION IN SUPPORT OF MOTION FOR LEAVE TO FILE SUBMISSION AS AMICUS CURIAE AND MOTION FOR RENEWAL AND REARGUMENT OF DEFENDANT PRODIGY SERVICES COMPANY

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of the Interactive Services Association (the "ISA") in support of:

(a) its motion for leave to file a submission amicus curiae; and

(b) the motion of Prodigy Services Company ("Prodigy") pursuant to CPLR 2221, for renewal and reargument of the Court's opinion and order dated May 24, 1995 (the "Opinion") holding, for purposes of plaintiffs' defamation claim, that Prodigy is a "publisher" rather than a "distributor."

In its Opinion, the Court attempted to limit its ruling based on what it determined were unique attributes of Prodigy's "policies, technology and staffing decisions." Opinion at 9 at 11. It expressly acknowledged that online providers of electronic bulletin board systems "generally" should be subject to a distributor standard of defamation liability. Opinion at 11. The ISA is concerned, however, that the Opinion could be read to suggest that electronic bulletin board providers may not be treated as distributors, even for material transmitted and posted instantaneously by third parties, if providers (1) established guidelines for subscriber conduct, (2) periodically reviewed or automatically screened material transmitted by subscribers and (3) deleted, either affirmatively or mechanically, material posted in violation of their guidelines when it came to their attention. Opinion at 9. A legal rule that eliminated distributor liability in these circumstances would have a damaging and unconstitutional impact on online service providers.

No online provider can operate an electronic bulletin board system without basic guidelines for subscriber conduct and the ability to review and delete violative materials that come to its attention. See accompanying affidavit of Robert L. Smith, Jr., sworn to August 28, 1995 ("Smith Aff.") 46. Without such guidelines, an electronic bulletin board easily would be captive to disseminators of pornography, obscenity, criminal communications, sales solicitations, irrelevant postings or other transmissions that would disrupt or damage the quality and operation of the system. Simply stated, subscriber guidelines and some measure of control over electronic bulletin board systems are essential in order for online providers responsibly to address potentially serious violations by others of existing law and pending legislation. Id. Thus, several of the factors relied on by the Court in refusing to apply a distributor liability standard are the unavoidable consequences of maintaining electronic bulletin boards responsibly and within required legal boundaries.

There is a world of difference, however, between imposing such prophylactic guidelines on subscriber conduct and assuming the responsibilities of a publisher with respect to subscriber messages for purposes of defamation law. A publisher affirmatively selects material prior to publication with specific and actual knowledge of its contents, and has a practical opportunity to, among other things, examine the material, evaluate the reputation and reliability of the author, and conduct appropriate fact and source investigation prior to publication. See infra at 24-26.

An online provider can perform none of these functions in connection with electronic bulletin board messages posted by third parties. Electronic bulletin boards provide a medium for thousands of subscribers with common interests to communicate information and ideas virtually instantaneously. Online providers that offer electronic bulletin boards facilitate these vigorous real-time interactive exchanges among subscribers. The dynamic characteristics of electronic bulletin board communications ĐĐ and the sheer volume and rapid pace of messages
posted by subscribers. If D do not allow an online provider (or a party that may undertake contractual responsibility for the management of a bulletin board) the opportunity to review the contents of messages posted by subscribers before they are transmitted, let alone perform the type of evaluation of truth and accuracy undertaken by publishers. See Smith Aff. ¶34D40.

Were the Opinion to be broadly interpreted, it would place online providers in an intolerable position. They either would have to abandon the basic subscriber guidelines and control that the Court identified in imposing publisher obligations, or to investigate and evaluate the truth and accuracy of every message posted on their electronic bulletin boards prior to posting. Even assuming that it were technically or economically feasible for online providers to undertake such obligations and it is not -- such a requirement would inhibit and clog the free flow of information among subscribers, frustrate the purpose of electronic bulletin boards and violate the First Amendment of the United States Constitution and the New York State Constitution. It also improperly would permit the imposition of defamation liability without fault on the part of online providers.

The purpose of the ISA's submission is to assist the Court by illustrating that the publisher/distributor standard of liability should turn, not on the presence or absence of subscriber guidelines, but on the particular function actually performed by an online provider with respect to the allegedly defamatory material. When online providers (or bulletin board managers) themselves compose the text of information accessed by online subscribers, they truly may be "making decisions as to content" and exercising "editorial control." Opinion at 9. An absolutely critical distinction exists, however, between this "content provider" function and the "bulletin board" function. In the latter instance, online providers create areas that permit subscribers to communicate information in "real time" and have no opportunity for prior review. Because the record at the time of the original summary judgment motion did not allow the Court to draw this distinction, the ISA respectfully requests that the Court accept and consider the ISA's submission and issue a new decision on plaintiffs' motion for partial summary judgment.

INTERESTS OF THE AMICUS

The ISA is a nonprofit, national trade association founded in 1981 whose over 300 members are involved in the delivery of telecommunications-based interactive services to consumers. All of the major online providers in the United States are members of the ISA including America Online, Inc., CompuServe Incorporated, Delphi Internet Services Corporation, GE Information Services, Inc. (GENie), Apple Online Services, The Microsoft Network, MCI Communications Corporation, AT&T Corp. and Prodigy. (1) ISA members offer more than fifteen thousand electronic bulletin boards, which are devoted to topics such as current events, literature, the arts, politics, business and many other interests and avocations. There are approximately seven million subscribers to the online services offered by ISA members. Smith Aff. ¶ 2, 5, 18.

No online provider that offers electronic bulletin boards can function without subscriber guidelines. Even such guidelines, however, cannot permit providers any practical opportunity to review messages posted in real-time for potentially defamatory content, without wholesale shifts in both their methods of operation and the nature of electronic bulletin board communications. For these reasons, the Opinion has caused uncertainty among providers, users and policy-makers. It threatens a rapidly expanding medium of communication relied upon by millions of individuals. The determination of the issues raised on Prodigy's motion for renewal and reargument materially will affect the interests of the ISA and its members.

The importance of this case to the future of online communications was illustrated by this summer's extraordinary and immediate Congressional reaction to the Opinion. 2 In response to the Opinion, the House of Representatives announced that it is the "policy of the United States" to promote continued development of online services and that it would be contrary to reason and good public policy if online providers who established subscriber guidelines to limit obscene or offensive communications were punished by the imposition of a broader standard of liability. (3) Accordingly, in a floor amendment to H.R. 1555, the Communications Act of 1995, the House, by an overwhelming vote of 420D4, declared that online providers should not be "treated as the publisher or speaker" with respect to material originated by third parties, even if an online provider also attempts to preclude the dissemination of obscene or other objectionable materials on its system. Id. at H8469, H8478D79. As Rep. Cox, one of the sponsors of the amendment stated:

221
The New York Supreme Court, held that Prodigy... could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank... The court said 'No, no, no, no, you are different... You, therefore, are going to face higher, [stricter] liability because you tried to exercise some control over offensive material. Mr. 'chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.

Id. at H8469D70. (4)

For all of these reasons, the interests of the ISA and its members directly are affected by Prodigy's pending motion pursuant to CPLR 2221, and the ISA respectfully requests that the Court consider its submission. (5)

I.
COMMON LAW AND CONSTITUTIONAL PRINCIPLES REQUIRE ONLINE PROVIDERS TO BE TREATED AS DISTRIBUTORS OF ELECTRONIC BULLETIN BOARD MESSAGES POSTED BY THIRD PARTIES.

A. The Functions Performed By Online Providers Vary Substantially.

Online providers offer a number of different services to subscribers and the functions they perform vary substantially according to the services offered. The opportunity and ability of an online provider to examine the content, truth or accuracy of information that is communicated over its system turns entirely upon the particular function that the online provider has performed with respect to such material. Smith Aff. ¶11(a)D(h), 15(a)D(e), 16. Online providers may perform many functions, including the following:

- "System" Function. Online providers operate host computers, supply communications software and create the online technical environment for the system. These responsibilities can be categorized as the "system" function of an online provider. Smith Aff. ¶15(a).

- "Gateway" Function. A number of online services provide the means for communications between subscribers and autonomous computer networks such as the Internet or third party host computers. The "gateway" function permits a high volume of completely autonomous two-way data traffic to flow among subscribers and remote servers. Id. ¶15(b).

- "Content Provider" Function. Some online providers also originate the content of certain information made available to subscribers. The content provider function is performed when specific text is actually composed by an online provider and an affirmative selection is made prior to its transmission. Id ¶15(e).

- "Database" Function. In some circumstances, online providers may contract directly with a third party content provider such as an encyclopedia or newspaper publisher or a provider of weather or financial information, in which case the third party's material is made available to subscribers. Id. ¶15(c).

- "Bulletin Board" Function. Online providers establish and arrange for the management of electronic "areas" on their systems that are available to subscribers interested in particular topics. Features of these areas include electronic bulletin boards and "chat session" capabilities in which the content of messages generally originates with subscribers. The purpose of the "bulletin board" function is to permit information to be made rapidly available among subscribers who share common interests. An online provider (or bulletin board manager) also may itself function as a "content provider" with respect to bulletin board messages that it composes and transmits to subscribers. Id. ¶15(d).

When an online provider functions as the "content provider", it will have originated material that is uploaded onto,
stored and transmitted across its system. Smith Aff. ¶15(e). In these circumstances, the online provider should have ample practical opportunity to review the contents of the message for truth and accuracy. The ISA's concerns relating to the standard of liability described in the Court's Opinion are not directed to the performance of the "content provider" function, but to the "bulletin board" function.

In contrast, when a subscriber composes or supplies a message, and an online provider performs the bulletin board function, the online provider plays only a conduit role, permitting a message posted by one subscriber to be immediately available for access by all other subscribers. No creation of material, nor even a conscious or affirmative selection of material is made by the online provider and there is no practical opportunity to review and examine the contents of these real-time messages, let alone evaluate their truth or accuracy. Smith Aff. ¶23-D26, 40. The volume of messages posted on electronic bulletin boards by subscribers and the speed with which they are transmitted among subscribers make it literally impossible for an online service provider or a bulletin board manager to review messages prior to posting. Smith Aff. ¶35-D39. Neither the existence of subscriber guidelines, nor the ability to delete posted material after the fact and once the provider is made aware of its contents, alters this inherent technological and practical limitation.


When a party involved in the dissemination of information has no practical opportunity to know in advance the content of the information disseminated, let alone to evaluate its truth and accuracy, settled principles of the common law of defamation require that a "distributor" standard of liability be applied. Pursuant to these principles, there can be no liability unless a party "knows or had reason to know" of the allegedly defamatory statements. See Restatement (Second) of Torts, Section 581 and comments d-d' (1977) (it would be an "unreasonable burden" to require a bookstore, library or person that transmits a message to "make the investigation necessary" to determine the truthfulness or accuracy of material); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140-D41 (S.D.N.Y. 1991) (distributor standard applies where online provider had no "feasible" opportunity to examine truth or accuracy of messages transmitted on system); Auivil v. CBS 60 Minutes, 800 F. Supp. 928, 931-D32 (E.D. Wash. 1992) (distributor standard applies where network television affiliate had no "realistic" opportunity to "continually monitor incoming transmissions and exercise on-the-spot discretionary calls"); Misut v. Mooney, 124 Misc. 2d 95, 99, 475 N.Y.S.2d33, 235-D36 (Sup. Ct. Suffolk Co. 1984) (distributor standard applies where printer had no practical opportunity to "confirm facts, check sources and to thereby be responsible for the truth of printed statements"); O'Brien v. Western Union Telegraph Co., 113 F.2d 539, 542 (1st Cir. 1940) (distributor standard applies because telegraph company "cannot spend much time pondering the contents of the messages with a view to determining whether they bear a defamatory meaning" if they are to handle a significant volume of business expeditiously).

When performing the bulletin board function, online providers do not know, and do not have a practical opportunity to review, the contents of messages posted by subscribers before they are made available to other subscribers. Accordingly, settled common law principles, in and of themselves, require the application of a distributor standard of liability when the allegations of defamation against an online provider are based on its performance of the bulletin board function.

C. Constitutional Guarantees Require A Distributor Standard Of Liability For Messages Posted By Third Parties.

In addition to the common law, the United States Constitution and the New York State Constitution also require application of a distributor standard of defamation liability to online providers performing the bulletin board function.

The application of a distributor standard of defamation liability to parties with no practical opportunity to evaluate the contents of material they disseminate is "deeply rooted in the First Amendment." Cubby v. CompuServe, 776 F. Supp. at 139. If an online provider must evaluate the truth and accuracy of each message composed by a subscriber
before it can be made available to other subscribers, the free flow of ideas and information among subscribers will be clogged and restrained. Any rule of liability that would create such a result would run afoul of the First Amendment.

The purpose of the First Amendment is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (citation omitted). It reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Id. at 270. A rule of law that "dampens the vigor and limits the variety of public debate" is inconsistent with the First Amendment. Id. at 278-79. See also Associated Press v. United States, 326 U.S. 1, 20 (1945) (First Amendment seeks to secure "the widest possible dissemination of information from diverse and antagonistic sources").

In Smith v. California, 361 U.S. 147 (1959), the Supreme Court held that a rule of law that required a bookseller to examine the content of each book in his store before it was disseminated unconstitutionally would restrict and deplete the materials available to the public. The Court stated:

[the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.

Id. at 153-54 (emphasis supplied).

Imposing publisher responsibilities on online providers performing the bulletin board function would have the identical impact of the criminal statute struck down by the Supreme Court as unconstitutional in Smith v. California. (6) Online providers have neither the practical nor technological ability to detect and delete defamatory material originated by subscribers on a real-time basis without impeding or eliminating the dynamic and interactive nature of electronic bulletin board communications. Requiring them to evaluate the truth and accuracy of subscriber communications prior to dissemination by categorizing them as publishers for defamation purposes, impermissibly would dampen and restrict the public's access to ideas and information. See Cubby, 776 F. Supp. at 140-41 ("Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to [the online provider] is whether it knew or had reason to know of the allegedly defamatory [ ] statements"); Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985)("[T]he national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment"); Misut v. Mooney, 124 Misc. 2d at 99, 475 N.Y.S.2d at 235-36 (requiring a printer to "confirm facts, check sources and to thereby be responsible for the truth of printed statements . . . would be impractical in economic terms and undesirable in social terms").

A rule that requires online providers to restrict and delay subscriber communications in this manner also would defeat the advances in rapid and unprecedented communication achieved by online bulletin boards, thus violating the Supreme Court's admonition that courts not "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities DB who wish to exercise their freedom of speech even though they are not members of the press." New York Times v. Sullivan, 376 U.S. at 266. See also City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 & n.13 (1994) (First Amendment prohibits rule of law that will "foreclose an entire medium of expression" or "unduly constrict the opportunities for free expression").

Imposing expanded liability on online providers for subscriber-generated material is especially inappropriate as more and more online providers offer gateways to the Internet, an interrelated network of networks, on their systems. No amount of screening and no level of detailed guidelines can prevent subscribers from using a provider's system to retrieve material from disparate databases worldwide, available through the Internet, which may be stored on a provider's system and instantaneously be made available by a subscriber to other subscribers by electronic posting. The vast quantities of material available through the Internet never could be reviewed for content prior to such
retrieval and transmission. The Opinion, however, could be read to require that providers choose among eliminating all subscriber guidelines and control, eliminating access to all Internet material, or risk liability for content generated by remote third parties wholly outside their control. Smith Aff. ¶39. That choice is inconsistent with First Amendment guarantees.

In this regard, it is critical to focus on the requirement under the First Amendment that state defamation laws "not impose liability without fault." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The purpose of this rule is to allow breathing space for free speech so that the dissemination of truthful information is not deterred. Id. at 340D41. A rule that fails to recognize an online provider's limited ability to review material posted by third parties on its bulletin boards would violate the settled rule of Gertz, which requires liability to be confined to situations where the provider knew or had reason to know of the allegedly defamatory material. See Auvil, 800 F. Supp. at 931; Cubby, 776 F. Supp. at 140D41. (7)

The Constitution of the State of New York provides even a broader scope of protection for free speech than the United States Constitution. People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557D58, 510 N.Y.S.2d 844, 846D47 (1986); see Immuno AG v. Moor Jankowski, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913, cert. denied, 500 U.S. 954 (1991); Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 102, 520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987)(online news provider not liable for alleged negligent transmission of inaccurate information under state law). New York State emphatically has refused to impose standards of defamation liability that would have the effect of limiting the free flow of communication on subjects of public interest. Immuno AG, 566 N.Y.S.2d at 916D917. Imposing publisher standards on an online provider performing the bulletin board function, however, would have precisely this effect. The adverse impact such a rule would have on new technology, which permits the rapid and unfettered oneDtoDmany or manyDtoDmany interchange among individuals on topics of common concern, would conflict with the view consistently adopted by New York courts that technological advances must continually be evaluated and their relation to legal rules determined so that antiquated rules are not misapplied in modern settings. [W]ith new conditions, there must be new rules.'

Daniel v. Dow Jones & Co., 137 Misc. 2d at 99, 520 N.Y.S.2d at 338 (quoting Cardozo, The Nature of the Legal Process at 137 (Yale Paperbound ed. 1960)). The New York State Constitution does not permit a rule of law that would require an online provider to restrict and delay bulletin board communications among subscribers and thereby inhibit the use of "modern, technologically interesting, alternative ways" for the public to communicate. Id., 137 Misc. 2d at 102, 520 N.Y.S.2d at 340.

II.

GUIDELINES SIMILAR TO THOSE ESTABLISHED BY PRODIGY AND OTHER ONLINE PROVIDERS, WHICH LIMIT THE TRANSMISSION OF OBSCENITY AND OTHER OUTRAGEOUS CONDUCT, NEVER HAVE RESULTED IN THE IMPOSITION OF A "PUBLISHER" STANDARD OF LIABILITY FOR DEFAMATION CLAIMS.

In the Opinion, this Court seemed implicitly to adopt the wellDsettled common law and constitutional principles described above. In the context of emphasizing its view that "[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates" the Court quoted language from Auvil v. CBS 60 Minutes that acknowledged the practical impossibility of requiring local broadcasters
to continually monitor incoming transmissions and exercise discretion in spot discretionary calls or face $75 million dollar lawsuits at every turn... More than merely unrealistic in economic terms, it is difficult to imagine a scenario more chilling on the media's right of expression and the public's right to know.

Opinion at 10D11 (emphasis added) (quoting Auvil, 800 F. Supp. at 931D32).
Had the factual record before the Court been properly developed, the ISA believes the Court would have recognized that, when it comes to the bulletin board function, an online provider such as Prodigy has even less of an opportunity to monitor incoming transmissions than local broadcasters who carry incoming transmissions from the national networks with which they are affiliated. Moreover, as the Court noted, the record in Auivil established that local broadcasters had the right and ability to exercise control over CBS broadcasts and, in fact, had "censored network programming in the past." Opinion at 10 (emphasis supplied). In other words, although the broadcaster in Auivil had guidelines and abilities similar to those plaintiffs allege Prodigy to have, a distributor standard of liability was applied.

Auivil and other reported decisions stand for the principle that "publisher" obligations cannot be imposed on a disseminator of information who, regardless of the existence of rules or guidelines relating to outrageous or offensive conduct, performs a function in which there is no practical opportunity to evaluate the accuracy or truthfulness of material. For example, in Cubby, which involved an interactive area established by an online provider relating to the journalism industry, the court observed that the provider had reserved the right to establish "editorial and technical standards and conventions of style" and contracted with a forum manager to "manage, review, create, delete, edit and otherwise control the contents" in accordance with those guidelines. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. at 137. Nevertheless, the court applied a distributor standard of defamation liability to the online provider because there was no practical opportunity to examine the truthfulness and accuracy of statements originated by third parties and transmitted over its system. Id. at 140D41.

In Misut v. Mooney, although a printer had established standards relating to "nudity, profanity and vulgarity for the purpose of eliminating such elements from the final, printed version," 124 Misc. 2d at 96, 475 N.Y.S. 2d at 233, a distributor standard of liability was imposed. 124 Misc. 2d at 99, 475 N.Y.S. 2d at 235D36. The court stated:

That the defendant Merlin may have taken steps to enforce its own standards of decency or civility, or to ensure its own compliance with the obscenity laws of the State, is not an indication that defendant Merlin was in a position to test the truth of statements submitted by an independent author.

Id. 124 Misc. 2d at 100, 475 N.Y.S. 2d at 236 (emphasis supplied).

Unlike the editorial staff of a newspaper or magazine publisher, an online provider performing the bulletin board function has neither actual knowledge nor control over the content of material prior to publication. True publishers examine and make an affirmative selection of the specific material that is to be published, which often has been researched and written by employees, reporters or other authors whose reputation, reliability and experience are known to the publisher. A publisher's editors have the opportunity to revise, perform additional review, fact checking, source checking and investigation prior to publication. See, e.g., Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 622 (2d Cir.) (describing research of article by reporter, review of article by newspaper's editors and examination of the article by newspaper's legal department prior to publication), cert. denied, 488 U.S. 856 (1988); Herbert v. Lando, 781 F.2d 298, 309 & n.7 (2d Cir.) (publisher had familiarity with reporter's reliability and the opportunity to make inquiry of his former employer concerning his reputation) cert. denied, 476 U.S. 1182 (1986); Chapadeau v. Utica Observer Dispatch, Inc., 38 N.Y.2d 196, 200, 379 N.Y.S.2d 61, 65 (1975) ("two authoritative sources had been consulted and [newspaper article] was not published until it had been checked by at least two persons other than the writer").

These attributes and capabilities contrast starkly with those of online providers performing the bulletin board function. They undertake no affirmative selection or prepublication review of posted materials and, absent specific knowledge, cannot be expected to be familiar with or to investigate the reputation or reliability of a subscriber that composes a message posted on a bulletin board system. Neither subscriber guidelines nor Prodigy's screening software permit the level of scrutiny that true publishers are able to bring to bear on material they select for inclusion in magazines or newspapers. (8)

In fact, neither Prodigy's purported control over content nor the operating principles of other online providers differ markedly from procedures carried out every day by librarians and boards of trustees of libraries across the United
States. These libraries have long established guidelines for the acquisition or rejection of books and materials based upon a range of content considerations. See E. Futas, Collection Development Policies and Procedures (3d ed. 1995) (9)

The sheer number of books that a library maintains on its shelves, however, precludes it from any practical opportunity to examine and evaluate the contents of every book that it disseminates. Libraries, therefore, are accountable for defamatory statements in those materials only pursuant to a distributor standard of liability. See Restatement (Second) of Torts, Section 581 and comment e; Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. at 140.

The same considerations that have led to a recognition that editorial-based acquisition guidelines for a library do not transform it into a publisher, compel the conclusion that an online provider performing the bulletin board functions should not be held to a publisher standard of liability absent actual knowledge, or a reason to know, of the allegedly defamatory content of a subscriber's transmission.

CONCLUSION

For the foregoing reasons, the ISA respectfully requests that the Court grant Prodigy's motion for renewal and reargument and modify its Opinion to provide that a distributor standard of liability be applied to Prodigy with respect to the electronic bulletin board messages at issue.

Dated: New York, New York
August 29, 1995

DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Of Counsel:
Bruce P. Keller Attorneys for Amicus Curiae
Jeffrey P. Cunard Interactive Services Association
Lorin L. Reisner
Albert L. Wells

FOOTNOTES

(1) As an amicus, and not a party, ISA does not purport to speak on behalf of Prodigy in this motion. Back


(4) Expressing concerns similar to those of Rep. Cox, and citing the impact of the Opinion on online providers, a representative of the ISA recently testified before the Senate Judiciary Committee that one "current obstacle to wide implementation of measures to block or filter out offensive materials" which measures many in Congress, and the industry itself, would like to encourage is "the threat of liability for any offending material that may fail to get screened." See Hearing on S. 892 and Indecency on the Internet Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (Jul. 24, 1995)(statement of William W. Burrington, Chairman, Online Policy Committee, ISA, and Assistant General Counsel and Director of Government Affairs, America Online, Inc.) Back

(5) A motion to renew or modify an order pursuant to CPLR 2221 should be granted where the Court "misapprehended the relevant facts." 2 Carmody&Wait 2d 8.75, at 400 (1994) (citations omitted). The ISA believes that the inadequate factual record before the Court at the time of the original motion led it to misapprehend relevant facts concerning the function of online providers in connection with electronic bulletin boards and the ability of online providers to evaluate messages posted by third parties. The ISA does not take any position on the "agency"
issue decided by the Court, except to note that imposition of the legal responsibilities of a publisher on a board leader or forum manager of an electronic bulletin board is subject to the same limitations under the First Amendment and the New York State Constitution discussed below and that the determination of whether a person acts as an agent or independent contractor will depend on the particular facts of each case. Back

5) It is settled law that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times v. Sullivan, 376 U.S. at 277. Back

(7) Treating online providers as publishers of messages posted on electronic bulletin boards without regard to the function they perform also makes little sense in light of the ultimate standards of liability in a defamation action. For example, New York Times v. Sullivan and its progeny require proof that a publisher entertained serious doubts about the truth of material at the time it is published. See, e.g., Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382 N.E.2d 83, 397 N.Y.S. 2d 943, 952, cert. denied, 434 U.S. 969 (1977). An online provider simply cannot hold such doubts if it has no knowledge of content that has been transmitted to a bulletin board by a subscriber. See Adams v Frontier Broadcasting Co., 555 P.2d 556, 564-67 (Wyo. 1976) (it is legally "impossible" to establish that broadcasters of radio call-in show published a third party caller’s remark with "actual malice" because broadcaster had no practical opportunity to evaluate content of caller’s remarks). Back

(8) Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), referred to by the Court, Opinion at 7 and 9, acknowledged that true publishers have actual knowledge of materials prior to publication and an opportunity to review and make a decision as to their publication, even when submitted by an unrelated third party. Id. at 257-58; see also Immuno AG v. MoorJankowski, 77 N.Y.2d at 256, 566 N.Y.S.2d at 918 (outside commentary such as letters to the editor published by newspapers are examined by editors and affirmatively selected prior to publication). Back

(9) Criteria for the selection or withdrawal of library materials have included the "appropriateness of format, content and style", "suitability of subject and style for intended audience", "present and potential relevance to local interests and needs", "the audience for whom it was intended" and "lack of bias or prejudice". E. Futas Collection Development Policies and Procedures at 222-233. See also Charleston County Library Materials Selection Policy at 7 (Selection of "materials dealing with the subject of sex... is made with regard to suitability for such varied groups as parents, teachers, young people contemplating marriage, newly married, adolescents and children"); Salt Lake City Public Library Materials Selection Policy (1992)("Material about sex and sexuality appropriate for young people is carefully selected to provide sound and reliable information"). Back

Elements of the Prodigy Brief * ISA Affidavit
Firm to drop suit against Prodigy

Judge will be asked to overturn ruling holding on-line service liable

NEW YORK — An investment firm said Tuesday that it had agreed to drop a $200 million libel lawsuit against Prodigy Services Co., in return for Prodigy's saying it was sorry.

Citing the "best interests of the parties as well as the on-line and interactive services industries," Stratton Oakmont Inc. of Lake Success, N.Y., said it would not contest a motion filed by Prodigy asking Justice Stuart L. Ain of the State Supreme Court for Nassau County to dismiss the case.

In a surprising reversal that heartened free-speech advocates and the on-line industry, Stratton also agreed not to oppose Prodigy's request that Ain set aside, or overturn, his earlier decision holding the on-line service liable for comments made by its users.

Prodigy is jointly owned by Sears, Roebuck and IBM.

Ain's earlier decision, in May, held that Prodigy acted as a publisher of information, not just a distributor of messages among its users, and thus could be found legally responsible for comments made electronically by its users. The ruling had significant implications for all commercial on-line information services, whose millions of members post tens of thousands of messages on computer bulletin boards each day.

Critics said that if it were upheld by higher courts, Ain's decision would force on-line service operators to choose between two equally odious paths: either to try to screen every public message for potentially defamatory comments or to avoid altogether any effort to monitor messages.

Even though Stratton now agrees that Prodigy is not a publisher, there is no assurance that Ain will agree to vacate or reverse his earlier ruling. As a result, the settlement left Prodigy's supporters pleased but uneasy.

"Unquestionably, it was a win for users and for free expression and privacy, but the law is still unsettled," said Danny Weitzner, staff counsel for the Center for Democracy and Technology, an advocacy group in Washington.

"There are still repeated attempts under way in Congress to hold on-line services liable for the content of messages sent by users."

Under terms of the agreement reached Tuesday, Prodigy will pay nothing to Stratton or its president, Daniel Porush, who had sued Prodigy in January for $100 million, plus $100 million more in punitive damages.

Stratton and Porush contended they had been libeled by an unknown Prodigy subscriber who posted a series of messages about Stratton on Prodigy's "Money Talk" bulletin board.

The messages, posted last October by someone claiming to be a lawyer, said Stratton and Porush had committed criminal and fraudulent acts in connection with the initial public offering of the stock of Solomon-Page Ltd.
Religious Technology Center v. Netcom

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California non-profit corporation; and BRIDGE PUBLICATIONS, INC., a California non-profit corporation, Plaintiffs, v. NETCOM ON-LINE COMMUNICATION SERVICES, INC., a Delaware corporation; DENNIS ERLICH, an individual; and TOM KLEMESRUD, an individual, dba CLEARWOOD DATA SERVICES, Defendants.

NO. C-95-20091 RMW

ORDER DENYING DEFENDANT NETCOM'S MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT KLEMESRUD'S MOTION FOR JUDGMENT ON THE PLEADINGS; AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST NETCOM AND KLEMESRUD

This case concerns an issue of first impression regarding intellectual property rights in cyberspace.[n1] Specifically, this order addresses whether the operator of a computer bulletin board service ("BBS"), and the large Internet access provider that allows that BBS to reach the Internet, should be liable for copyright infringement committed by a subscriber of the BBS.

Plaintiffs Religious Technology Center ("RTC") and Bridge Publications, Inc. ("BPI") hold copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology ("the Church"). Defendant Dennis Erlich ("Erlch")[n3] is a former minister of Scientology turned vocal critic of the Church, whose pulpit is now the Usenet newsgroup[n4] alt.religion.scientology ("a.r.s."), an on-line forum for discussion and criticism of Scientology. Plaintiffs maintain that Erlich infringed their copyrights when he posted portions of their works on a.r.s. Erlich gained his access to the Internet through defendant Thomas Klemesrud's ("Klemesrud's") BBS "support.com." Klemesrud is the operator of the BBS, which is run out of his home and has approximately 500 paying users. Klemesrud's BBS is not directly linked to the Internet, but gains its connection through the facilities of defendant Netcom On-Line Communications, Inc. ("Netcom"), one of the largest providers of Internet access in the United States.

After failing to convince Erlich to stop his postings, plaintiffs contacted defendants Klemesrud and Netcom. Klemesrud responded to plaintiffs' demands that Erlich be kept off his system by asking plaintiffs to prove that they owned the copyrights to the works posted by Erlich. However, plaintiffs refused Klemesrud's request as unreasonable. Netcom similarly refused plaintiffs' request that Erlch not be allowed to gain access to the Internet through its system. Netcom contended that it would be impossible to prescreen Erlich's postings and that to kick Erlich off the Internet meant kicking off the hundreds of users of Klemesrud's BBS. Consequently, plaintiffs named Klemesrud and Netcom in their suit against Erlich, although only on the copyright infringement claims.[n5]

On June 23, 1995, this court heard the parties' arguments on eight motions, three of which relate to Netcom and Klemesrud and are discussed in this order: (1) Netcom's motion for summary judgment; (2) Klemesrud's motion for judgment on the pleadings,[n6] and (3) plaintiffs' motion for a preliminary injunction against Netcom and Klemesrud. For the reasons set forth below, the court grants in part and denies in part Netcom's motion for summary judgment and Klemesrud's motion for judgment on the pleadings and denies plaintiffs' motion for a preliminary injunction.

I. NETCOM'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT

A. Summary Judgment Standards
Because the court is looking beyond the pleadings in examining this motion, it will be treated as a motion for summary judgment rather than a motion to dismiss. Grove v. Mead School District, 753 F.2d 1528, 1532 (9th Cir. 1985). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is a "genuine" issue of material fact only when there is sufficient evidence such that a reasonable juror could find for the party opposing the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Entry of summary judgment is mandated against a party if, after adequate time for discovery and upon motion, the party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court, however, must draw all justifiable inferences in favor of the nonmoving parties, including questions of credibility and of the weight to be accorded particular evidence. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991).

B. Copyright Infringement

To establish a claim of copyright infringement, a plaintiff must demonstrate (1) ownership of a valid copyright and (2) "copying" of protectable expression by the defendant. Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954 (1987). Infringement occurs when a defendant violates one of the exclusive rights of the copyright holder. 17 U.S.C. Section 501(a). These rights include the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work. 17 U.S.C. Sections 106(1)-(3) & (5). The court has already determined that plaintiffs have established that they own the copyrights to all of the Exhibit A and B works, except item 4 of Exhibit A. [n8] The court also found that plaintiffs likely to succeed on their claim that defendant Erlich copied the Exhibit A and B works and was not entitled to a fair use defense. Plaintiffs argue that, although Netcom was not itself the source of any of the infringing materials on its system, it nonetheless should be liable for infringement, either directly, contributorily, or vicariously. 9 Netcom disputes these theories of infringement and further argues that it is entitled to its own fair use defense.

1. Direct Infringement

Infringement consists of the unauthorized exercise of one of the exclusive rights of the copyright holder delineated in section 106. 17 U.S.C. Section 501. Direct infringement does not require intent or any particular state of mind, although willfulness is relevant to the award of statutory damages. 17 U.S.C. Section 504(c).

Many of the facts pertaining to this motion are undisputed. The court will address the relevant facts to determine whether a theory of direct infringement can be supported based on Netcom's alleged reproduction of plaintiffs' works. The court will look at one controlling Ninth Circuit decision addressing copying in the context of computers and two district court opinions addressing the liability of BBS operators for the infringing activities of subscribers. The court will additionally examine whether Netcom is liable for infringing plaintiffs' exclusive rights to publicly distribute and display their works.

a. Undisputed Facts

The parties do not dispute the basic processes that occur when Erlich posts his allegedly infringing messages to a.r.s. Erlich connects to Klemsrud's BBS using a telephone and a modem. Erlich then transmits his messages to Klemsrud's computer, where they are automatically briefly stored. According to a prearranged pattern established by Netcom's software, Erlich's initial act of posting a message to the Usenet results in the automatic copying of Erlich's message from Klemsrud's computer onto Netcom's computer and onto other computers on the Usenet. In order to ease transmission and for the convenience of Usenet users, Usenet servers maintain postings from newsgroups for a short period of time eleven days for Netcom's system and three days for Klemsrud's system. Once on Netcom's computers, messages are available to Netcom's customers and Usenet neighbors, who may then
download the messages to their own computers. Netcom's local server makes available its postings to a group of
Usenet servers, which do the same for other servers until all Usenet sites worldwide have obtained access to the
postings, which takes a matter of hours. Francis Decl. Paragraph 5.

Unlike some other large on-line service providers, such as CompuServe, America Online, and Prodigy, Netcom does
not create or control the content of the information available to its subscribers. It also does not monitor messages as
they are posted. It has, however, suspended the accounts of subscribers who violated its terms and conditions, such
as where they had commercial software in their posted files. Netcom admits that, although not currently configured
to do this, it may be possible to reprogram its system to screen postings containing particular words or coming from
particular individuals. Netcom, however, took no action after it was told by plaintiffs that Erlich had posted
messages through Netcom's system that violated plaintiffs' copyrights, instead claiming that it could not shut out
Erlich without shutting out all of the users of Klemesrud's BBS.

b. Creation of Fixed Copies

The Ninth Circuit addressed the question of what constitutes infringement in the context of storage of digital
information in a computer's random access memory ("RAM"). MAI Systems Corp. v. Peak Computer, Inc., 991
F.2d 511, 518 (9th Cir. 1993). In Mai, the Ninth Circuit upheld a finding of copyright infringement where a repair
person who was not authorized to use the computer owner's licensed operating system software, turned on the
computer, thus loading the operating system into RAM for long enough to check an "error log." Id at 518-19.
Copyright protection subsists in original works of authorship "fixed in any tangible medium of expression, now
known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either
directly or with the aid of a machine or device." 17 U.S.C. Section 102 (emphasis added). A work is "fixed" when its
"embodiment in a copy perceived, reproduced, or otherwise communicated for a period of more than transitory
duration." Id Section 101. MAI established that the loading of data from a storage device into RAM constitutes
copying because that data stays in RAM long enough for it to be perceived. MAI Systems, 991 F.2d at 518.

In the present case, there is no question after "that "copies" were created, as Erlich's act of sending a message to
a r.s. caused reproductions of portions of plaintiffs' works on both Klemesrud's and Netcom's storage devices. Even
though the messages remained on their systems for at most eleven days, they were sufficiently "fixed" to constitute
recognizable copies under the Copyright Act. See Information Infrastructure Task Force, Intellectual Property and
("IITF Report").

c. Is Netcom Directly Liable for Making the Copies?

Accepting that copies were made, Netcom argues that Erlich, and not Netcom, is directly liable for the copying. MAI
did not address the question raised in this case: whether possessors of computers are liable for incidental copies
automatically made on their computers using their software as part of a process initiated by a third party. Netcom
correctly distinguishes MAI on the ground that Netcom did not take any affirmative action that directly resulted in
copying plaintiffs' works other than by installing and maintaining a system whereby software automatically forwards
messages received from subscribers onto the Usenet, and temporarily stores copies on its system. Netcom's actions,
to the extent that they created a copy of plaintiffs' works, were necessary to having a working system for
transmitting Usenet postings to and from the Internet. Unlike the defendants in MAI, neither Netcom nor Klemesrud
initiated the copying. The defendants in MAI turned on their customers' computers thereby creating temporary
copies of the operating system, whereas Netcom's and Klemesrud's systems can operate without any human
intervention. Thus, unlike MAI, the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs'
works does not mean

Netcom has caused the copying.[n11] The court believes that Netcom's act of designing or implementing a system
that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner

232
of a copying machine who lets the public make copies with it.\textsuperscript{[n12]} Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner's liability under the rubric of contributory infringement, not direct infringement. See, e.g., RCA Records v. All-Fast System, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984); 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT Section 12.04[A][2][b], at 12-78 to -79 (1995) ("NIMMER ON COPYRIGHT"); Elkin-Koren, supra, at 363 (arguing that "contributory infringement is more appropriate for dealing with BBS liability, first, because it focuses attention on the BBS-users relationship and the way imposing liability on BBS operators may shape this relationship, and second because it better addresses the complexity of the relationship between BBS operators and subscribers"). Plaintiffs' theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability. It is not difficult to conclude that Erlich infringes by copying a protected work onto his computer and by posting a message to a newsgroup. However, plaintiffs' theory further implicates a Usenet server that carries Erlich's message to other servers regardless of whether that server acts without any human intervention beyond the initial setting up of the system. It would also result in liability for every single Usenet server in the worldwide link of computers transmitting Erlich's message to every other computer. These parties, who are liable under plaintiffs' theory, do no more than operate or implement a system that is essential if Usenet messages are to be widely distributed. There is no need to construe the Act to make all of these parties infringers. Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.

Plaintiffs point out that the infringing copies resided for eleven days on Netcom's computer and were sent out from it onto the "Information Superhighway." However, under plaintiffs' theory, any storage of a copy that occurs in the process of sending a message to the Usenet is an infringement. While it is possible that less "damage" would have been done if Netcom had heeded plaintiffs' warnings and acted to prevent Erlich's message from being forwarded,\textsuperscript{[n13]} this is not relevant to its direct liability for copying. The same argument is true of Klemesrud and any Usenet server. Whether a defendant makes a direct copy that constitutes infringement cannot depend on whether it received a warning to delete the message. See D.C. Comics, Inc. v. Mini Gift, 912 F.2d 29, 35 (2d Cir. 1990). This distinction may be relevant to contributory infringement, however, where knowledge is an element. See infra part I.B.2.a. The court will now consider two district court opinions that have addressed the liability of BBS operators for infringing files uploaded by subscribers.

d. Playboy Case

Playboy Enterprises, Inc. v. Frena involved a suit against the operator of a small BBS whose system contained files of erotic pictures. 839 F. Supp. 1552, 1534 (M.D. Fla 1993). A subscriber of the defendant's BBS had uploaded files containing digitized pictures copied from the plaintiff's copyrighted magazine, which files remained on the BBS for other subscribers to download. Id. The court did not conclude, as plaintiffs suggest in this case, that the BBS is itself liable for the unauthorized reproduction of plaintiffs' work; instead, the court concluded that the BBS operator was liable for violating the plaintiff's right to publicly distribute and display copies of its work. Id at 1556-57.

In support of their argument that Netcom is directly liable for copying plaintiffs' works, plaintiffs cite to the court's conclusion that "[t]here is no dispute that [the BBS operator] supplied a product containing unauthorized copies of a copyrighted work. It does not matter that [the BBS operator] claims he did not make the copies [him]self." D at 1556. It is clear from the context of this discussion\textsuperscript{[n14]} that the Playboy court was looking only at the exclusive right to distribute copies to the public, where liability exists regardless of whether the defendant makes copies. Here, however, plaintiffs do not argue that Netcom is liable for its public distribution of copies. Instead, they claim that Netcom is liable because its computers in fact made copies. Therefore, the above-quoted language has no bearing on the issue of direct liability for unauthorized reproductions. Notwithstanding Playboy's holding that a BBS operator may be directly liable for distributing or displaying to the public copies of protected works,\textsuperscript{[n15]} this court holds that the storage on a defendant's system of infringing copies and retransmission to other servers is not a direct infringement by the BBS operator of the exclusive right to reproduce the work where such copies are uploaded by an infringing user. Playboy does not hold otherwise.\textsuperscript{[n16]}
e. Sega Case

A court in this district addressed the issue of whether a BBS operator is liable for copyright infringement where it solicited subscribers to upload files containing copyrighted materials to the BBS that were available for others to download. Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 683 (N.D. Cal. 1994). The defendant's "MAPIA" BBS contained copies of plaintiff Sega's video game programs that were uploaded by users. Id. at 683. The defendant solicited the uploading of such programs and received consideration for the right to download files. Id. Access was given for a fee or to those purchasing the defendant's hardware device that allowed Sega video game cartridges to be copied. Id at 683-84. The court granted a preliminary injunction against the defendant, finding that plaintiffs had shown a prima facie case of direct and contributory infringement. Id at 687. The court found that copies were made by unknown users of the BBS when files were uploaded and downloaded. Id. Further, the court found that the defendant's I knowledge of the infringing activities, encouragement, direction and provision of the facilities through his operation of the BBS constituted contributory infringement, even though the defendant did not know exactly when files were uploaded or downloaded. Id. at 686-87.

This court is not convinced that Sega provides support for a finding of direct infringement where copies are made on a defendant's BBS by users who upload files. Although there is some language in Sega regarding direct infringement, it is entirely conclusory:

Sega has established a prima facie case of direct copyright infringement under 17 U.S.C. Section 501. Sega has established that unauthorized copies of its games are made when such games are uploaded to the MAPHIA bulletin board, here with the knowledge of Defendant Scherman. These games are thereby placed on the storage media of the electronic bulletin board by unknown users. Id. at 686 (emphasis added). The court's reference to the "knowledge of Defendant" indicates that the court was focusing on contributory infringement, as knowledge is not an element of direct infringement. Perhaps, Sega's references to direct infringement and that "copies . . . are made" are to the direct activity of the "unknown users," as there can be no contributory infringement by a defendant without direct infringement by another. See 3 NIMMER ON COPYRIGHT Section 12.04[A][3][a], at 12-89. Thus, the court finds that neither Playboy nor Sega requires finding Netcom liable for direct infringement of plaintiffs' exclusive right to reproduce their works.[n17]

f. Public Distribution and Display?

Plaintiffs allege that Netcom is directly liable for making copies of their works. See FAC 25. They also allege that Netcom violated their exclusive rights to publicly display copies of their works. FAC m 44, 51. There are no allegations that Netcom violated plaintiffs' exclusive right to publicly distribute their works. However, in their discussion of direct infringement, plaintiffs insist that Netcom is liable for "maintain[ing] copies of [Erlich's] messages on its server for eleven days for access by its subscribers and 'USENET neighbors'" and they compare this case to the Playboy case, which discussed the right of public distribution. Opp'n at 7. Plaintiffs also argued this theory of infringement at oral argument. Tr.[n18] 5:22. Because this could be an attempt to argue that Netcom has infringed plaintiffs' rights of public distribution and display, the court will address these arguments.

Playboy concluded that the defendant infringed the plaintiff's exclusive rights to publicly distribute and display copies of its works. 839 F. Supp. at 1556-57. The court is not entirely convinced that the mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator. Such a holding suffers from the same problem of causation as the reproduction argument. Only the subscriber should be liable for causing the distribution of plaintiffs' work, as the contributing actions of the BBS provider are automatic and indiscriminate. Erlich could have posted his messages through countless access providers and the outcome would be the same: anyone with access to Usenet newsgroups would be able to read his messages. There is no logical reason to draw a line around Netcom and Klemersud and say that they are uniquely responsible for distributing Erlich's messages. Netcom is not even the first link in the chain of distribution-Erlich had no direct
relationship with Netcom but dealt solely with Klemesrud's BBS, which used Netcom to gain its Internet access. Every Usenet server has a role in the distribution, so plaintiffs' argument would create unreasonable liability. Where the BBS merely stores and passes along all messages sent by its subscribers and others, the BBS should not be seen as causing these works to be publicly distributed or displayed.

Even accepting the Playboy court's holding, the case is factually distinguishable. Unlike the BBS in that case, Netcom does not maintain an archive of files for its users. Thus, it cannot be said to be "supplying a product." In contrast to some of its larger competitors, Netcom does not create or control the content of the information available to its subscribers; it merely provides access to the Internet, whose content is controlled by no single entity. Although the Internet consists of many different computers networked together, some of which may contain infringing files, it does not make sense to hold the operator of each computer liable as an infringer merely because his or her computer is linked to a computer with an infringing file. It would be especially inappropriate to hold liable a service that acts more like a conduit, in other words, one that does not itself keep an archive of files for more than a short duration. Finding such a service liable would involve an unreasonably broad construction of public distribution and display rights. No purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping to achieve the Internet's automatic "public distribution" and the users' "public" display of files.

g. Conclusion

The court is not persuaded by plaintiffs' argument that Netcom is directly liable for the copies that are made and stored on its computer. Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made. Plaintiffs occasionally claim that they only seek to hold liable a party that refuses to delete infringing files after they have been warned. However, such liability cannot be based on a theory of direct infringement, where knowledge is irrelevant. The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits. Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement. Cf. IIIF Report at 69 (noting uncertainty regarding whether BBS operator should be directly liable for reproduction or distribution of files uploaded by a subscriber).[n19]

2. Contributory Infringement

Netcom is not free from liability just because it did not directly infringe plaintiffs' works; it may still be liable as a contributory infringer. Although there is no statutory rule of liability for infringement committed by others,

[1]The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) (footnote omitted). Liability for participation in the infringement will be established where the defendant, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Gershwin Publishing Corp v Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

a. Knowledge of Infringing Activity
Plaintiffs insist that Netcom knew that Erlich was infringing their copyrights at least after receiving notice from plaintiffs' counsel indicating that Erlich had posted copies of their works onto a.r.s. through Netcom's system. Despite this knowledge, Netcom continued to allow Erlich to post messages to a.r.s. and left the allegedly infringing messages on its system so that Netcom's subscribers and other Usenet servers could access them. Netcom argues that it did not possess the necessary type of knowledge because (1) it did not know of Erlich's planned infringing activities when it agreed to lease its facilities to Klemesrud, (2) it did not know that Erlich would infringe prior to any of his postings, (3) it is unable to screen out infringing postings before they are made, and (4) its knowledge of the infringing nature of Erlich's postings was too equivocal given the difficulty in assessing whether the registrations were valid and whether Erlich's use was fair. The court will address these arguments in turn.

Netcom cites cases holding that there is no contributory infringement by the lessors of premises that are later used for infringement unless the lessor had knowledge of the intended use at the time of the signing of the lease. See, e.g., Deutsch v. Arnold, 98 F.2d 686, 688 (2d Cir. 1938). The contribution to the infringement by the defendant in Deutsch was merely to lease use of the premises to the infringer. Here, Netcom not only leases space but also serves as an access provider, which includes the storage and transmission of information necessary to facilitate Erlich's postings to a.r.s. Unlike a landlord, Netcom retains some control over the use of its system. See infra part I.B.3.a. Thus, the relevant time frame for knowledge is not when Netcom entered into an agreement with Klemesrud. It should be when Netcom provided its services to allow Erlich to infringe plaintiffs' copyrights. Cf. Screen Gems-Columbia Music Inc. v. Mark-Fi Records Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (analyzing knowledge at a time that defendant rendered its particular service). It is undisputed that Netcom did not know that Erlich was infringing before it received notice from plaintiffs. Netcom points out that the alleged instances of infringement occurring on Netcom's system all happened prior to December 29, 1994, the date on which Netcom first received notice of plaintiffs' infringement claim against Erlich. See Pisani Feb. 8, 1995 Decl., s 6 & Exs. (showing latest posting made on December 29, 1994); McShane Feb. 8, 1995 Decl.; FAC m 36-38 & Ex. 1. Thus, there is no question of fact as to whether Netcom knew or should have known of Erlich's infringing activities that occurred more than 11 days before receipt of the December 28, 1994 letter.

However, the evidence reveals a question of fact as to whether Netcom knew or should have known that Erlich had infringed plaintiffs' copyrights following receipt of plaintiffs' letter. Because Netcom was arguably participating in Erlich's public distribution of plaintiffs' works, there is a genuine issue as to whether Netcom knew of any infringement by Erlich before it was too late to do anything about it. If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich's infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation in Erlich's public distribution of the message. Cf. R.T. Nimmer, THE LAW OF COMPUTER TECHNOLOGY Paragraph 15.11 B, at S 15-42 (2d ed. 1994) (opining that "where information service is less directly involved in the enterprise of creating unauthorized copies, a finding of contributory infringement is not likely").

Netcom argues that its knowledge after receiving notice of Erlich's alleged infringing activities was too equivocal given the difficulty in assessing whether registrations are valid and whether use is fair. Although a mere unsupported allegation of infringement by a copyright owner may not automatically put a defendant on notice of infringing activity, Netcom's position that liability must be unequivocal is unsupportable. While perhaps the typical infringing activities of BBSs will involve copying software, where BBS operators are better equipped to judge infringement, the fact that this involves written works should not distinguish it. Where works contain copyright notices within them, as here, it is difficult to argue that a defendant did not know that the works were copyrighted. To require proof of valid registrations would be impractical and would perhaps take too long to verify, making it impossible for a copyright holder to protect his or her works in some cases, as works are automatically deleted less than two weeks after they are posted. The court is more persuaded by the argument that it is beyond the ability of a BBS operator to accurately and fairly determine when a use is not infringement where there is at least a colorable claim of fair use. Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will
be no liability for contributory infringement for allowing the continued distribution of the works on its system.

Since Netcom was given notice of an infringement claim before Erlich had completed his infringing activity, there may be a question of fact as to whether Netcom knew or should have known that such activities were infringing. Given the context of a dispute between a former minister and a church he is criticizing, Netcom may be able to show that its lack of knowledge that Erlich was infringing was reasonable. However, Netcom admits that it did not even look at the postings once given notice and that had it looked at the copyright notice and statements regarding authorship, it would have triggered an investigation into whether there was infringement. Kobrin June 7, 1995 Decl., Ex. H, Hoffman Depo. At 125-128. These facts are sufficient to raise a question as to Netcom's knowledge once it received a letter from plaintiffs on December 29, 1994.[n21]

b. Substantial Participation

Where a defendant has knowledge of the primary infringer's infringing activities, it will be liable if it "induces, causes or materially contributes to the infringing conduct of" the primary infringer. Gershwin Publishing, 443 F.2d at 1162. Such participation must be substantial. Apple Computer, Inc v. Microsoft Corp., 821 F. Supp. 616, 625 (N.D. Cal. 1993), aff'd, 35 F.3d 1435 (9th Cir. 1994); Demetriades v. Kaufmann, 690 F. Supp. 289, 294 (S.D.N.Y. 1988).

Providing a service that allows for the automatic distribution of all Usenet postings, infringing and noninfringing, goes well beyond renting a premises to an infringer. See Fonovisa Inc. v. Cherry Auction. Inc., 847 F. Supp. 1492, 1496 (E.D. Cal. 1994) (finding that renting space at swap meet to known bootleggers not "substantial participation" in the infringers' activities). It is more akin to the radio stations that were found liable for rebroadcasting an infringing broadcast. See. e.g., Select Theatres Corp. v. Ronzoni Macaroni Corp, 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943). Netcom allows Erlich's infringing messages to remain on its system and be further distributed to other Usenet servers worldwide. It does not completely relinquish control over how its system is used, unlike a landlord. Thus, it is fair, assuming Netcom is able to take simple measures to prevent further damage to plaintiffs' copyrighted works, to hold Netcom liable for contributory infringement where Netcom has knowledge of Erlich's infringing postings yet continues to aid in the accomplishment of Erlich's purpose of publicly distributing the postings. Accordingly, plaintiffs do raise a genuine issue of material fact as to their theory of contributory infringement as to the postings made after Netcom was on notice of plaintiffs' infringement claim.

3. Vicarious Liability

Even if plaintiffs cannot prove that Netcom is contributorily liable for its participation in the infringing activity, it may still seek to prove vicarious infringement based on Netcom's relationship to Erlich. A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement. See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 306 (2d Cir. 1963). Unlike contributory infringement, knowledge is not an element of vicarious liability. 3 NIMMER ON COPYRIGHT Section 12.04[A][1], at 12-70.

a. Right and Ability To Control

The first element of vicarious liability will be met if plaintiffs can show that Netcom has the right and ability to supervise the conduct of its subscribers. Netcom argues that it does not have the right to control its users' postings before they occur. Plaintiffs dispute this and argue that Netcom's terms and conditions, to which its subscribers[n22] must agree, specify that Netcom reserves the right to take remedial action against subscribers. See. e.g., Francis Depo. at 124-126. Plaintiffs argue that under "netiquette," the informal rules and customs that have developed on the Internet, violation of copyrights by a user is unacceptable and the access provider has a duty take measures to prevent this; where the immediate service provider fails, the next service provider up the transmission stream must act. See Castleman Decl. m 3243. Further evidence of Netcom's right to restrict infringing activity is its prohibition of copyright infringement and its requirement that its subscribers indemnify it for any damage to third parties. See
Kobrin May 5, 1995 Decl., Ex. G. Plaintiffs have thus raised a question of fact as to Netcom's right to control Erlich's use of its services.

Netcom argues that it could not possibly screen messages before they are posted given the speed and volume of the data that goes through its system. Netcom further argues that it has never exercised control over the content of its users' postings. Plaintiffs' expert opines otherwise, stating that with an easy software modification Netcom could identify postings that contain particular words or come from particular individuals. Castleman Decl. m 39-43; see also Francis Depo. at 262-63; Hoffman Depo. at 173-74, 178 [n23] Plaintiffs further dispute Netcom's claim that it could not limit Erlich's access to Usenet without kicking off all 500 subscribers of Klemesrud's BBS. As evidence that Netcom has in fact exercised its ability to police its users' conduct, plaintiffs cite evidence that Netcom has acted to suspend subscribers' accounts on over one thousand occasions. See Ex. J (listing suspensions of subscribers by Netcom for commercial advertising, posting obscene materials, and off-topic postings). Further evidence shows that Netcom can delete specific postings. & Tr. 9:16. Whether such sanctions occurred before or after the abusive conduct is not material to whether Netcom can exercise control. The court thus finds that plaintiffs have raised a genuine issue of fact as to whether Netcom has the right and ability to exercise control over the activities of its subscribers, and of Erlich in particular.

b. Direct Financial Benefit

Plaintiffs must further prove that Netcom receives a direct financial benefit from the infringing activities of its users. For example, a landlord who has the right and ability to supervise the tenant's activities is vicariously liable for the infringements of the tenant where the rental amount is proportional to the proceeds of the tenant's sales. Shapiro. Bernstein, 316 F.2d at 306. However, where a defendant rents space or services on a fixed rental fee that does not depend on the nature of the activity of the lessee, courts usually find no vicarious liability because there is no direct financial benefit from the infringement. See e.g., Roy Export Co. v. Trustees of Columbia University, 344 F. Supp. 1350, 1353 (S.D.N.Y. 1972) (finding no vicarious liability of university because no financial benefit from allowing viewing of bootlegged films); Fonovisa, 847 F. Supp. at 1496 (finding swap meet operators did not financially benefit from fixed fee); see also Kelly Tickle, Comment, The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards, 80 IOWA L. REV. 391, 415 (1995) (arguing that BBS operators "lease cyberspace" and should thus be treated like landlords, who are not liable for infringement that occurs on their premises).

Plaintiffs argue that courts will find a financial benefit despite fixed fees. In Polygram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F Supp: 1314, 1330-33 (D. Mass. 1994), the court found a trade show organizer vicariously liable for the infringing performance of an exhibitor because, although the infringement did not affect the fixed rental fee received by the organizers, the organizers benefitted from the performances, which helped make the show a financial success. Sat see Artists Music. Inc. v. Reed Publishing, Inc., 31 U.S.P.Q. 2d 1623, 1994 WL 191643, at *6 (S.D.N.Y. 1994) (finding no vicarious liability for trade show organizers where revenues not increased because of infringing music performed by exhibitors). Plaintiffs cite two other cases where, despite fixed fees, defendants received financial benefits from allowing groups to perform infringing works over the radio without having to get an ASCAP license, which minimized the defendants' expenses. See Boz Scaggs Music v. KND Corp, 491 F Supp. 980, 913 (D. Conn. 1980); Realsongs v. Gulf Broadcasting Corp., 824 F. Supp. 89, 92 (M.D La 1993). Plaintiffs' cases are factually distinguishable. Plaintiffs cannot provide any evidence of a direct financial benefit received by Netcom from Erlich's infringing postings. Unlike Shapiro. Bernstein, and like Fonovisa, Netcom receives a fixed fee. There is no evidence that infringement by Erlich, or any other user of Netcom's services, in any way enhances the value of Netcom's services to subscribers or attracts new subscribers. Plaintiffs argue, however, that Netcom somehow derives a benefit from its purported "policy of refusing to take enforcement actions against its subscribers and others to transmit infringing messages over its computer networks." Opp'n at 18. Plaintiffs point to Netcom's advertisements that, compared to competitors like CompuServe and America Online, Netcom provides easy, regulation-free Internet access. Plaintiffs assert that Netcom's policy attracts copyright infringers to its system, resulting in a direct financial benefit. The court is not convinced that such an argument, if true, would constitute a
direct financial benefit to Netcom from Erlich's 'infringing activities. See Fonovisa 847 F. Supp. at 1496 (finding no
direct financial benefit despite 'argument that lessees included many vendors selling counterfeit goods and that
clientele sought "bargain basement prices"). Further, plaintiffs' argument is not supported by probative evidence.
The only "evidence" plaintiffs cite for their supposition is the declaration of their counsel, Elliot Abelson, who states
that [o]n April 7, 1995, in a conversation regarding Netcom's position related to this case, Randolph Rice, attorney for
Netcom, informed me that Netcom's executives are happy about the publicity it is receiving in the press as a result of
this case. Mr. Rice also told me that Netcom was concerned that it would lose business if it took action against
Erlich or Klemesrud in connection with Erlich's infringements. Abelson Decl. Paragraph 2. Netcom objects to this
declaration as hearsay and as inadmissible evidence of statements made in compromise negotiations. Fed. R. Ev. 801, 408.
Whether or not this declaration is admissible, it does not support plaintiffs' argument that Netcom either has a
policy of not enforcing violations of copyright laws by its subscribers or, assuming such a policy exists, that
Netcom's policy directly financially benefits Netcom, such as by attracting new subscribers. Because plaintiffs have
failed to raise a question of fact on this vital element, their claim of vicarious liability fails. See Roy Exports 344 F. Supp. at 1353.

4. First Amendment Argument

Netcom argues that plaintiffs' theory of liability contravenes the first amendment, as it would chill the use of the
Internet because every access provider or user would be subject to liability when a user posts an infringing work to a
Usenet newsgroup. While the court agrees that an overbroad injunction might implicate the First Amendment, see In
re Capital Cities/ABC. Inc, 918 F.2d 140, 144 (11th Cir. 1990), imposing liability for infringement where it is
otherwise appropriate does not necessarily raise a First Amendment issue. The copyright concepts of the
idea/expression dichotomy and the fair use defense balance the important First Amendment rights with the
constitutional authority for "promot[ing] the progress of science and useful arts," U.S. CONST. art. I, Section 8, cl.
8; 1 NIMMER ON COPYRIGHT Section 1.10[B], at 1-71 to -83. Netcom argues that liability here would force
Usenet servers to perform the impossible-screening all the information that comes through their systems. However,
the court is not convinced that Usenet servers are directly liable for causing a copy to be made, and absent evidence
of knowledge and participation or control and direct profit, they will not be contributorily or vicariously liable. If
Usenet servers were responsible for screening all messages coming through their systems, this could have a serious
chilling effect on what some say may turn out to be the best public forum for free speech yet devised. A Jerry Berman
& Daniel J. Weitzner, Access and User Control: Renewing the Democratic Heart of the First Amendment in the
Age of Interactive Media, 104 YALE L. J. 1619, 1624 (1995) (praising decentralized networks for opening access to
all with no entity stifling independent sources of speech); Rose, supra at 4.[n25] Finally, Netcom admits that its First
Amendment argument is merely a consideration in the fair use argument, which the court will now address. See
Reply at 24.

5. Fair Use Defense

Assuming plaintiffs can prove a violation of one of the exclusive rights guaranteed in section 106, there is no
infringement if the defendant's use is fair under section 108. The proper focus here is on whether Netcom's actions
qualify as fair use, not on whether Erlich himself engaged in fair use; the court has already found that Erlich was not
likely entitled to his own fair use defense, as his postings contained large portions of plaintiffs' published and
unpublished works quoted verbatim with little added commentary.

Although the author has the exclusive rights to reproduce, publicly distribute, and publicly display a copyrighted
work under section 106, these rights are limited by the defense of "fair use." 17 U.S.C. Section 107. The defense
"permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the
very creativity which that law is designed to foster." Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170
(1994) (citation omitted). Congress has set out four nonexclusive factors to be considered in determining the
availability of the fair use defense:
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. Section 107. The fair use doctrine calls for a case-by-case analysis. Campbell, 114 S. Ct. at 1170. All of the factors "are to be explored, and the results weighed together, in light of the purposes of copyright." Id at 1170-71.

a. First Factor: Purpose and Character of the Use

The first statutory factor looks to the purpose and character of the defendant's use. Netcom's use of plaintiffs' works is to carry out its commercial function as an Internet access provider. Such a use, regardless of the underlying uses made by Netcom's subscribers, is clearly commercial. Netcom's use, though commercial, also benefits the public in allowing for the functioning of the Internet and the dissemination of other creative works, a goal of the Copyright Act. See Sega v. Accolade 977 F.2d 1510, 1523 (9th Cir. 1992) (holding that intermediate copying to accomplish reverse engineering of software fair use despite commercial nature of activity; considering public benefit of use). The Campbell Court emphasized that a commercial use does not dictate against a finding of fair use, as most of the uses listed in the statute are "generally conducted for profit in this country." 114 S. Ct. at 1174. Although Netcom gains financially from its distribution of messages to the Internet, its financial incentive is unrelated to the infringing activity and the defendant receives no direct financial benefit from the acts of infringement. Therefore, the commercial nature of the defendant's activity should not be dispositive. Moreover, there is no easy way for a defendant like Netcom to secure a license for carrying ever, v possible type of copyrighted work onto the Internet. Thus, it should not be seen as "profit[ing] from the exploitation of the copyrighted work without paying the customary prices." Harper & Row. Publishers. Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985). It is undisputed that, unlike the defendants in Playboy and Sega, Netcom does not directly gain anything from the content of the information available to its subscribers on the Internet. See supra part I.B.3.b. Because it does not itself provide the files or solicit infringing works, its purpose is different from that of the defendants in Playboy and Sega. Because Netcom's use of copyrighted materials served a completely different function than that of the plaintiffs, this factor weighs in Netcom's favor, see Hustler Magazine. Inc. v. Moral Majority. Inc., 606 F. Supp. 1526, 1535 (C.D. Cal. 1985), aff'd, 796 F.2d 1148 (9th Cir. 1986), notwithstanding the otherwise commercial nature of Netcom's use.

b. Second Factor: Nature of the Copyrighted Work

The second factor focuses on two different aspects of the copyrighted work: whether it is published or unpublished and whether it is informational or creative. [n26] Plaintiffs rely on the fact that some of the works transmitted by Netcom were unpublished and some were arguably highly creative and original. However, because Netcom's use of the works was merely to facilitate their posting to the Usenet, which is an entirely different purpose than plaintiffs' use (or, for that matter, Erlich's use), the precise nature of those works is not important to the fair use determination. Campbell, 114 S. Ct. at 1175 (finding creative nature of work copied irrelevant where copying for purposes of parody); Hustler Magazine. 606 F. Supp. at 1537; 3 NIMMER ON COPYRIGHT Section 13.05[A][2][a], at 13177 ("It is sometimes necessary, in calibrating the fair use defense, to advert to the defendant's usage simultaneously with the nature of the plaintiff's work.").

c. Third Factor: Amount and Substantiality of the Portion Used

The third factor concerns both the percentage of the original work that was copied and whether that portion constitutes the "heart" of the copyrighted work. Harper & Row, 471 U.S. at 564-65. Generally, no more of a work may be copied than is necessary for the particular use. See Supermarket of Homes v. San Fernando Valley Board of Realtors 786 F.2d 1400, 1409 (9th Cir. 1986). The copying of an entire work will ordinarily militate against a finding of fair use, although this is not a per se rule. Sony, 464 U.S. at 449-450.
Plaintiffs have shown that Erlich's postings copied substantial amounts of the originals or, in some cases, the entire works. Netcom, of course, made available to the Usenet exactly what was posted by Erlich. As the court found in Sony, the mere fact that all of a work is copied is not determinative of the fair use question, where such total copying is essential given the purpose of the copying. Id (allowing total copying in context of time-shifting copyrighted television shows by home viewers). For example, where total copying was necessary to carry out the defendants' beneficial purpose of reverse engineering software to get at the ideas found in the source code, the court found fair use. Sega v. Accolade, 977 F.2d at 1526-27. Here, Netcom copied no more of plaintiffs' works than necessarily to function as a Usenet server. Like the defendant in Sega v. Accolade, Netcom had no practical alternative way to carry out its socially useful purpose; a Usenet server must copy all files, since the prescreening of postings for potential copyright infringement is not feasible. 977 F.2d at 1526. Accordingly, this factor should not defeat an otherwise valid defense.

d. Fourth Factor: Effect of the Use upon the Potential Market for the Work

The fourth and final statutory factor concerns "the extent of market harm caused by the particular actions of the alleged infringer" and "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original." Campbell, 114 S. Ct. at 1177 (quoting 3 NIMMER ON COPYRIGHT Section 13.05 [A][4]) (remanding for consideration of this factor). Although the results of all four factors must be weighed together, id at 1171, the fourth factor is the most important consideration, 3 NIMMER ON COPYRIGHT Section 13.05[A][4], at 13-188 to -189 (citing Harper & Row, 471 U.S. at 566), 13-207 (observing that fourth factor explains results in recent Supreme Court cases).

Netcom argues that there is no evidence that making accessible plaintiffs' works, which consist of religious scriptures and policy letters, will harm the market for these works by preventing someone from participating in the Scientology religion because they can view the works on the Internet instead. Further, Netcom notes that the relevant question is whether the postings fulfill the demand of an individual who seeks to follow the religion's teachings, and not whether they suppress the desire of an individual who is affected by the criticism posted by Erlich. Netcom argues that the court must focus on the "normal market" for the copyrighted work, which in this case is through a Scientology-based organization. Plaintiffs respond that the Internet's extremely widespread distribution—where more than 25 million people worldwide have access—multiplies the effects of market substitution. In support of its motion for a preliminary injunction against Erlich, plaintiffs submitted declarations regarding the potential effect of making the Church's secret scriptures available over the Internet. Plaintiffs point out that, although the Church currently faces no competition, groups in the past have used stolen copies of the Church's scriptures in charging for Scientology-like religious training. See e.g., Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 633-34 (S.D. Cal. 1993); Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1078-79 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). This evidence raises a genuine issue as to the possibility that Erlich's postings, made available over the Internet by Netcom, could hurt the market for plaintiffs' works.

e. Equitable Balancing

In balancing the various factors, the court finds that there is a question of fact as to whether there is a valid fair use defense. Netcom has not justified its copying plaintiffs' works to the extent necessary to establish entitlement to summary judgment in light of evidence that it knew that Erlich's use was infringing and had the ability to prevent its further distribution. While copying all or most of a work will often preclude fair use, courts have recognized the fair use defense where the purpose of the use is beneficial to society, complete copying is necessary given the type of use, the purpose of the use is completely different than the purpose of the original, and there is no evidence that the use will significantly harm the market for the original. This case is distinguishable from those cases recognizing fair use despite total copying. In Sony, the home viewers' use was not commercial and the viewers were allowed to watch the entire shows for free. In Sega v. Accolade, the complete copying was necessitated to access the unprotectable idea in the original. Here, plaintiffs never gave either Edich or Netcom permission to view or copy
their works. Netcom's use has some commercial aspects. Further, Netcom's copying is not for the purpose of getting to the unprotected idea behind plaintiffs' works. Although plaintiffs may ultimately lose on their infringement claims if, among other things, they cannot prove that posting their copyrighted works will harm the market for these works, see Religious Technology Center v. Lerma, F. Supp., No. 95-1107-A, slip op. at 10 (E.D. Va. August 30, 1995) (finding fair use defense exists where no separate market for works because Scientologists cannot effectively use them without the Church's supervision); Religious Technology Center v. F.A.C.T. Net. Inc., No. 95-B-2143, slip op. at 11-14 (D. Colo. September 15, 1995) (finding no showing of a potential effect on the market for plaintiffs' works), fair use presents a factual question on which plaintiffs have at least raised a genuine issue of fact. Accordingly, the court does not find that Netcom's use was fair as a matter of law.

C. Conclusion

The court finds that plaintiffs have raised a genuine issue of fact regarding whether Netcom should have known that Erlich was infringing their copyrights after receiving a letter from plaintiffs, whether Netcom substantially participated in the infringement, and whether Netcom has a valid fair use defense. Accordingly, Netcom is not entitled to summary judgment on plaintiffs' claim of contributory copyright infringement. However, plaintiffs' claims of direct and vicarious infringement fail.

II. KLEMESRUD'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standards for Judgment on the Pleadings

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(C) is directed at the legal sufficiency of a part's allegations. A judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. General Conference Corp. v. Seventh Day Adventist Church, 887 F.2d 228, 230 (9th Cir. 1989), =, denied, 493 U.S. 1079 (1990); Hal Roach Studios v. Rich-d Feiner & Asso., 896 F.2d 1542, 1550 (9th Cir. 1990). In ruling on a motion for judgment on the pleadings, district courts must accept all material allegations of fact alleged in the complaint as true, and resolve all doubts in favor of the nonmoving party. Id. The court need not accept as true conclusory allegations or legal characterizations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Materials submitted with the complaint may be considered. Hal Roach Studios, 896 F.2d at 1555. All affirmative defenses must clearly appear on the face of the complaint. McCallen v. California Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990).

B. Copyright Infringement

1. Direct Infringement

First, plaintiffs allege that Klemesrud directly infringed their copyrights by "reproduce[ing] and publish[ing] plaintiffs' works. FAC Paragraph 35. The complaint alleges that "Erlich . . . caused copies of [plaintiffs' works] to be published, without authorization, on the BBS computer maintained by Klemesrud" and that "Klemesrud's BBS computer, after receiving and storing for some period of time the copies of the Works sent to it from Erlich, created additional copies of the works and sent these copies to Netcom's computer." FAC Paragraph 34. The allegations against Klemesrud fail for the same reason the court found that Netcom was entitled to judgment as a matter of law on the direct infringement claim. There are no allegations that Klemesrud took any affirmative steps to cause the copies to be made. The allegations, in fact, merely say that "Erlich . . . caused" the copies to be made and that Klemesrud's computer, not Klemesrud himself, created additional copies. There are no allegations in the complaint to overcome the missing volitional or causal elements necessary to hold a BBS operator directly liable for copying that automatic and caused by a subscriber. See supra part I.B. I.

2. Contributory Infringement
Second, the complaint alleges that Klemesrud is contributorily liable. FAC 1135- It further alleges that plaintiffs repeatedly objected to Klemesrud's actions and informed him that Erlich's (and his) actions constituted infringement. FAC Paragraph 36. A letter attached to the complaint indicates that such notice was first sent to Klemesrud on December 30, 1994. FAC, Ex. I. Despite the warnings, Klemesrud allegedly refused to assist plaintiffs in compelling Erlich to stop his postings and refused to stop receiving, copying, transmitting and publishing the postings. FAC Paragraph 38. To state a claim for contributory infringement, plaintiffs must allege that Klemesrud knew or should have known of Erlich's infringing actions at the time they occurred and yet substantially participated by "induc[ing], caus[ing] or materially contribut[ing] to the infringing conduct" of Erlich. Gershwin, 443 F.2d at 1162. For the reasons discussed in connection with Netcom's motion, the court finds plaintiffs' pleadings sufficient to raise an issue of contributory infringement.

3. Vicarious Liability

The third theory of liability argued by plaintiffs, vicarious liability, is not specifically mentioned in the complaint. Nonetheless, this theory fails as a matter of law because there are insufficient factual allegations to support it. Plaintiffs must show that Klemesrud had the right and ability to control Erlich's activities and that Klemesrud had a direct financial interest in Erlich's infringement. Shapiro Bernstein, 316 F.2d at 306. A letter from Klemesrud to plaintiffs' counsel states that Klemesrud would comply with plaintiffs' request to take actions against Erlich by deleting the infringing postings from his BBS if plaintiffs mailed him the original copyrighted work and he found that they matched the allegedly infringing posting. FAC, Ex. J. Plaintiffs argue that this letter indicates Klemesrud's ability and right to control Erlich's activities on his BBS. The court finds that this letter, construed in the light most favorable to plaintiffs, raises a question as to whether plaintiffs can show that Klemesrud, in the operation of his BBS, could control Erlich's activities, such as by deleting infringing postings. However, plaintiffs' failure to allege a financial benefit is fatal to their claim for vicarious liability.

The complaint alleges that Klemesrud is in the business of operating a BBS for subscribers for a fee. The complaint does not say how the fee is collected, but there are no allegations that Klemesrud's fee, or any other direct financial benefit received by Klemesrud, varies in any way with the content of Erlich's postings. Nothing in or attached to the complaint states that Klemesrud in any way profits from allowing Erlich to infringe copyrights. Plaintiffs are given 30 days leave in which to amend to cure this pleadings deficiency if they can do so in good faith.

III. PRELIMINARY INJUNCTION AGAINST NETCOM AND KLEMSRUD

A. Legal Standards for a Preliminary Injunction

A party seeking a preliminary injunction may establish its entitlement to equitable relief by showing either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) serious questions as to these matters and the balance of hardships tipping sharply in the movant's favor. First Brands Corp. v. Fred Meyer. Inc., 809 F.2d 1378, 1381 (9th Cir. 1987). These two tests are not separate, but represent a "continuum" of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success need be shown. Regents of University of California v. American Broadcasting Cos., 747 F.2d 511, 515 (9th Cir. 1984). The primary purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

B. Likelihood of Success

The court finds that plaintiffs have not met their burden of showing a likelihood of success on the merits as to either Netcom or Klemesrud. The only viable theory of infringement is contributory infringement, and there is little evidence that Netcom or Klemesrud knew or should have known that Erlich was engaged in copyright infringement of plaintiffs' works and was not entitled to a fair use defense, especially as they did not receive notice of the alleged infringement until after all but one of the postings were completed. Further, their participation in the infringement
was not substantial. Accordingly, plaintiffs will not likely prevail on their claims.

C. Irreparable Injury

The court will presume irreparable harm for the copyright claim where plaintiffs have shown a likelihood of success in their claims of infringement. Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 886 F.2d 1173, 1174 (9th Cir. 1989). Here, however, plaintiffs have not made an adequate showing of likelihood of success. More importantly, plaintiffs have not shown that the current preliminary injunction prohibiting Erlich from infringing plaintiffs' copyrights will not be sufficient to avoid any harm to plaintiffs' intellectual property rights.

D. First Amendment Concerns

There is a strong presumption against any injunction that could act as a "prior restraint" on free speech, citing CBS. Inc. v. Davis, 114 S. Ct. 912, 913-14 (1994) (Justice Blackmun, as Circuit Justice, staying a preliminary injunction prohibiting CBS from airing footage of inside of meat packing plant). Because plaintiffs seek injunctive relief that is broader than necessary to prevent Erlich from committing copyright infringement, there is a valid First Amendment question raised here. Netcom and Klemesrud play a vital role in the speech of their users. Requiring them to prescreen postings for possible infringement would chill their users' speech. In re Capital Cities/ABC. Inc, 918 F.2d at 144.

E. Conclusion

Plaintiffs have not shown a likelihood of success on the merits of their copyright claims nor irreparable harm absent an injunction against defendants Netcom and Klemesrud. Accordingly, plaintiffs are not entitled to a preliminary injunction.

\/ ORDER

The court denies Netcom's motion for summary judgment and Klemesrud's motion for judgment on the pleadings, as a triable issue of fact exists on the claim of contributory infringement. The court also gives plaintiffs 30 days leave in which to amend to state a claim for vicarious liability against defendant Klemesrud, if they can do so in good faith. Plaintiffs' application for a preliminary injunction against defendants Netcom and Klemesrud is denied.

The parties shall appear for a case management conference at 10:30 a.m. on Friday, January 1-9, 1996. The deadline for completing required disclosures is January 5, 1996. The joint case management conference statement must be filed by January 12, 1996.

DATED: 11/21/95

/s/ RONALD M. WHYTE

United States District Judge

- - - - - FOOTNOTES - - - - -


2 "The Internet today is a worldwide entity whose nature cannot be easily or simply defined. From a technical definition, the Internet is the 'set of all interconnected IP networks'-the collection of several thousand local, regional, and global computer networks interconnected in real time via the TCP/IP Internetworking Protocol suite." Daniel P.
Dern, The Internet Guide for New Users 16 (1994). One article described the Internet as a collection of thousands of local, regional, and global Internet Protocol networks. What it means in practical terms is that millions of computers in schools, universities, corporations, and other organizations are tied together via telephone lines. The Internet enables users to share files, search for information, send electronic mail, and log onto remote computers. But it isn't a program or even a particular computer resource. It remains only a means to link computer users together.

Unlike on-line computer services such as CompuServe and America On Line, no one runs the Internet....

No one pays for the Internet because the network itself doesn't exist as a separate entity. Instead various universities and organizations pay for the dedicated lines linking their computers. Individual users may pay an Internet provider for access to the Internet via its server.

David Bruning, Along the InfoBahn, ASTRONOMY, Vol. 23, No. 6, p. 76 (June 1995).

3 Issues of Erlich's liability were addressed in this court's order of September 22, 1995. That order concludes in part that a preliminary injunction against Erlich is warranted because plaintiffs have shown a likelihood of success on their copyright infringement claims against him. Plaintiffs likely own valid copyrights in Hubbard's published and unpublished works and Erlich's near-verbatim copying of substantial portions of plaintiffs' works was not likely a fair use. To the extent that Netcom and Klemesrud argue that plaintiffs' copyrights are invalid and that Netcom and Klemesrud are not liable because Erlich had a valid fair use defense, the court previously rejected these arguments and will not reconsider them here.

4 The Usenet has been described as a worldwide community of electronic BBSSs that is closely associated with the Internet and with the Internet community. Paragraph The messages in Usenet are organized into thousands of topical groups, or "Newsgroups".... Paragraph As a Usenet user, you read and contribute ("post") to your local Usenet site. Each Usenet site distributes its users' postings to other Usenet sites based on various implicit and explicit configuration settings, and in turn receives postings from other sites. Usenet traffic typically consists of as much as 30 to 50 Mbytes of messages per day. Paragraph Usenet is read and contributed to on a daily basis by a total population of millions of people.... Paragraph There is no specific network that is the Usenet. Usenet traffic flows over a wide range of networks, including the Internet and dial-up phone links. Dern, supra, at 196-97.

5 The First Amended Complaint ("FAC") contains three claims: (1) copyright infringement of BPTIS published literary works against all defendants; (2) copyright infringement of RTC's unpublished confidential works against all defendants; and (3) misappropriation of RTC'S trade secrets against defendant Erlich only.

6 Klemesrud alternatively filed a motion for summary judgment, which will not be considered at this struck those portions of the motion that referred matters outside of the pleadings.

7 In this context, "copying" is "shorthand for the infringement of any of the copyright owner's five exclusive rights." S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1085 n.3 (9th Cir. 1989).

8 The court has under submission plaintiffs' request to expand the preliminary injunction against Erlich.

9 Plaintiffs have argued at times during this litigation that Netcom should only be required to respond after being given notice, which is only relevant to contributory infringement. Nevertheless, the court will address all three theories of infringement liability.

10 The strict liability for copyright infringement is in contrast to another area of liability affecting online service providers: defamation. Recent decisions have held that where a BBS exercised little control over the content of the material on its service, it was more like a "distributor" than a "republishe" and was thus only liable for defamation on its system where it knew or should have known of the defamatory statements. Cubby, Inc. v. CompuServe. Inc.,
776 F. Supp. 135 (S.D.N.Y. 1991). By s contrast, a New York state court judge found that Prodigy was a publisher because it held itself out to be controlling the content of its services and because it used software to automatically prescreen messages that were offensive or in bad taste. Stratton Oakmont, Inc. v. Prodigy Services Co., THE RECORDER, June 1, 1995, at 7 (excerpting May 24, 1995 Order Granting Partial Summary Judgment to Plaintiffs).

One commentator addressed the difficulty in translating copyright concepts, including the public/private dichotomy, to the digitized environment. See Niva Elkin-Koren, Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 346, 390 (1993). This commentator noted that one way to characterize a BBS operation is that it "provides subscribers with access and services. AS such, BBS operators do not create copies, and do not transfer them in any way. Users post the copies on the BBS, which other users can then read or download." Id at 356.

12 Netcom compares itself to a common carrier that merely acts as a passive conduit for information. In a sense, a Usenet server that forwards all messages acts like a common carrier, passively retransmitting every message that gets sent through it. Netcom would seem no more liable than the phone company for carrying an infringing facsimile transmission or storing an infringing audio recording on its voice mail. AS Netcom's counsel argued, holding such a server liable would be like holding the owner of the highway, or at least the operator of a toll booth, liable for the criminal activities that occur on its roads. Since other similar carriers of information are not liable for infringement, there is some basis for exempting Internet access providers from liability for infringement by their users. The IITF Report concluded that "[i]f an entity provided only the wires and conduits such as the telephone company, it would have a good argument for an exemption if it was truly in the same position as a common carrier and could not control who or what was on its system." IITF Report at 122. Here, perhaps, the analogy is not completely appropriate as Netcom does more than just "provide the wire and conduits." Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier. a - at 122 n.392 (citing Federal Communications Commission v. MidwestVideo Corp., 440 U.S. 689, 701 (1979)). Section 111 of the Copyright Act codifies the exemption for passive carriers who are otherwise liable for a secondary transmission. 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright Section 12.04[B][3], at 12-99 (1995). However, the carrier must not have any direct or indirect control over the content or selection of the primary transmission. Id; 17 U.S.C. Section 111(a)(3). Cf, infra, part I.B.3.a. In any event, common carriers are granted statutory exemptions for liability that might otherwise exist. Here, Netcom does not fall under this statutory exemption, and thus faces the usual strict liability scheme that exists for copyright. Whether a new exemption should be carved out for online service providers is to be resolved by Congress, not the courts. Compare Comment, "Online Service Providers and Copyright Law: The Need for Change," I SYRACUSE J. LEGIS. & POL'Y 197, 202 (1995) (citing recommendations of online service providers for amending the Copyright Act to create Liability only where a "provider has 'actual knowledge that a work that is being or has been transmitted onto, or stored on, its system is infringing,' and has the 'ability and authority' to stop the transmission, and has, after a reasonable amount of time, allowed the infringing activity to continue")) with IITF Report at 122 (recommending that Congress not exempt service providers from strict liability for direct infringements).

13 The court notes, however, that stopping the distribution of information once it is on the Internet is not easy. The decentralized network was designed so that if one link in the chain be closed off, the information will be dynamically rerouted through another link. This was meant to allow the system to be used for communication after a catastrophic event that shuts down part of it. Francis Decl. Paragraph 4.

14 The paragraph in Playboy containing the quotation begins with a description of the right of public distribution. Id Further, the above quoted language is followed by a citation to a discussion of the right of public distribution in Jay Dratler, Jr., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY Section 6.01[3], at 6-15 (1991). This treatise states that "the distribution right may be decisive, if, for example, a distributor supplies products containing unauthorized copies of a copyrighted work but has not made the copies itself." Id. (citing to Williams Electronics, Inc. v. Arctic International, Inc., 685 F.2d 870, 876 (3d Cir. 1982)). In any event, the Williams holding regarding public distribution was dicta, as the court found that the defendant had
15 Given the ambiguity in plaintiffs' reference to a violation of the right to 'publish' and to Playboy, it is possible that plaintiffs are also claiming that Netcom infringed their exclusive right to publicly distribute their works. The court will address this argument infra.

16 The court further notes that Playboy has been much criticized. See, e.g., L. Rose, NETLAW 91-92 (1995). The finding of direct infringement was perhaps influenced by the fact that there was some evidence that defendants in fact knew of the infringing nature of the works, which were digitized photographs labeled "Playboy" and "Playmate."

17 To the extent that Sega holds that BBS operators are directly liable for copyright infringement when users upload infringing works to their systems, this court respectfully disagrees with the court's holding for the reasons discussed above. Further, such a holding was dicta, as there was evidence that the supporting the contributory infringement theory. Id. at 683.

18 References to "Tr." are to the reporter's transcript of the June 23, 1995 hearing on these motions.

19 Despite that uncertainty, the IITF Report recommends a strict liability paradigm for BBS operators. See IITF Report at 122-24. It recommends that Congress not exempt on-line service providers from strict liability because this would prematurely deprive the system of an incentive to get providers to reduce the damage to copyright holders by reducing the chances that users will infringe by educating them, requiring indemnification, purchasing insurance, and, where efficient, developing technological solutions to screening out infringement. Denying strict liability in many cases would leave copyright owners without an adequate remedy since direct infringers may act anonymously or pseudonymously or may not have the resources to pay a judgment. Id.; see also Hardy, supra.

20 Adopting such a rule would relieve a BBS of liability for failing to take steps to remove infringing works from its system even after being handed a court's order finding infringement. This would be undesirable and is inconsistent with Netcom's counsel's admission that Netcom would have an obligation to act in such circumstances. Tr. 35:25; see also Tr. 42:18-42:20.

21 The court does not see the relevance of plaintiffs' argument that Netcom's failure to investigate their claims of infringement or take actions against Erlich was a departure from Netcom's normal procedure. A policy and practice of acting to stop postings where there is inadequate knowledge of infringement in no way creates a higher standard of care under the Copyright Act as to subsequent claims of user infringement.

22 In this case, Netcom is even further removed from Erlich's activities. Erlich was in a contractual relationship only with Klemesrud. Netcom thus dealt directly only with Klemesrud. However, it is not crucial that Erlich does not obtain access directly through Netcom. The issue is Netcom's right and ability to control the use of its system, which it can do indirectly by controlling Klemesrud's use.

23 However, plaintiffs submit no evidence indicating Netcom, or anyone, could design software that could determine whether a posting is infringing.

24 For example, plaintiffs' demand that the court order Netcom to terminate Klemesrud's BBS's access to the Internet, thus depriving all 500 of his subscribers, would be overbroad, as it would unnecessarily keep hundreds of users, against whom there are no allegations of copyright infringement, from accessing a means of speech. The overbroadness is even more evident if, as plaintiffs contend, there is a way to restrict only Erlich's access to a.r.s.

25 Netcom additionally argues that plaintiffs' theory of liability would have a chilling effect on users, who would be liable for merely browsing infringing works. Browsing technically causes an infringing copy of the digital information to be made in the screen memory. MAI holds that such a copy is fixed even when information is temporarily placed
in RAM, such as the screen RAM. The temporary copying involved in browsing is only necessary because humans cannot otherwise perceive digital information. It is the functional equivalent of reading, which does not implicate the copyright laws and may be done by anyone in a library without the permission of the copyright owner. However, it can be argued that the effects of digital browsing are different because millions can browse a single copy of a work in cyberspace, while only one can read a library's copy at a time.

Absent a commercial or profit-depriving use, digital browsing is probably a fair use; there could hardly be a market for licensing the temporary copying of digital works onto computer screens to allow browsing. Unless such a use is commercial, such as where someone reads a copyrighted work online and therefore decides not to purchase a copy from the copyright owner, fair use is likely. Until reading a work online becomes as easy and convenient as reading a paperback, copyright owners do not have much to fear from digital browsing and there will not likely be much market effect.

Additionally, unless a user has reason to know, such as from the title of a message, that the message contains copyrighted materials, the browser will be protected by the innocent infringer doctrine, which allows the court to award no damages in appropriate circumstances. In any event, users should hardly worry about a finding of direct infringement; it seems highly unlikely from a practical matter that a copyright owner could prove such infringement or would want to sue such an individual.

26 A recent report noted that a third aspect of the nature of the work may be relevant: whether it is in digital or analog form. IIIF Report at 78. Although the copyright laws were developed before digital works existed, they have certainly evolved to include such works, and this court can see no reason why works should deserve less protection because they are in digital form, especially were, as here, they were not put in such form by plaintiffs.
Howard STERN, Plaintiff,
v.
DELPHI INTERNET SERVICES CORPORATION, Defendant.

Supreme Court, New York County,
Part 17.
April 20, 1995.

Phillips, Nizer, Benjamin, Krim, & Ballon by Michael J. Silverberg, for plaintiff.
Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin by Slade R. Metcalf, for defendant.

EMILY JANE GOODMAN, Justice.

BACKGROUND AND FACTS

This case involves state-of-the-art electronic communication and public figures.

Howard Stern ("Stern" or "Plaintiff"), a controversial radio talk show celebrity and heavily promoted public figure, announced his candidacy for the office of Governor of the State of New York in the Spring of 1994. Defendant Delphi Internet Services Corporation ("Delphi" or "Defendant") provides access to paid subscribers to the vast electronic "information super highway," known as the Internet. Stern brought this lawsuit because his photograph was used without his permission in an advertisement for the on-line bulletin board service Delphi had set up to debate Stern's own political candidacy. There is no allegation that the defendant obtained the outlandish, bare buttock photo unlawfully or improperly. It is clear that plaintiff posed for the picture, but he does not object on grounds of its lewdness.

Delphi, as an on-line computer network, offers three types of information services to its subscribers: (1) "hard information," such as news stories, stock quotes, or reference material; (2) computer games; (3) user interaction, meaning electronic mail, on-line conferences or bulletin board messages. Delphi has been operating for eleven years and currently has over 100,000 subscribers who pay "on-line time" for access.

Delphi set up on its on-line electronic bulletin board, a subscriber-participation debate on the merits of Stern's candidacy. A June 1994 full page advertisement in New York Magazine and the New York Post featured the flamboyant photograph of Stern in leather pants which largely exposed his buttocks. The ad caption read "Should this man be the next governor of New York?" and continued: You've heard him. You've seen him. You've been exposed to his Private Parts. Now he's stumping to be governor. Maybe it's time to tell the world exactly what you think. The Internet's the one frontier even the King of (Almost) All Media hasn't conquered. And Delphi's where you get aboard. The online service that "leads the way in Internet access." With Delphi, navigating the Net is as easy as falling down. Assistance is available at every turn. From help files, guides and books, to hundreds of online experts, including Wald Howe, Delphi's resident Internet guru and all around smart guy. So whether you think Howard-the-Aspiring-Governor should be crowned King of the Empire State, or just greased up and sent face-first down a water slide, don't put a cork in it. Sit down, jack in, and be heard.

In this action Stern alleges that defendant's use of his name and photograph violates Sections 50 and 51 of the New York Civil Rights Law (the "CRL"). Stern does not deny that it is his picture and buttocks that appear in the advertisement, nor does Delphi.
Defendants have moved to dismiss the complaint, pursuant to CPLR 3211(a)(7), (c).

DISCUSSION


To state a claim under § 51, plaintiff must show that: (1) defendant used his name, portrait or picture, (2) for purposes of trade or advertising, (3) without his written consent. Cohen, 482 N.Y.S.2d at 459, 472 N.E.2d at 309. It is undisputed that Delphi used Stern's name and picture without his permission, and that both were used "for advertising purposes" within the meaning of the statute since it "appeared in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." Beverley v. Choices Women's Medical Center, 78 N.Y.2d 745, 579 N.Y.S.2d 637, 640, 587 N.E.2d 275, 278 (1991).

Defendants contends, however, that its use of Stern's name and photograph falls within the scope of the "incidental use exception" to Sections 50 and 51. [FN1]

FN1. The Court need not reach the issue of the newsworthiness exception as the Court finds that the incidental use exception applies.

The incidental use exception was first adopted in Humiston v. Universal Film Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1st Dept. 1919). The court there held that a news disseminator was entitled to display the name and photograph of a woman who was the subject of the defendant's newsreel for purposes of attracting and selling the film. The court reasoned: If it be held that they cannot be used under the statute for purposes of advertising these motion pictures, then it is clear that they cannot advertise the motion pictures at all, because they cannot be fully advertised, at least, without giving the name of the parties represented ... [T]he use of the plaintiff's name or picture in the approach to the theater and upon the billboard in from, as advertising what was to appear upon the screen, is ... incidental to the exhibition of the film itself.

Humiston, supra, 178 N.Y.S. at 758.

Here we are presented with the novel issues of whether Delphi's electronic bulletin board service is to be treated as a news disseminator, whether the incidental use exception is applicable, and defendant's entitlement to First Amendment protections.

Although only paid subscribers may access Delphi's on-line information services from their computers or terminals, this service is analogous to that of a news vendor or bookstore, or a
letters-to-the-editor column of a newspaper, which require purchase of their materials for the public to actually gain access to the information carried. As Judge Leisure of the United States District Court, Southern District of New York, has noted, "a computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor ... than that which is applied to a public library, bookstore or newsstand would impose an undue burden on the free flow of information." Cubby, Inc. v. CompuServe, Inc., 776 F.Supp. 135, 140 (S.D.N.Y.1991). In Cubby, Judge Leisure found that Compuserve, a computer service company that provides service similar to Delphi, was in essence "an electronic, for-profit library" which is afforded the same First Amendment protections as distributors of publications. Similarly, here it is evident that Delphi's on-line service must be analogized to distributors such as news vendors, bookstores and libraries. (It is unnecessary to discuss Delphi's function as a media news organization disseminating "hard news").

New York courts have consistently held that the incidental advertising exception applies to all "news disseminators," not just newspapers and magazines. See Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737, 741 (1st Dept.), aff'd, 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812 (1962) (privileged or incidental advertising use by a news disseminator of a person's name or identity does not violate CRL § 51); Velez v. VV Pub. Corp., 135 A.D.2d 47, 50, 524 N.Y.S.2d 186, 187 (1st Dept.), appeal denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425 (1988) ("[T]he incidental use in an advertisement by a news disseminator of a person's name or identity does not violate the statutory proscription, if it had previously published the item exhibited as a matter of public interest.") (emphasis supplied).

Plaintiff concedes that on-line computer services engage, on occasion, in activities similar to those of news vendors. Plaintiff also does not dispute that Delphi's services include dissemination of news and that the service for which Stern's likeness was exploited was a newsworthy service similar to a letters-to-the-editor column in a news publication.

Defendant concedes that if the advertisements at issue used plaintiff's name and likeness to advertise products unrelated to news dissemination, plaintiff would have stated a claim for relief under CRL § 51. However, since the advertisements were for a service related to news dissemination (in this case plaintiff's very candidacy for public office), defendant argues they are protected by the incidental use exception. Thus it is defendant's position that the use of the likeness determines the applicability of the exception, not whether a defendant is solely or even predominantly engaged in the dissemination of news.

The New York courts are consistently cautioned that the protections of CRL Sections 50-51 shall be construed narrowly "so as not to apply to publications concerning newsworthy events or matters of public interest." Creel v. Crown Publishers, Inc., 115 A.D.2d 414, 415, 496 N.Y.S.2d 219 (1st Dept.1985). The First Amendment, of course, is construed broadly. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). It is well established that "the constitutional guarantees of freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the content of the reading materials they carry. Smith v. California, 361 U.S. 147, 152-53, 80 S.Ct. 215, 218-219, 4 L.Ed.2d 205 (1959). In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of obscene books, regardless of whether the bookseller had knowledge of the books' contents. The Court reasoned that if First Amendment protections are not afforded to booksellers, "the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." Id. at 153, 80 S.Ct. at 219. Other courts have noted that "First Amendment guarantees
have long been recognized as protecting distributors of publications ... obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985); see also Daniel v. Dow Jones & Co., 137 Misc.2d 94, 102, 520 N.Y.S.2d 334, 340 (Civ.Ct.1987) (computerized database service "is one of the modern, technologically interesting alternative ways the public may obtain up to the minute news" and "is entitled to the same protection as more established means of news distribution"). Affording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result.

The proper analogy is to a television network. As a quantitative, though not qualitative assessment, there can be no question that a television network engages both in dissemination of news and entertainment, and that in the former situation "it should be entitled to the same privilege accorded other such media where the statutory right to privacy ... is at issue." Delan by Delan v. CBS, Inc., 91 A.D.2d 255, 260, 458 N.Y.S.2d 608 (2nd Dept.1983). Because Stern's name was used by Delphi to elicit public debate on Stern's candidacy, logically the subsequent use of Stern's name and likeness in the advertisement is afforded the same protection as would be afforded a more traditional news disseminator engaged in the advertisement of a newsworthy product.

Plaintiff's alternative argument that issues of fact remain as to whether Delphi is "a news disseminator" is not persuasive in the resolution of this motion for summary judgment. Plaintiff does not contest Delphi's description of its services. Delphi does not claim that it is exclusively a news disseminator. Therefore, there is no need to develop a factual record.

Plaintiff also argues that defendant is not entitled to the incidental advertising exception because Stern never approved the use of his photograph by Delphi and therefore Delphi was not merely reproducing a likeness that was previously published in conjunction with a permitted newsworthy dissemination as was the case in Humiston, supra, and Booth v. Curtis, supra, 15 A.D.2d at 343, 223 N.Y.S.2d 737 (photograph of plaintiff for advertisement/solicitation had previously appeared in defendant's magazine). However, Velez v. VV Publishing Corp., 135 A.D.2d 47, 524 N.Y.S.2d 186 (1st Dept.), appeal denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425 (1988), clearly rejects the position that an incidental use loses its protection because the subject did not give permission for the original use of his or her likeness. In Velez, activist Ramon Velez was the subject of a lengthy investigative report published in the Village Voice. The Voice subsequently used the title of the report and a picture of Velez to advertise for subscriptions although Velez had never given consent to the Voice for the use of his name or picture in the original story or in the subscription advertisements. The First Department held that the incidental use exception protected the Voice from liability so long as it was clear that Velez had not actually endorsed the Village Voice as a product. Id. at 52, 524 N.Y.S.2d 186. Similarly, here, Stern's photograph is not part of the on-line bulletin board and Stern did not give permission for use of his likeness in the first instance. Still, under Velez, this does not render the use unlawful.

Other cases make clear that it is the purpose of the advertisement that determines whether it is protected, not whether the defendant had permission to use the likeness. The newsworthy use of a private person's name or photograph does not give rise to a cause of action under CRL § 51 as long as the use is reasonably related to a matter of public interest. For instance, in Creel v. Crown Publishers, Inc., supra, 115 A.D.2d 414, 496 N.Y.S.2d 219, the court held that a guide to
nude beaches disseminated information concerning a matter in the public
interest and, accordingly, the unauthorized use of plaintiff's
photograph in the guide did not violate CRL § 51. See also Delan by
Delan v. CBS, Inc., supra 91 A.D.2d 255, 458 N.Y.S.2d 608 (photograph of
plaintiff which appeared in a documentary film dealt with matters in the
public interest and, accordingly, did not violate CRL § 51).

Most persuasive is the analysis of Judge Martin in Groden v. Random
House, Inc., 1994 WL 455555 (S.D.N.Y.1994). In Groden, the plaintiff
objected to the use of his name and photograph to advertise a book about
the assassination of President Kennedy. Although Groden's photograph is
not contained in the book, the book mentions him by name and directly
discusses Groden's work in the investigation of the assassination. The
Court found that because there was no question that the purpose of the
advertisement was to promote sales of the book, and that the
advertisement itself described the main arguments advanced in the book,
the use of Groden's photograph, which concededly did not appear in the
book, did not "transform a privileged use into an unlawful use because
the goal of the advertisement--to inform potential readers about the
contents of the book and induce them to purchase it--remains unchanged."
Groden, supra; See also Arrington v. New York Times Co., 55 N.Y.2d 433,
of public interest are to be broadly "defined"), cert. denied, 459 U.S.
1146, 103 S.Ct. 787, 74 L.Ed.2d 994 (1983); Davis v. High Society
Magazine, 90 A.D.2d 374, 457 N.Y.S.2d 308, 315 (2nd Dept.1982) (holding
that a well-known female posing partially nude is a newsworthy event
within the context of § 50-51).

The controlling cases on the issue of the use of plaintiff's
likeness for advertising purposes are Rand v. Hearst Corp., 31 A.D.2d
406, 298 N.Y.S.2d 405 (1st Dept.1969), aff'd, 26 N.Y.2d 806, 309
Ayn Rand alleged that the use of her name on the front cover of a book
with which she had no connection was a violation of Sections 50 & 51 of
the CRL. Ms. Rand's name was used on the front cover in an excerpt from
a review of the book in which the reviewer compared the book to Ms.
Rand's books. It was not disputed that the book publisher used Ms.
Rand's name for promotional purposes without her permission. As in this
case, the material complained of also was initially published in the
book review without Ms. Rand's permission and was republished by the
defendant publisher, also without her permission.

In rejecting Ms. Rand's claim, the Appellate Division discussed the
history and purpose of Sections 50 & 51 of the CRL and of the incidental
use exception to the CRL. The court noted that "the sections in the law
were designed to protect an individual against "selfish, commercial
exploitation" and that in construing the law "the courts have looked to
its underlying purpose--the need it was intended to fill--and rather
than adhering to its exact letter have [been] interpreting the spirit in
which it was written." Id. at 408-409, 298 N.Y.S.2d 405. The words
"advertising purposes" and for the "purposes of trade" must be
"construed narrowly and not used to curtail the right of free speech, or
free press, or to shut off the publication of matters newsworthy or of
public interest, or to prevent comment on matters in which the public
has an interest or the right to be informed." Id. Since the underlying
purpose of the statute is to protect privacy, no liability exists when
the name or picture of a public figure (who has no complete privacy) is
used unless the publication is knowingly false or may be considered a
blatant "selfish, commercial exploitation" of the individual's
personality." Id. at 409, 298 N.Y.S.2d 405. The court found that there
could be no objection to the use of Ms. Rand's name since the comparison
between Ms. Rand's work and the book at issue was "of public interest"
and the quotation from the book review was "a method of best informing
the public of the nature and style of the book published." Id. at 410,
298 N.Y.S.2d 405.

Thus it is clear that what drives the "incidental use" exception is
the First Amendment interest in protecting the ability of news
disseminators to publicize, to make public, their own communications.
Groden, supra; Velez, supra, 524 N.Y.S.2d at 187 (incidental use
exception "is a necessary and logical extension of the clearly protected
editorial use of the content of the publication"). The Stern candidacy
is, of course, well within the range of subjects which courts have
deemed to be of public interest, namely electoral politics. See also
Arrington, 449 N.Y.S.2d 914, 434 N.E.2d 1319 (noting that subjects of
public interest are to be "freely defined"), cert. denied, 459 U.S.
1146, 103 S.Ct. 787, 74 L.Ed.2d 994 (1983); Davis, 457 N.Y.S.2d at 315;
jacket is a "legitimate news item" for purposes of applying exceptions
to 15 50). The fact that the advertisement in this case uses plaintiff's
name and photograph to indicate the subject on the computer bulletin
board--namely, a debate of Stern's candidacy--clearly brings it within
the ambit of the incidental use exception. See Namath v. Sports
Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10, 11-12 (1st Dept.1975),
aff'd, 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976) (use of
plaintiff's photograph for purposes of soliciting subscriptions is an
incidental use where photograph gave reader indication of contents of
magazine); Rand, supra, 31 A.D.2d at 412, 298 N.Y.S.2d 405 ("We hold
that the book publisher had a right to use the book review in the manner
it did. To hold otherwise would constitute an impermissible restriction
on what we deem to be the right of a publisher in informing the public
of the nature of his book and comparing with the works of other
authors").

Delphi used Stern's photograph to communicate to the public the
nature and style of its service which in this case was the promotion of
a news event in which plaintiff was a principal. To restrict Delphi
from informing the public of the nature and subject of its service would
constitute an impermissible restriction.

Stern's privacy has not been invaded; Stern does not deny that he
posed for the photograph in which he and his backside exposed in Dr.
Denton style, leather pants are prominently featured and, of course,
that he promoted himself as a candidate for governor of this state.
Thus no public purpose would be served by permitting Stern to silence
Delphi; on the contrary. Indeed, it is ironic that Stern, a radio talk
show host (as well as author and would-be politician) seeks to silence
the electronic equivalent of a talk show, an on-line computer bulletin
board service.

The court in Rand pointed to two other relevant factors which
render the incidental use exception applicable. First, the reproduced
item was newsworthy and, second, advertised material was related to the
product and to the use for which the reproduced material first appeared.
Id. at 411, 298 N.Y.S.2d 405. Both factors are present here. In Rand,
the dissent maintained the position urged upon the Court by plaintiff
here. That is that the use of plaintiff's name must be incidental to
the use for which the reproduced material was originally generated. Id.
at 413, 298 N.Y.S.2d 405. The majority rejected this view because the
use of a person's likeness is protected by the incidental use exception
if the use is newsworthy and related to the matter's original purpose.
As the First Department has noted, the incidental use exception "is a
necessary and logical extension of the clearly protected editorial use
of the content of the publication." Velez v. VV Publishing Corp.,
supra, 135 A.D.2d at 50, 524 N.Y.S.2d 186. Delphi's bulletin board,
like a letter-to-the-editor column of a newspaper, is a protected First
Amendment activity. Under Velez, the use of Stern's likeness to
advertise the content of the service is clearly protected. See also
Groden v. Random House, Inc., supra (advertisement to promote sales of
book about Kennedy assassination which used unauthorized photograph to
inform potential readers about contents of the book is protected).

It is obvious and beyond question that the purpose of the
advertisement was to promote sales of Delphi's Internet service, and the Stern bulletin board in particular, and that the use of Stern's photograph with the ad's caption describes the main point of the service. Had defendant merely used plaintiff's name in the advertisement, that use would clearly fall within the incidental use exception under the above-cited precedents. The fact that the advertisement also contained Stern's photograph, which defendant concedes does not appear on-line on computer screens, cannot transform a privileged use into an unlawful use when the goal of the advertisement--to inform potential subscribers about the contents of the on-line service and induce them to purchase it--remains unchanged.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is dismissed.
STERN V. DELPHI: ARE ONLINE SERVICES "NEWS DISSMINATORS"?
by Eric Schlachter, Esq.

The laws of cyberspace continue to develop, albeit slowly. The debate over the regulation of the Internet and online services has begun to rage at the Congressional level, potentially entangling pornography, hate speech and bomb recipes on the Net in a web of federal regulations. But as these debates wend their way through rhetorical drivel and outright paranoia, at this moment the real law of cyberspace is being developed in the courts.

The recent New York decision of Stern v. Delphi Internet Services Corp. (New York Supreme Court, May 1, 1995) exemplifies how the law of cyberspace is being developed in comparative obscurity. Stern v. Delphi also indicates the way courts are grappling with the technology of cyberspace in an attempt to craft sensible rules to govern this technology.

The Stern case deals with the issue of whether an online service is a "news disseminator" for the purposes of applying an invasion of privacy statute. Stratton Oakmont v. Prodigy, also a New York Supreme Court decision which was issued about three weeks following Stern, deals with the issue of whether an online service is a "publisher" for purposes of defamation liability. (See Lance Rose's analysis of the Stratton Oakmont v. Prodigy case elsewhere in this month's "Legally Online" section). While the Stratton Oakmont and Stern courts both engaged in "analogizing" to reach their decisions, the Stratton Oakmont court did not look to or discuss the Stern case in reaching its decision. As this analysis will discuss, the Stern court's methodology could have been useful in reaching a more precise result in the Stratton Oakmont case - and could be helpful in resolving future cases involving online services.

THE FACTS

Delphi is a major national online service and Internet service provider, with approximately 500,000 subscribers. When talk radio host Howard Stern announced his candidacy for Governor of New York in 1994, Delphi created an online discussion forum for its subscribers to discuss Stern's candidacy.

At that time, to promote its service, Delphi placed some advertisements in New York periodicals, advertising Delphi and its discussion forum on Stern's candidacy. As part of the advertisements, Delphi used a photograph of Stern in leather pants that exposed most of his behind. Although the source of the photograph was not specified, it was clear Stern had posed for the photo, and he did not allege that Delphi's possession of it was impermissible or unlawful.

INVASION OF PRIVACY

Common law recognizes the tort of invasion of privacy, which includes a cause of action for the misappropriation of a person's name or likeness. In New York, the common law tort action has been codified by New York Civil Right Law, Sections 50 and 51, which makes it both a misdemeanor and a tort to commercially misappropriate a person's name or likeness. In this case, it was undisputed that Delphi had commercially appropriated Stern's likeness by using a photo of Stern's behind in its advertisement without Stern's permission.

INCIDENTAL USE EXCEPTION

New York courts have created an exception to the statute called the "incidental use exception." This exception permits "news disseminators" to use a person's name or likeness to advertise the news disseminator. Therefore, if the New York Times wants to advertise its news gathering and reporting by using a photograph in an advertisement, the New York Times is not liable to the subject of the photo for invasion of privacy, whether or not the Times obtained permission from the subject.

Because the exception is available only to "news disseminators," the Stern court had to deal with the "novel" issue of whether Delphi should be treated as a news disseminator.

On the one hand, this is an easy question. While in the 1970s there was great paranoia that the "Fourth Estate" would obtain a monopoly on the dissemination of news, it is clear that the hegemony of the traditional news filters has disappeared. The Internet played a prominent role in such major world events as Tiananmen Square and the failed Russian coup of 1991. Online services typically create discussion forums for the dissemination of news and information within hours or even minutes after major crises such as the Northridge earthquake of 1994 and the recent Oklahoma City bombing. These discussion areas are often the quickest and most accessible way of obtaining news from the source during a crisis. The instantaneous nature and global scope of online services have created a flourishing online information economy that allows many information seekers to bypass the slower, filtered news media. As a result, there can be little question that online ser-
services are news disseminators, and important ones at that.

On the other hand, online services do much more than just disseminate news. Online services allow users to chat with each other on silly topics, to play games, and to download photos of naked women. A court anxious to look beyond the more "socially valued" functions of news dissemination might easily have derived the significance of the new technology, finding that its news dissemination component was outweighed by its frivolous functions.

At this critical juncture in the court's analysis, Judge Goodman made a leap of heroic proportions. Instead of trying to fit Delphi into a single functional category, the court looked to whether the likeness was used to promote the news dissemination function.

The importance of doing such a functional analysis cannot be overstated. Functionally, online services users can post public messages on a bulletin board, send private e-mail, chat with each other in real time, upload and download information, upload and download software, shop, store information electronically, and so on. No one doctrine of law can cover the rights and responsibilities of sysops and users in such a broad range of functions. Yet, there is always the danger that an uninformed court will ignore the different functional uses and try to apply the law that is applicable in one function to a function to which the laws are less suited. Judge Goodman asked the questions:

(1) is there a news dissemination component to the service, and

(2) did the advertisement pertain to this function?

By asking these questions, the court used the correct approach—what function is implicated and how did the online service treat that function—that we can only hope will be replicated in future decisions.

SEARCHING FOR THE RIGHT ANALOGY

In deciding whether or not Delphi in fact did act as a news disseminator, the court looked at various analogies to determine if Delphi had a news dissemination function.

The court initially looked to the landmark case of Cubby v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991). In Cubby, CompuServe established an independent contractor relationship with the manager of its journalism forum. One of the content providers to the journalism forum disseminated allegedly defamatory material, and the (allegedly) defamed party sued, among others, the manager of the journalism forum and CompuServe. CompuServe pointed out that it had no relationship with the party that wrote the material in question other than that CompuServe allowed the material to be disseminated over its network. The Cubby court, recognizing that CompuServe had little control over what content was being disseminated, analogized CompuServe to "an electronic, for-profit library" and further reasoned that CompuServe should not be liable for the content contained on the forum, any more than a library would be responsible for defamatory content in one of its thousands of books.

The Stern court, looking at the Cubby decision, noted that the Cubby court had afforded CompuServe the same First Amendment protection as a "distributor of publications." As a result, the Stern court concluded that it is "evident that Delphi's online service must be analogized to distributors such as news vendors, bookstores and libraries.” The court's statement is an important application of the Cubby holding. Whereas the Cubby court went through a number of factors to determine the independence of CompuServe from the content provider, the Stern court took it as "evident" that a subscriber-participation forum (an online bulletin board discussion area) is like a "news vendor, bookstore or library." This is a potentially important conclusion, because holding that message forums are like a news vendor, bookstore or library could insulate sysops from liability for the actions or statements of their users on such message forums.

(In contrast, the Stratton Oakmont court held that Prodigy was the publisher of its message forum, exposing Prodigy to significant liability for defamation. If the Stratton Oakmont court had considered the analysis in Stern, the Stratton Oakmont court might have considered more deeply the import of its conclusion.)

After sifting through analogies to find the right one, the Stern court stated that the discussion forum was "a newsworthy service similar to a letters-to-the-editor column in a news publication." This statement indicates that the court's search for an analogy had become muddled. Letters-to-the-editor columns are subject to completely different sets of rights and responsibilities under the law. The difference between a letters-to-the-editor column and, say, a library is editorial control. Content publishers such as newspapers have the power to control the content they disseminate and therefore are legally required to exercise that editorial power; their failure to do so can lead to legal liability. There are countless cases in which newspapers have been held liable for defamatory statements contained in letters printed in letters-to-the-editors columns.

In contrast, libraries and bookstores deal in a high volume of content created by third parties. If libraries and bookstores were legally liable for the content of the material they disseminate, these entities would have to pre-review everything—an impossible task. As a result, libraries and bookstores are generally absolved from liability for the content in the materials they disseminate, in the absence of some specific reason why they knew there was a problem.

The court's weak analysis regarding these analogies is compounded by the fact that the court did not look to see how Delphi actually managed the Stern discussion forum. Some online services, such as Prodigy, previously managed their public discussion areas extensively, to the point that the Stratton Oakmont court concluded that Prodigy exercised editorial control and looked more like a letters-to-the-editor column. Other online services do not manage their discussion forums at all, allowing users to disseminate content without any control by the sysop, which looks a lot more like a library or bookstore.

The distinction between primary publishers (publications with letters-to-the-editors columns) and secondary publishers (bookstores and libraries) was not significant to the court's analysis. Either type of publisher can claim the incidental use exception. However, the court failed to realize how its choice of
analyses might affect the application of these analogies in the future. Indeed, in Stratton Oakmont, the court reached the conclusion that Prodigy acted as a publisher of its message forum.

Analogizing online services to news vendors, bookstores, libraries, and letters-to-the-editor columns, the court had yet more analogies to make. In trying to deal with the fact that Delphi could be used for both serious (news dissemination) and entertainment purposes, the court said "the proper analogy is to a television network" in that television will broadcast both news and entertainment, but that the television network is capable of claiming the role of news disseminator only for its news component and not its entertainment component. The court's reasoning is sound and accurate, but the introduction of yet another analogy creates some confusion about exactly how the court conceptualized the technology.

CONCLUSION

Concluding that Delphi was a news disseminator and that the advertisement related to Delphi's role as news disseminator, the court awarded summary judgment to Delphi under the incidental use exception, stating that there was no factual dispute over the application of the incidental use exception to Delphi.

While the case ostensibly dealt with a fine point of statutory analysis and judicially created exceptions, the court's treatment of the issues was significant and may have broad implications. More courts may recognize the power of online services, BBSs, and Internet sites as legitimate competitors to the traditional news media, even though these sites also support other, totally unrelated functions. As online services gain legitimacy in the courts' eyes, the courts should be willing to protect these services from the broad limitations being considered by Congress and state legislatures. Furthermore, a functional analysis of online services' liability, such as for the actions and statements of their users, could also support the development of an increased number of unmanaged user interactivity forums where the courts will recognize the sysops' limited power to control content.

Unfortunately, the New York Supreme Court, just three weeks after the Stern decision, reached the conclusion in *Stratton Oakmont v. Prodigy* that Prodigy was a publisher of its online message forums. In reaching its conclusion, the Stratton Oakmont court did not undertake the difficult factual inquiry into the methods of control employed by the network. However, because the Prodigy decision was more widely publicized than the Stern case, many will hold it up as the latest and greatest statement on the matter.

In the end, the Stern case may indicate only that many courts are trying to be thoughtful and sensitive to the technology in weighing cases. As might be expected with new technology, early litigation will result in a mixed bag, but the *Stern v. Delphi* result is a relatively heartening decision for those seeking to protect the rights of computer networks and system operators.

---

OPERATING SYSTEMS WERE AIRLINES...

**DOSAir**: All the passengers go out onto the runway, grab hold of the plane, push it until it gets in the air, hop on, jump off when it hits the ground. Then they grab the plane again, push it back into the air, hop on, etc.

**Mac Airways**: The cashiers, flight attendants and pilots all look the same, feel the same and act the same. When asked questions about the flight, they reply that you don't want to know, don't need to know, and would you please return to your seat and watch the movie.

**Windows Airlines**: The terminal is neat and clean, the attendants all attractive, the pilots capable. The fleet of Learjets the carrier operates is immense. Your jet takes off without a hitch, pushing above the clouds, and at 20,000 feet itexplodes without warning.

**OS/2 Skyways**: The terminal is almost empty, with only a few prospective passengers milling about. The announcer says that their flight has just departed, wishes them a good flight, although there are no planes on the runway. Airline personnel walk around, apologizing profusely to customers in hushed voices, pointing from time to time to the sleek, powerful jets outside the terminal on the field. They tell each passenger how good the real flight will be on these new jets and how much safer it will be than Windows Airlines, but that they will have to wait a little longer for the technicians to finish the flight systems. Maybe until mid-1995. Maybe longer.

**Fly Windows NT**: All the passengers carry their seats out onto the tarmac, placing the chairs in the outline of a plane. They all sit down, flap their arms and make jet swooshing sounds as if they are flying.

**Unix Express**: All passengers bring a piece of the airplane and a box of tools with them to the airport. They gather on the tarmac, arguing constantly about what kind of plane they want to build and how to put it together. Eventually, the passengers split into groups and build a few different aircraft, but give them all the same name. Some passengers actually reach their destinations. All passengers believe they got there.
CANE, Presiding Judge.

1) Jeff Meneau and It's In The Cards, Inc., appeal a summary judgment granted in favor of Rosario Fuschetto, d/b/a Triple Play Collectibles. Meneau contends that posting messages to a bulletin board on the SportsNet on-line service is not a "periodical" under s 895.05(2), STATS., [FN1] and thus no notice to Fuschetto requesting a retraction is necessary before bringing suit under this statute. Because we conclude that bulletin board postings on the SportsNet service are not periodicals under s 895.05(2), we reverse and remand for further proceedings.

FN1. Section 895.05(2), STATS., reads: Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as the libeled person's statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them. (Emphasis added.)

2) This action arises out of a series of communications exchanged between Meneau, a Wisconsin resident, and Fuschetto, a resident of New York, by telephone and via SportsNet. SportsNet is a national computer network service whereby sports memorabilia dealers may communicate to purchase and sell merchandise. [FN2] There are two features on SportsNet, mailbox and bulletin board. The mailbox feature is personal in nature and allows a person to send messages exclusively to another SportsNet user, similar to electronic mail (e-mail). The bulletin board feature allows a person to send messages to all members accessing SportsNet.

FN2. The on-line service, SportsNet, is not the Internet, but is one network service. The Internet is a network of thousands of independent networks, containing millions of host computers that provide information services. Further, the Internet is not owned or controlled by a private company or the government. See MTV Networks v. Curry, 867 F.Supp. 202, 204 n. 1 (S.D.N.Y.1994).

3) Fuschetto and Meneau communicated with each other over both the
bulletin board and mailbox features of SportsNet, as well as on the telephone. In the course of these conversations, it was agreed that Meneau would visit Fuschetto in New York in January 1994. After agreeing to Meneau's visit, Fuschetto and his wife were afflicted with mononucleosis. Via the computerized mailbox function, Fuschetto notified Meneau of his illness and asked Meneau if he could postpone his trip. A series of mailbox communications ensued, wherein the two started arguing over the cost of the airline tickets and tickets to a Knicks game and the David Letterman show that were purchased for Meneau's visit.

4) Consequently, Fuschetto posted a note on the bulletin board feature, accessible to all subscribers of SportsNet, explaining his arguments with Meneau. Meneau alleges that Fuschetto's communications made over the bulletin board features were communications which form the basis for defamation, negligence and tortious interference with business relations claims. Fuschetto filed a motion for summary judgment asserting that Meneau failed to comply with s 895.05(2), STATS., the publication was not defamatory as a matter of law and the publication was true. Without deciding whether the information was defamatory, the trial court granted the motion on the grounds that s 895.05(2) applied, specifically, the bulletin board communications were a "periodical" under the statute, and thus a demand for retraction was required before Meneau could bring suit under the statute. Meneau appeals.

5) Under s 895.05(2), STATS., the party claiming to have been defamed in a newspaper, magazine or periodical must give the other party an opportunity to retract the alleged libel prior to commencing suit. Hucko v. Jos. Schlitz Brewing Co., 100 Wis.2d 372, 379-81, 302 N.W.2d 68, 73-74 (Ct.App.1981). This condition "serves to limit damages recoverable for libel published in a newspaper, periodical, or magazine to actual damages, and may serve to mitigate the latter as well." Id. at 379, 302 N.W.2d at 73 (footnote omitted). This statute reflects that only certain writings will be required to be retracted; magazines, newspapers or periodicals. The parties agree that the SportsNet bulletin board function is not a newspaper or magazine, thus the sole issue on appeal is whether the computerized bulletin board is a "periodical" under s 895.05(2).

6) There are no Wisconsin cases that interpret the word "periodical" in the context of s 895.05(2), STATS. Thus, our first step is to examine the language of the statute itself to discern if it is ambiguous. The relevant language from s 895.05(2) states: "Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter." In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1680 (Unabr.1976), periodical is defined as "a magazine or other publication of which the issues appear at stated or regular intervals." Periodicals are publications that appear on a regular basis, not infrequently or intermittently. We conclude that the term "periodical" is not susceptible to two or more reasonable meanings, and thus is not ambiguous. Thus, we arrive at the legislative intent by giving the word "periodical" its ordinary meaning.

7) Posting a message to the SportsNet bulletin board is a random communication of computerized messages analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals. SportsNet users place their messages on the bulletin board at any time and there are no set time limits as to when the messages are read. The messages are not done on a monthly, weekly or daily basis, but are sporadic as to whenever a SportsNet user desires to
write a communication. Thus, we conclude that these messages on the bulletin board are not periodicals under the ordinary meaning of the term.

8) Furthermore, the statute requires retractions for specified writings; magazines, newspapers and periodicals. Writings such as personal letters, billboards and signs are not included, therefore, the statute is not inclusive of all forms of alleged libel. Section 895.05(2), STATS. Additionally, in Hucko, 100 Wis.2d at 386, 302 N.W.2d at 76, we held that s 895.05(2) relates only to libelous publications in print media, not broadcast media. The nature of bulletin board postings on computer network services cannot be classified as print.

9) Additionally, subsec. (2) of s 895.05, STATS., was repealed in 1951 and reenacted in its present form, years before cyberspace was envisioned. The magnitude of computer networks and the consequent communications possibilities were non-existent at the time this statute was enacted. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.

10) The rate at which technological developments is growing coupled with the complexity of technology is beyond many laypersons' ken. A uniform system of managing information technology and computer networks is needed to cope with the impact of the information age. It is the responsibility of the legislature to manage this technology and to change or amend the statutes as needed. Therefore, we conclude that extending the definition of "periodical" under s 895.05(2), STATS., to include network bulletin board communications on the SportsNet computer service is judicial legislation in which we will not indulge.

Judgment reversed and cause remanded for further proceedings.
SECTION 4

SPECIAL ISSUES IN DEFAMATION
DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, INC.

No. 83-18

SUPREME COURT OF THE UNITED STATES


March 21, 1984, Argued
June 26, 1985, Decided

SUBSEQUENT HISTORY: [***1]

October 3, 1984, Reargued.

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF VERMONT.

DISPOSITION: 143 Vt. 66, 461 A. 2d 414, affirmed.

SYLLABUS: Petitioner credit reporting agency sent a report to five subscribers indicating that respondent construction contractor had filed a voluntary petition for bankruptcy. The report was false and grossly misrepresented respondent’s assets and liabilities. Thereafter, petitioner issued a corrective notice, but respondent was dissatisfied with this notice and brought a defamation action in Vermont state court, alleging that the false report had injured its reputation and seeking damages. After trial, the jury returned a verdict in respondent’s favor and awarded both compensatory or presumed damages and punitive damages. But the trial court believed that Gertz v. Robert Welch, Inc., 418 U.S. 323, controlled, and granted petitioner’s motion for a new trial on the ground that the instructions to the jury permitted it to award damages on a lesser showing than "actual malice." The Vermont Supreme Court reversed, holding that Gertz was inapplicable to nonmedia defamation actions.

Held: The judgment is affirmed.

COUNSEL: Gordon Lee [***2] Garrett, Jr., reargued the cause for petitioner. With him on the briefs were Hugh M. Dorsey, Jr., David J. Bailey, William B. B. Smith, Peter J. Monte, and A. Buffum Lovell.

Thomas F. Heilmann reargued the cause and filed briefs for respondent. *

* Briefs of amici curiae urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by Robert M. Weinberg, George Kaufmann, and Laurence Gold; for Dow Jones & Co., Inc., by Robert D. Sack and Frederick T. Davis; for the Information Industry Association by Richard E. Wiley, Lawrence W. Secrest III, Michael Yourshaw, and Patricia M. Reilly; and for the Washington Post by David E. Kendall and Kevin T. Baine.

William E. Murane filed briefs for Sunward Corp. as amicus curiae urging affirmance.

JUDGES: JUSTICE POWELL, joined by JUSTICE REHNQUIST and JUSTICE O’CONNOR, concluded that: 1. The fact that the jury instructions in question referred to "malice," "lack of good faith," and "actual malice," did not require the jury to find "actual malice," as respondent contends, where the instructions failed to define any of these terms. Consequently, the trial court correctly concluded that the instructions did [***3] not satisfy Gertz. Pp. 753-755. 2. Permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Pp. 755-763. (a) In light of the reduced constitutional value of speech on matters of purely private concern, as opposed to speech on matters of public concern, the state interest in compensating private individuals for injury to their reputation adequately supports awards of presumed and punitive damages -- even absent a showing of "actual malice." Cf. Gertz. Pp. 755-761. (b) Gertz, supra, does not apply to this case. Petitioner’s credit report concerned no public issue but was speech solely in the individual interest of the speaker and its specific business audience. This particular interest warranted no special protection when it was wholly false and damaging to the victim’s business reputation. Moreover, since the credit report was made available to only five subscribers, who, under the subscription agreement, could not disseminate it further, it cannot be said that the report involved any strong interest [***4] in the free flow of commercial information. And the speech here, like advertising, being solely motivated by a desire for profit, is hardy and unlikely to be deterred by incidental state regulation. In any event, the market provides a powerful incentive to a credit reporting agency to be accurate, since false reporting is of no
use to creditors. Pp. 761-763. THE CHIEF JU
JUSTICE concluded that Gertz is inapplicable to this case, because the allegedly defamatory expression involved did not relate to a matter of public concern, and that no other reason was needed to dispose of the case. Pp. 763-764. JUSTICE WHITE concluded that Gertz should not be applied to this case either because Gertz should be overruled or because the defamatory publication in question did not deal with a matter of public importance. P. 774. POWELL, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST and O'CONNOR, JJ., joined. BURGER, C. J., post, p. 763, and WHITE, J., post, p. 765, filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, post, p. 774.

OPINION: BY: POWELL

OPINION: [*751] [**2941] JUSTICE POWELL [***5] announced the judgment of the Court and delivered an opinion, in which JUSTICE REHNQUIST and JUSTICE O'CONNOR joined.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of Gertz applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary [***6] petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, [*752] to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent [***7] then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in Gertz v. Robert Welch, Inc., supra, at 349, this Court had ruled broadly that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless [**2942] disregard for the truth," and it argued [***8] that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether Gertz applied to "non-media cases," but granted a new trial "[because] of . . . dissatisfaction with its charge and . . . conviction that the interests of justice [required]" it. App. 26.
The Vermont Supreme Court reversed. 143 Vt. 66, 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants [*753] may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." Id., at 73, 461 A. 2d, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by New York Times [Co. v. Sullivan, 376 U.S. 254 (1964),] and its progeny." Id., at 73-74, [*99] 461 A. 2d, at 417-418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 75, 461 A. 2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to nonmedia defamation actions." Ibid.

Recognizing disagreement among the lower courts about when the protections of Gertz apply, n1 we granted certiorari. 464 U.S. 959 (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.


II

As an initial matter, respondent contends that we need not determine whether Gertz applies in this case because the instructions, taken as a whole, required the jury to find "actual [*754] malice" before awarding presumed or punitive damages. n2 The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, id., at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." Id., at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Id., at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth -- the "actual malice" of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) -- before it awarded presumed or punitive damages.

n2 Respondent also argues that petitioner did not seek the protections outlined in Gertz before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See Orr v. Orr, 440 U.S. 268, 274-275 (1979).

n3 The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous
Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. App. 18-19 (emphasis added).

--- End Footnotes ---

III

In New York Times Co. v. Sullivan, supra, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Id., at 271. Noting that "freedom of expression upon public questions is secured by the First Amendment," id., at 269 (emphasis added), and that "debate on public issues should be uninhibited, robust, and wide-open," id., at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not," id., at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e. g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.).

[*756] In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the protections of New York Times did not extend as far as Rosenbloom suggested. Gertz concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U.S., at 343. Rather, they represented "an accommodation between [First Amendment] interests and the limited state interest present in the context of libel actions brought by public persons." Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, id., at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." Id., at 348-349. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved. n4

--- Footnotes ---

n4 The dissent states that "[at] several points the Court in Gertz makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." Post, at 785, n. 11. Given the context of Gertz, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving public speech. In fact, the dissent itself concedes that "Gertz . . . focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of public issues should mandate plaintiffs to show actual malice to obtain a judgment and actual damages . . . ." Post, at 777 (original emphasis).

The dissent also incorrectly states that Gertz "specifically held," post, at 779, 793, both "that the award of presumed and punitive damages on less than
a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . . ," post, at 779, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," post, at 793-794. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was "unnecessarily" broad with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, Gertz is consistent with the result we reach today.

---End Footnotes---

[***16]

IV

We have never considered whether the Gertz balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." 418 U.S., at 348. A State should not lightly be required to abandon it. 

"for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name [*758] 'reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion)." Id., at 341.

The First Amendment interest, on the [***17] other hand, is less important than the one weighed in Gertz. We have long recognized that not all speech is of equal First Amendment importance. n5 It is speech on [***2945] "matters of public concern" [*759] that is "at the heart of the First Amendment's protection." First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), citing Thornhill v. Alabama, 310 U.S. 88, 101 (1940). As we stated in Connick v. Myers, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] is no mystery":

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). '[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest [***18] rung of the hierarchy of First Amendment values," and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. Id., at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated New York Times and Gertz are absent. n6 In such a case, [*760] "[there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; [***2946] and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." Harley-Davidson Motorsports, Inc. v. Markley, 279 Ore. 361, 366, 568 P. 2d 1359, 1363 (1977). Accord, Rowe v. Metz, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); [***19] Denny v. Mertz, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U.S. 883 (1982).

---Footnotes---

n5 This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. Roth v. United States, 354 U.S. 476, 483 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942); cf. Harisiades v. Shaughnessy, 342 U.S. 580, 591-592 (1952) (advocating violent overthrow of the Government is unprotected speech); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931)
(publication of troopship sailings during wartime may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. Ohralik, supra, at 456; Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 562-563 (1980).

Other areas of the law provide further examples. In Ohralik we noted that there are "[numerous] examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See Brown v. Hartlage, 456 U.S. 45, 52-53 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 279, n. 19 (1964); Buckley v. Valeo, 424 U.S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers -- all of whom speak for a living -- is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. Thomas v. Collins, 323 U.S. 516 (1945); see also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinate whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"). [***20] n6 As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit" -- the case before us today -- "If the first amendment requirements outlined in Gertz apply, there is something clearly wrong with the first amendment or with Gertz." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1268 (1983).

While such speech is not totally unprotected by the First Amendment, see Connick v. Myers, supra, at 147, its protections are less stringent. In Gertz, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of [*621] history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts @ 112, p. 765 (4th ed. 1971); accord, Roe v. Metz, supra, at 425-426, 579 P. 2d, at 84; Note, Developments in the Law -- Defamation, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances [*761] and publications. Restatement of Torts @ 568, Comment b, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages -- even absent a showing of "actual malice." n7

n7 The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of Gertz. Post, at 786. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in Gertz that, it believes, shows the State's interest to be "irrelevant." See post, at 794. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. Gertz, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by Gertz itself, for it held that presumed and punitive damages were available under some circumstances. 418 U.S., at 349. Rather, what the Gertz language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels -- no matter how attenuated their constitutional interest. If the dissent were the
law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, but in the more demanding sense of New York Times. The dissent would, in effect, constitutionalize the entire common law of libel.

--- End Footnotes---[***22]

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[whether] . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." Connick v. Myers, supra, at 147-148. [*762] These factors indicate that petitioner's credit report concerns no public issue. n8 It [*2947] was speech solely in the individual interest of the speaker and its specific business audience. Cf. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. Cf. id., at 566; Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be [*223] said that the report involves any "strong interest in the free flow of commercial information." Id., at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270.

--- Footnotes---[***25]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

CONCURBY: BURGER; WHITE

CONCUR: CHIEF JUSTICE BURGER, concurring in the judgment.
The single question before the Court today is whether Gertz applies to this case. The plurality opinion holds that Gertz does not apply because, unlike the challenged expression in Gertz, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that Gertz is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that Gertz is inapplicable in this case for the two reasons indicated. No more is needed to dispose of the present case.

I continue to believe, however, that Gertz was ill-conceived, and therefore agree with JUSTICE WHITE that Gertz should be overruled. I also agree generally with JUSTICE WHITE's observations concerning New York Times Co. v. Sullivan. New York Times, however, equates "reckless disregard of the truth" with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of New York Times in this way, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

[*765] JUSTICE WHITE, concurring in the judgment.

... I have also become convinced that the Court struck an improvident balance in the New York Times case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As [***33] the Court said in Gertz: "[T]here is no constitutional value in false statements of fact. Neither [***2950] the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S., at 340. Yet in New York Times cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no [*768] jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recur all too frequently because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no [****34] judgment that the publication was false, even though it was without foundation in reality. n2 The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment [*769] interests -- "it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." Rosenbloom, 403 U.S., at 46-47 (opinion of BRENNAN, J.); Gertz, supra, at 363-364 (BRENNAN, J., dissenting).

... I still believe the common-law rules should have been retained where the plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the Gertz premise that the press also needed protection in suits by private [****41] parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and
the recovery of additional sums within the limitations that the Court might have set. n3

...  

DISSENT BY: BRENNA

DISSENT: JUSTICE BRENNA, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

...  

Thus, when an alleged libel involves criticism of a public official or a public figure, the need to nurture robust debate of public issues and the requirement that all state regulation of speech be narrowly tailored coalesce to require actual malice as a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits States significant leeway to compensate for actual damage to reputation. n5 The requirement of narrowly tailored [*781] regulatory measures, however, always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. It has remained the judgment of the Court since Gertz that this comprehensive two-tiered structure best accommodates the values of the constitutional free speech guarantee [*2957] and the States' interest in protecting reputation.

...  

II  

A  

Relying on the analysis of the Vermont Supreme Court, respondent urged that this pruning be accomplished by restricting the applicability of Gertz to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[the] inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, [*3957] or individual." First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). [*782] First Amendment difficulties lurk in the definitional questions such an approach would generate. n6 And the distinction would likely be born an anachronism. n7 [*783] Perhaps most importantly, the argument that Gertz should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees. n8 This solicitude [*2958] implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." First National Bank of Boston v. Bellotti, supra, at 784-785. See Bridges v. California, 314 U.S. 252, 277-278 (1941).

-----Footnotes-----  

n6 An attempt to characterize petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 143 Vt. 66, 73, 461 A. 2d 414, 417 (1983). The court added that "[there] is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." Ibid.

No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest, and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. Keeton v.

. . .

- - - - - - - End Footnotes - - - - - - - [**59]

. . .

B

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of Gertz. Arguing that at most Gertz should protect speech that "deals with a matter of public or general importance," ante, at 773, JUSTICE WHITE, without analysis or explanation, decides that the credit report at issue here falls outside this protected category. The plurality opinion of JUSTICE POWELL offers virtually the same conclusion with at least a garnish of substantive analysis.

. . .

In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952); American Federation of Labor v. Swing, 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S. 88, 101-103 (1940); see also Abood v. Detroit Board of Education, 431 U.S., at 231-232, and n. 28. [*Our] cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protection." Id., at 231. The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S., at 503-504; [*65] Whitney v. California, 274 U.S., at 375 (Brandeis, J., concurring).

. . .

[*789] [**2961] The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," ante, at 762, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." Virginia Pharmacy Bd., 425 U.S., at 761. See also Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn, Inc. v. Wilson, supra, at 501. More importantly, an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in Thornhill, such a bankruptcy "in a single factory may have economic repercussions upon a whole region." And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public [*68] concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.

[*790] (2)
Even if the subject matter of credit reporting were properly considered --in the terms of JUSTICE WHITE and JUSTICE POWELL -- as purely a matter of private discourse, this speech would fall well within the range of valuable expression for which the First Amendment demands protection. Much expression that does not directly involve public issues receives significant protection. Our cases do permit some diminution in the degree of protection afforded one category of speech about economic or commercial matters. "Commercial speech" --defined as advertisements that "[d]o no more than propose a commercial transaction," Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) -- may be more closely regulated than other types of speech. Even commercial speech, however, receives substantial First Amendment protection. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., supra, at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation [***70] of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable"). Credit reporting is not "commercial speech" as this Court has defined the term. Even if credit reporting were so considered, it would still be entitled to the substantial protections the First Amendment affords that category. See Zauderer, 471 U.S., at 637; id., at 657-658 (BRENNAN, J., concurring in part and dissenting in part). Under either view, the [***2962] expression at issue in this case should receive protection from the chilling potential of unrestrained presumed and punitive damages awards in defamation actions.

[*791] Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S., at 20. [***71] The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being. Justice Douglas made precisely this point:


Justice Douglas further noted that "[presumably] the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), [***72] arising out of a squabble over whether a vendor had sold obscene magazines." Id., at 905, n. 9.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In every case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated [*792] was pure advertising -- an offer to buy or sell goods and services or encouraging such buying and selling. n15 Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardy dissipates rapidly when the speech is not advertising. Compare Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980), with Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1980). [***73]
IN THE SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN

DAVID RINDOS and GILBERT JOHN HARDWICK

Note that this is unverified

Heard: 25 March 1994

Delivered: 31 March 1994

No 1994 of 1993 (Unreported Judgement 940164)

IPP J

In this matter I am required to assess damages for defamation. The plaintiff issued an endorsed writ claiming:

(i) Damages for libel published by the Defendant and contained on an entry on the DIALx science anthropology computer bulletin board on 26 June 1993.

(ii) Damages for libel published by the Defendant and contained in a letter to the Secretary of the Anthropological Association of Western Australia on or about 9 September 1993.

(iii) Interest on damages pursuant to Section 32 of the Supreme Court Act at the rate of 8% per annum or such other rate as the Court thinks fit from the 26 June 1993 and 9 September 1993 respectively until judgment or payment of damages. The defendant did not enter an appearance to defend and judgement by default was granted to the plaintiff. Thereafter, an order was made that the damages payable by the defendant to the plaintiff pursuant to that judgment be assessed and that evidence be introduced by affidavit. Leave to serve the necessary documents on the defendant by way of substituted service was granted and service was effected as required. It appears that the defendant does not wish to defend the action. In a letter dated 9 September 1993 to the plaintiff's solicitor he stated: "Let this matter be expedited and done with ... If you wish to ... have your client allowed his day in court to air his grievances against Western Australians, then let it be. I can do nothing to prevent it lacking any resources whatsoever to defend myself from whatever charges anyone for that matter might wish to bring against me at (sic) time they see fit."

The plaintiff is an anthropologist. He obtained a doctorate from Cornell University in the United States of America in August 1981 and worked for several years at universities in the USA as assistant professor and in other capacities as an anthropologist. In about 1988 he emigrated to Australia. In June 1989 he commenced employment as a senior lecturer in the Department of Archaeology at the University of Western Australia. In November 1989 he was appointed temporary acting head of the Department of Archaeology and in February 1990 he became the acting head of the Department. From March 1991 until June 1993 he was attached to the Geography Department of the University of Western Australia as senior lecturer in archaeology. He ceased being engaged at the University after June 1993.

Numerous publications of the plaintiff's works have appeared throughout the world, including translations into languages other than English. He has given papers at numerous national and international
conferences and has given lectures at different universities around the world. His work has been cited regularly in papers by other academics. He is well known internationally in the areas of anthropology and archaeology.

While the plaintiff was employed at the University of Western Australia, a review took place as to whether he should be granted tenure. In early March 1993 the Tenure Review Committee recommended that he be denied tenure on the ground of insufficient productivity. This was made formal in June 1993 and the plaintiff was dismissed by the Vice Chancellor of the University with effect from 13 June 1993.

There was a large amount of interest, internationally, about the actions of the University of Western Australia in denying the plaintiff tenure and in dismissing him.

On 23 June 1993 a message appeared on a worldwide computer network bulletin board, inserted by one Hugh Jarvis, an anthropologist in the United States of America. The message criticised the University of Western Australia for refusing to grant tenure to the plaintiff and for dismissing him.

The computer bulletin board on which the message appeared is devoted to "science anthropology". It is part of an international computer news service to which persons can have access through computers and by which users of computers can communicate with each other. Subscribers to or participants in the network utilise their computers to communicate and receive items of interest concerning anthropology. Most major universities throughout the world are participants in the network, which is also used by other persons. The main users are academics and students. There are approximately 23,000 persons worldwide whose computers have access to the bulletin board in question:

The bulletin board has a wide international readership.

The messages that appear on the bulletin board can remain on the computer of a subscriber or participant for a number of days or weeks, depending on the storage capacity of the computer in question. The types of messages vary. Examples include information on anthropological issues and personalities, debates on anthropological topics and personal messages between anthropologists. The messages come from persons all round the world, but particularly from the United States of America, the United Kingdom, Canada and Australia. Most of the persons who send messages and who view the bulletin board on a regular basis are persons who are working or studying in the general field of anthropology.

Items of interest on the bulletin board can be printed on hard copy. Such print outs can be and at times, no doubt, are circulated. Persons who read the contents of the bulletin board and cause messages to be printed include not only the owner of the particular computer, but any person who has access to it, such as academics and university students.

On 26 June 1993, in reply to the message published by Hugh Jarvis, the defendant caused a message to be published on the bulletin board. According to the material supplied by the defendant to the computer, it was transmitted by him from a computer in Derby, Western Australia. The distribution was to "the world", which means that the message was visible, and would have been able to have been read, on every computer around the world able to receive the science anthropology news bulletin.

The relevant passages in the message that the defendant so sent, are as follows:

"Well, here we have my old mate Hugh Jarvis, the guy responsible for the first anthropologist (myself) being denied access to ANTHRO-L, now crying over one of his fellow Americans being the first to be
denied tenure at an Australian University.

"Sorry, UWA is my own turf, Hugh. I know very well that problems there are associated with the Anthropology Department there (now including the Archaeology Department) but I am also well aware of the wider social and political issues associated with our discipline here in Western Australia centrally focussed around Aboriginal Affairs.

"The first matter I would raise in comment here, is the very public difference between myself and Dr Rhindos (sic) on the matter of categories in Aboriginal culture, played out on this very news group. In that case Dr Rhindos (sic) quite openly attempted to discredit my own lifetime's experience with Aboriginal people on the basis of his one phone call apparently to an outstation!

"I have met the man myself, and my impression is that his entire career has been built not on field research at all, but on his ability to berate and bully all and sundry on the logic of his own evolutionary theories. In the local pub, drinking and chain smoking all the while for that matter.

"Secondly, and this is rumours passed to me by several reputable and long-standing Western Australian anthropologists as to Dr Rhindos' (sic) 'Puppy Parties' focussed I am told on a local boy they called 'Puppy'. Hmm, strange dicey behaviour indeed, especially here in an environment dominated by conservative fundamentalists.

"Thirdly, and far more substantially, there are extremely serious questions arising here concerning an ongoing political campaign here against the Anthropology Department, most notably targetting (sic) the department's long-standing support for Aboriginal Land Rights against powerful international mining lobbies. This particular episode comes of great interest right in the midst of our national debate over the effects of the High Court's finding last year in favour of Eddie Mabo.

"I am sorry Hugh, but if someone for whom I might have a little more respect than yourself had posted what you did, I would have hesitated to post my own reply to your scurrilous attack on the University of Western Australia. I can only imagine prompted by the powerful vested interests lacking the guts and integrity to come out and speak honestly on important issues deeply affecting Western Australia. If you are on their payroll, I detest your involvement in this matter; if you are not on their payroll I can only assume you are a complete fool.

"As has been Dr Rhindos (sic), apparently believing that since he is an American he is somehow immune from the criticism of his non-American colleagues in *their* country.

"In the meantime your hysteria, in my case earlier when you decided unilaterally to deny me access to ANTHRO-L, and in this present case now, does not in any way bring you credibility.

"The rest of you professors, lecturers, staff, students, professionals and sundry lurkers and lookers-on, I do ask that you think critically about what is going on here. Please be a little more intelligent than to be swayed by grossly exaggerated and one-sided campaigns by a media to which only one party has ready access. Please think about which powerful politicians and vested interests might be behind this whole business.

"Please think that the real victims are the Aboriginal people here.

Thank you.
Gil Hardwick" It was submitted that the publication of 26 June 1993 contained five defamatory imputations, namely:

(a) The plaintiff engaged in sexual misconduct, in particular paedophilia with a "local boy" called "Puppy".

(b) The plaintiff has no genuine academic ability in his field and has not based his theories on appropriate research but has simply depended upon berating and bullying others.

(c) The plaintiff "is against Aboriginal land rights and Aboriginal people" and is a racist person.

(d) The plaintiff is not a genuine anthropologist but a tool of mining corporations.

(e) The plaintiff drinks to excess and spends most of his time "in the local pub".

I accept that words in the message published by the defendant give rise to an imputation that the plaintiff engaged in sexual misconduct with a "local boy".

I also accept that the message contains the imputation that the plaintiff's professional career and reputation has not been based on appropriate academic research "but on his ability to berate and bully all and sundry". This seriously denigrates his academic competence.

I do not accept that the other paragraphs give rise to the imputations alleged. In the course of argument these other imputations were not pressed.

The imputation of sexual misconduct, and that relating to the plaintiff's career being based on the ability to "berate and bully" and lack of professional competence are, in my opinion, seriously defamatory of the plaintiff. The inference is that these matters had some bearing on the failure of Dr Rindos to be awarded tenure and his dismissal from the University.

These defamatory remarks were published in academic circles throughout the world. I accept the submission made by counsel for the plaintiff that the nature of the remarks is such that they are likely to be repeated, and that any rumours of a like kind that had circulated previously were likely to gain strength from their publication.

The other publication of which the plaintiff complains, is a letter dated 9 September 1993 to the plaintiff's solicitor, copy of which was sent by the defendant to the secretary of the Anthropological Association of Western Australia. This letter contained the following remarks:

"My further understanding is that Dr Rindos had deliberately launched his now infamous campaign in his attempts to revive an already shattered academic career by constantly, openly and publicly seeking to discredit those against whom he had acted as head of the then Department of Archaeology, when he might well have approached them to discuss whatever irregularities he is alleged to have uncovered in the first instance.

He might very well have settled down to administer his department competently and professionally, and like the rest of us do some research, to present his papers and to seek the review of his peers."
"His persist failure to do as I understand it is in fact the very reason for the University's decision to finally deny him his tenure."

The imputation from the above quoted remarks is that the plaintiff did not administer his Department competently and professionally, and is again a denigration of his professional competence.

There has been no attempt by the defendant to justify these defamatory remarks or set up any other defence to them.

I repeat that the plaintiff is well-known internationally in academic anthropological and archaeological circles and that he is a person of high standing in those circles. The defamatory remarks published are likely to have a most harmful effect upon that standing.

I am also satisfied that the plaintiff has endured serious personal suffering as a result of the defamation. There is evidence from a consultant psychiatrist that the publication was the cause of a marked exacerbation of symptoms of major depression and anxiety.

While the two publications were different, there was a clear and close relationship between them. Their effect was similar to that of the two defamatory publications considered in Carson v John Fairfax & Sons Limited (1992) 113 ALR 577 where Mason CJ, Deane, Dawson and Gaudron JJ said (at 584):

"The effect of the defamatory publications was cumulative. The second compounded the harm to the appellant caused by the first:

it renewed and expanded the hurt to his feelings; it exacerbated the damage to the reputation which he had hitherto enjoyed in legal, commercial and other circles."

In such circumstances, as their Honours remarked (at 585):

"... it is permissible and sensible in a case where claims for closely related defamatory publications have been heard together for a jury, in determining what is the appropriate compensation to be awarded to the plaintiff in respect of each publication, to take account of the aggregate 'harm' suffered by the plaintiff by reason of both of them."

In Coyne v Citizen Finance Limited (1991) 172 CLR 211 Mason CJ and Deane J approved the statement by Diplock LJ in McCarey v Associated Newspapers Limited (No 2) [1965] 2 QB 86 at 107 that the injuries sustained by the defamed person may b:

"classified under two heads:

(1) the consequences of the attitude adopted towards him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (2) the grief or annoyance caused by the defamatory statement to the plaintiff himself."

Also in Coyne v Citizen Finance Limited (at 235) Toohey J referred, with approval, to the following remarks of Windeyer J in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 150:

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he operates
in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

I accept that the defamation caused serious harm to the plaintiff's personal and professional reputation. I am satisfied that the publication of these remarks will make it more difficult for him to obtain appropriate employment. He suffered a great deal of personal hurt. The damages awarded must compensate the plaintiff for all these matters and must vindicate his reputation to the public.

In all the circumstances I consider that the plaintiff should be awarded the sum of $40,000 in respect of damages. I also consider that the plaintiff should be awarded interest on that sum at the rate of 8% per annum from 9 September 1993.
SECTION 5

OBSCENITY, PORNOGRAPHY AND CHILD PORNOGRAPHY
MILLER v. CALIFORNIA

No. 70-73

SUPREME COURT OF THE UNITED STATES

413 U.S. 15; 93 S. Ct. 2607; 1973 U.S. LEXIS 149;
37 L. Ed. 2d 419; 1 Media L. Rep. 1441

January 18-19, 1972, Argued
June 21, 1973, Decided

SUBSEQUENT HISTORY: [***1]

Reargued, November 7, 1972.

PRIOR HISTORY: APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE.

DISPOSITION: Vacated and remanded.

SYLLABUS: Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in Memoirs v. Massachusetts, 383 U.S. 413, 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant’s conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the Memoirs plurality, it is held:

1. Obscene material is not protected by the First Amendment. Roth v. United States, 354 U.S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. Pp. 23-24.

2. The basic guidelines for the trier of fact must be: (a) whether "the [***2] average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Roth, supra, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 24-25.

3. The test of "utterly without redeeming social value" articulated in Memoirs, supra, is rejected as a constitutional standard. Pp. 24-25.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 30-34.

COUNSEL: Burton Marks reargued the cause and filed a brief for appellant.

Michael R. Capizzi reargued the cause for appellee. With him on the brief was Cecil Hicks.*

* Samuel Rosenwein, A. L. Wirin, Fred Okrand, Laurence R. Sperber, Melvin L. Wulf, and Joel M. Gora filed a brief for the American Civil Liberties Union of Southern California et al. as amici curiae urging reversal. [***3]


OPINIONBY: BURGER

OPINION: [*16] [**2610] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 [**2611] (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code @ 311.2 (a), a misdemeanor, by knowingly distributing obscene matter, n1 [*17] and the Appellate Department, Superior Court of California, County of
Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically [*18] based on his [***4] conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

----Footnotes----

n1 At the time of the commission of the alleged offense, which was prior to June 25, 1969, @@ 311.2 (a) and 311 of the California Penal Code read in relevant part:

"@ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

"@ 311. Definitions

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311 (e) of the California Penal Code, supra, was amended on June 25, 1969, to read as follows:

"(e) 'Knowingly' means being aware of the character of the matter."

----End Footnotes----

[***5]

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women [***2612] in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I


21024482

282
define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

Footnotes

n2 This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra, at 487, but the Roth definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin obscenus, ob, to, plus caenum, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as "1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "offensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (porne, harlot, and graphos, writing). The word now means "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a subgroup of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material "which deals with sex." Roth, supra, at 487. See also ALI Model Penal Code @ 251.4 (I) "Obscene Defined." (Official Draft 1962.)

End Footnotes

"obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

"All ideas having even the slightest redeeming social importance --unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in Chaplin v. New Hampshire, 315 U.S. 568, 571-572:

". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social [*21] value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." [Emphasis by Court in Roth opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U.S., at 484-485 (footnotes omitted).

Nine years later, in Memoirs v. Massachusetts, 383 U.S. 413 (1966), the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) [*40] the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Id., at 418.

The sharpness of the break with Roth, represented by the third element of the Memoirs test and emphasized by MR. JUSTICE WHITE's dissent, id., at 460-462,
was further underscored when the Memoirs plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value." Id., at 419 (emphasis in original).

While Roth presumed "obscenity" to be "utterly without redeeming social importance," Memoirs required [*22] that to prove obscenity it must be affirmatively established that the material is "utterly without redeeming social value." Thus, even as they repeated the words of Roth, the Memoirs [*310] plurality produced a drastically altered test that called on the prosecution to prove a negative, i. e., that the material was "utterly without redeeming social value" -- a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "utterly without redeeming social value" test had any meaning at all. See Memoirs v. Massachusetts, id., at 459 (Harlan, J., dissenting). [*2614] See also id., at 461 (WHITE, J., dissenting); United States v. Gruner, 479 F.2d 577, 579-581 (CA5 1973).

Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e. g., Redrup v. New York, 386 U.S., at 770-771. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v. Dallas, 390 U.S., at 704-705 (Harlan, [*11] J., concurring and dissenting) (footnote omitted). n3 This is not remarkable, for in the area [*23] of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

--- Footnotes ---

n3 In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup "policy." See Walker v. Ohio, 398 U.S. 434-435 (1970) (dissenting opinions of BURGER, C. J., and Harlan, J.). The Redrup procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

--- End Footnotes ---

[***12]

.
.
.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S., at 354; Roth v. United States, supra, at 485. n5 "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." Breed v. Alexandria, 341 U.S., at 642, and cases cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S., at 502. [*13] We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be [*24] carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe [*2615] sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. n6 A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a "patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

.
.
.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; [*15] (b) whether the work depicts or describes, in a "patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic,
political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts, [*25] 383 U.S., at 419; that concept has never commanded the adherence of more than three Justices at one time. n7 See supra, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, at 232; Memoirs v. Massachusetts, supra, at 459-460 (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S., at 204 (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 284-285 (1964); Roth v. United States, supra, at 497-498 [***16] (Harlan, J., concurring and dissenting).

Footnotes

n7 "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ." Kois v. Wisconsin, 408 U.S. 229, 231 (1972). See Memoirs v. Massachusetts, 383 U.S. 413, 461 (1966) (WHITE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See id., at 462 (WHITE, J., dissenting).

End Footnotes

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, [***17] and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures [***2616] exhibited or sold in places of public accommodation any more than live sex and nudity can [*26] be exhibited or sold without limit in such public places. n8 At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, at 230-232; Roth v. United States, supra, at 487; Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. n9

Footnotes

n8 Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v. O'Brien, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and non-speech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See California v. LaRue, 409 U.S. 109, 117-118 (1972). [***18]

End Footnotes

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale -- an absolutist, "anything goes" view of the First Amendment -- because it will lighten our burdens. n11 "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." Jacobellis v. Ohio, supra, at 187-188 (opinion of BRENNAN, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See Roth v. United States, supra, at 482-485. "Our duty admits of no substitute for facing up [*30] to the tough individual problems

n11 We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

- - - - - - - End Footnotes- - - - - - -

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying [***24] contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

... We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter [***28] of fact. Mr. Chief Justice Warren pointedly commented in his dissent in Jacobellis v. Ohio, supra, at 200:

"It is my belief that when the Court said in Roth that obscenity is to be defined by reference to "community standards," it meant community standards --not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. n13 [***33] See Hoyt v. Minnesota, 399 U.S. 524-525 (1970) [***27] (BLACKMUN, J., dissenting); Walker v. [***2620] Ohio, 398 U.S. 434 (1970) (BURGER, C. J., dissenting); id., at 434-435 (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319 (1970) (BURGER, C. J., dissenting); id., at 319-320 (Harlan, J., dissenting); United States v. Groner, 479 F.2d, at 581-583; O'Meara & Shaffer, Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1, 6-7 (1964). See also Memoirs v. Massachusetts, 383 U.S., at 458 (Harlan, J., dissenting); Jacobellis v. Ohio, supra, at 203-204 (Harlan, J., dissenting); Roth v. United States, supra, at 505-506 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508-509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary [***28] community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one. See Roth v. United States, supra, at 489. Cf. the now discredited test in Regina v. Hicklin, [1868] L. R. 3 Q. B. 360. We hold that the requirement that the jury evaluate the materials with reference to "contemporary [***34] standards of the State of California" serves this protective purpose and is constitutionally adequate. n14

... IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with
commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press . . . ." Breard v. Alexandria, 341 U.S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of [*35] political and social changes desired by the people," Roth v. United States, supra, at 484 [***2621] (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230-232; Thornhill v. Alabama, 310 U.S., at 101-102. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing [***31] commercial gain, is a different matter. n15

Vacated and remanded.

DISSENT BY: DOUGLAS; BRENNAN

DISSENT: MR. JUSTICE DOUGLAS, dissenting.

[omitted]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

[omitted]
STANLEY v. GEORGIA

No. 293

SUPREME COURT OF THE UNITED STATES

394 U.S. 557; 89 S. Ct. 1243; 1969 U.S. LEXIS 1972; 22 L. Ed. 2d 542

January 14-15, 1969, Argued
April 7, 1969, Decided

PRIOR HISTORY: [***1]

APPEAL FROM THE SUPREME COURT OF GEORGIA.


SYLLABUS: Under authority of a warrant to search appellant's home for evidence of his alleged bookmaking activities, officers found some films in his bedroom. The films were projected and deemed to be obscene. Appellant was arrested for their possession. He was thereafter indicted, tried, and convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of a Georgia law. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" Appellant contends that the Georgia obscenity statute is unconstitutional insofar as it punishes mere private possession of obscene matter. Georgia, relying on Roth v. United States, 354 U.S. 476, argues the statute's validity on the ground that "obscenity is not within the area of constitutionally protected speech or press." Id., at 485. Held: The First Amendment as made applicable to the States by the Fourteenth [****2] prohibits making mere private possession of obscene material a crime. Pp. 560-568.

(a) Neither Roth, supra, nor subsequent decisions of the Court were made in the context of a statute punishing mere private possession of obscene material, but involved governmental power to prohibit or regulate certain public actions respecting obscene matter. Pp. 560-564.

(b) The Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusions into one's privacy and control of one's thoughts. Pp. 564-566.

(c) The State may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct, Roth, supra, distinguished, or proscribe such possession on the ground that it is a necessary incident to a statutory scheme prohibiting distribution, see Smith v. California, 361 U.S. 147. Pp. 566-568.

COUNSEL: Wesley R. Asinof argued the cause and filed a brief for appellant.

J. Robert Sparks argued the cause for appellee. With him on the brief was Lewis R. Slaton.


OPINIONBY: MARSHALL

OPINION: [*558][***3][**1244] MR. JUSTICE MARSHALL delivered the opinion of the Court.

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law. n1 Appellant [*559] was tried before a jury and convicted. The Supreme Court of Georgia affirmed. Stanley v. State, 224 Ga. 259, 161 S. E. 2d 309 (1968). We noted probable jurisdiction of an appeal brought under 28 U. S. C. @ 1257 [****4] (2). 393 U.S. 819 (1968).

*n1 "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or
transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. @ 26-6301 (Supp. 1968).

End Footnotes

Appellant raises several challenges to the validity of his conviction. n2 We find it necessary to consider only one. [**1245] Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

n2 Appellant does not argue that the films are not obscene. For the purpose of this opinion, we assume that they are obscene under any of the tests advanced by members of this Court. See Redrup v. New York, 386 U.S. 767 (1967).

End Footnotes

The court below saw no valid constitutional objection to the Georgia statute, even though it extends further than the typical statute forbidding commercial sales of obscene material. It held that "it is not essential to an indictment charging one with possession of obscene matter [***6] that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" Stanley v. State, supra, at 261, 161 S. E. 2d, at 311. The State and appellant both agree that the question here before us is whether "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter" is constitutional. In this context, Georgia concedes that the present case appears to be one of "first [**560] impression . . . on this exact point," n3 but contends that since "obscenity is not within the area of constitutionally protected speech or press," Roth v. United States, 354 U.S. 476, 485 (1957), the States are free, subject to the limits of other provisions of the Constitution, see, e. g., Ginsberg v. New York, 390 U.S. 629, 637-645 (1968), to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?

n3 The issue was before the Court in Mapp v. Ohio, 367 U.S. 643 (1961), but that case was decided on other grounds. MR. JUSTICE STEWART, although disagreeing with the majority opinion in Mapp, would have reversed the judgment in that case on the ground that the Ohio statute proscribing mere possession of obscene material was "not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'" Id., at 672.

End Footnotes

It is true that Roth does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. See, e. g., Smith v. California, 361 U.S. 147, 152 (1959); Jacobellis v. Ohio, 378 U.S. 184, 186-187 (1964) (opinion of BRENAN, J.); Ginsberg v. New York, supra, at 635. However, neither Roth nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute. n4 The defendant in a companion case, Alberts v. California, 354 U.S. 476 (1957), was convicted of "lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing an obscene advertisement of them . . . ." Id., at 481. None of the statements cited by the Court in [*561] Roth for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" [***8] were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. n5 Moreover, none of this [**1246] Court's decisions subsequent to Roth involved prosecution for private possession of obscene materials. Those cases dealt with the power of the
State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter. n6 Indeed, with one [*562] exception, we have been unable to discover any case in which the issue in the present case has been fully considered. n7

n7 The Supreme Court of Ohio considered the issue in State v. Mapp, 170 Ohio St. 427, 166 N. E. 2d 387 (1960). Four of the seven judges of that court felt that criminal prosecution for mere private possession of obscene materials was prohibited by the Constitution. However, Ohio law required the concurrence of "all but one of the judges" to declare a state law unconstitutional. The view of the "dissenting" judges was expressed by Judge Herbert:

"I cannot agree that mere private possession of . . . [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." 170 Ohio St., at 437, 166 N. E. 2d, at 393.

Shortly thereafter, the Supreme Court of Ohio interpreted the Ohio statute to require proof of "possession and control for the purpose of circulation or exhibition." State v. Jacobellis, 173 Ohio St. 22, 27-28, 179 N. E. 2d 777, 781 (1962), rev'd on other grounds, 378 U.S. 184 (1964). The interpretation was designed to avoid the constitutional problem posed by the "dissenters" in Mapp. See State v. Ross, 12 Ohio St. 2d 37, 231 N. E. 2d 299 (1967).

Other cases dealing with nonpublic distribution of obscene material or with legitimate uses of obscene material have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds. In United States v. Chase, 135 U.S. 255 (1890), the Court held that federal law did not make criminal the mailing of a private sealed obscene letter on the ground that the law's purpose was to purge the mails of obscene matter "as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence . . . ." 135 U.S., at 261. The law was later amended to include letters and was sustained in that form. Andrews v. United States, 162 U.S. 420 (1896). In United States v. 31 Photographs, 156 F.Supp. 350 (D. C. S. D. N. Y. 1957), the court denied an attempt by the Government to confiscate certain materials sought to be imported into the United States by the Institute for Sex Research, Inc., at Indiana University. The court found, applying the Roth formulation, that the materials would not appeal to the "prurient interest" of those seeking to import and utilize the materials. Thus, the statute permitting seizure of "obscene" materials was not applicable. The court found it unnecessary to reach the constitutional questions presented by the claimant, but did note its belief that "the statement . . . [in Roth] concerning the rejection of obscenity must be interpreted in the light of the widespread distribution of the material in Roth." 156 F.Supp., at 360, n. 40. See also Redmond v. United States, 384 U.S. 264 (1966), where this Court granted the Solicitor General's motion to vacate and remand with instructions to dismiss an information charging a violation of a federal obscenity statute in a case where a husband and wife mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing. But see Ackerman v. United States, 293 F.2d 449 (C. A. 9th Cir. 1961).

[*563] In this context, we do not believe that this case can be decided simply by citing Roth. Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid [**1247] governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far. As the Court said in Roth itself, "ceaseless vigilance is the watchword to prevent . . . erosion of First Amendment rights by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." 354 U.S., at 488. Roth and the cases following it discerned such an "important interest" in the regulation of commercial distribution of [*564] obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established [***12] that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . .

This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U.S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited [**1248] circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual [***13] nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).


[***565] These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the [***14] present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. n8 To [***566] some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688-689 (1959), [***15]

"this argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority . . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission [***1249] of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See Winters v. New York, supra, at 510. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

---Footnotes---

n8 "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, Morals and the Constitution: The Sin of Obscenity. 63 Col. L. Rev. 391, 395 (1963).

---End Footnotes---

[***16]

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion.
n9 But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "among free men, the deterrents ordinarily to be [*567] applied to prevent crime are education and punishment for violations of the law . . . ." Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938 (1963). Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U.S. at 486-487. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see Ginsberg v. New York, supra, or that it might intrude upon the sensibilities or privacy of the general public. n10 See Redrup v. New York, 386 U.S. 767, 769 (1967). No such dangers are present in this case.

n10 The Model Penal Code provisions dealing with obscene materials are limited to cases of commercial dissemination. Model Penal Code @ 251.4 (Prop. Official Draft 1962); see also Model Penal Code @ 207.10 and comment 4 (Tent. Draft No. 6, 1957); H. Packer, The Limits of the Criminal Sanction 316-328 (1968); Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669 (1963).

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties [*568] exist, but even if they did we do not think that th justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See Smith v. California, 361 U.S. 147 (1959).

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. n11 Roth and the cases [**1250] following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed [***19] and the case is remanded for proceedings not inconsistent with this opinion.

n11 What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. See, e.g., 18 U.S. C. @ 793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . ." In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.

It is so ordered.

CONCURBY: BLACK; [***20] STEWART

CONCUR: MR. JUSTICE BLACK, concurring. [omitted]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, concurring in the result.

[omitted]

21024415
SEX AND THE SINGLE SYSADMIN:
The risks of carrying graphic sexual materials.
Column: Internet World
Approx: 3700 words
"arch/April 1994 issue

By Mike Godwin
(mnemonic@eff.org)

It's the kind of nightmare that will cause any sysadmin to bolt upright in bed, shaking, gripping the sheets with white-knuckled fingers.

In this nightmare scenario, the facts are simple: you hear a knock at the door, you answer to discover grim-faced law-enforcement agents holding a search warrant, and you are forced to stand by helplessly while they seize your system to search it for obscene or child-pornographic images.

In some versions of the nightmare, you may not even have known your hard disk contained such images; in others, your lack of knowledge may prove to be no defense in a criminal prosecution for possession of child pornography.

A wave of concern about porn

In recent months, the Legal Services Department here at EFF (the Electronic Frontier Foundation) has faced a wave of concern in the United States about the legal issues raised by online obscenity and child pornography. Most recently, a nationwide federal investigation into the importing of child-pornographic computer files led first to several well-publicized searches and seizures of computers and bulletin-board systems (BBSs) and later to a number of indictments of computer users on charges relating to possession or distribution of this material. One result has been that a large number of BBS operators and network site administrators have contacted EFF with questions and concerns about their potential liability under obscenity and child-pornography laws.

Why so much concern? Partly, it's that, thanks to the availability of cheap image scanners, fast modems, and capacious hard disks, a large number of this country's BBSs and network sites carry GIF (Graphic Interchange Format) files or other kinds of graphic images with sexual content. These images can range from centerfold-type nudes to "hard-core" pornography. (For the sake of simplicity, I will refer to all graphic-image files as GIFs, although there are a number of other formats commonly available.)

Just as the growth of the consumer VCR market was linked to a growth in the market for adult videos, the increasing availability of certain kinds of consumer computer technology has led to a rapid increase in GIF-file traffic. System operators who might never consider opening an adult book or video store have either allowed or encouraged sexually oriented images to be exchanged on their systems. To understand this difference in
attitudes one has to understand how online conferencing systems are generally run—as forums for their users to talk to each other, and to trade computer programs and files with each other.

How porn gets online

Although these problems pervade the world of the Internet, the easiest case to understand is the microcomputer-based BBS. The operator of a BBS typically dedicates a computer and one or more phone lines at her home or business for the use of a "virtual community" of users. Each user calls up the BBS and leaves public messages (or, in many cases, GIFs) that can be read by all other users or private mail (which may include GIFs) that can be read by a particular user or both. BBSs become forums—digital public houses, salons, and Hyde Park corners—for their users, and users with similar interests can associate with one another without being hindered by the accidents of geography. By some estimates, there are currently in excess of 40,000 BBSs throughout North America, ranging from low-end free-access BBSs with only one or two phone lines to BBSs run by companies, government agencies, user groups, and other organizations.

A step up from the BBS in complexity is the conferencing system or information service. These systems differ in capacity from BBSs: they have the capability of serving dozens, or hundreds, of users at the same time. But they're like BBSs in that uploaded files can be found at a fixed geographic location. A further step up are entities like Fidonet and Usenet, which, because they're highly distributed, decentralized conferencing systems, add complications to the legal issues raised by the computerization of sexual images.

Internet nodes and the systems that connect to them, for example, may carry such images unwittingly, either through uuencoded mail or through uninspected Usenet newsgroups. The store-and-forward nature of message distribution on these systems means that such traffic may exist on a system at some point in time even though it did not originate there, and even though it won't ultimately end up there. What's more, even if a sysadmin refuses to carry the distributed forums most likely to carry graphic images, she may discover that sexually graphic images have been distributed through a newsgroup that's not obviously sexually oriented.

Depending on the type of system he or she runs, a system operator may not know (and may not be able to know) much about the system's GIF-file traffic, especially if his or her system allows GIFs to be traded in private mail. Other operators may devote all or part of their systems to adult-oriented content, including image files.

Regardless of how their systems are run, though, operators often create risks for themselves under the mistaken assumption that a) since this kind of material is commonplace, it must be legal, and b) even if it's illegal, they can't be prosecuted for something they don't know about. EFF's Legal Services Department has been working actively to educate system operators about the risks of making these assumptions.

What counts as "obscene"?
First of all, we've explained that the fact that graphic sexual material is common on BBSs doesn't mean that it's not legally obscene and illegal in their jurisdiction.

Judge Richard Posner comments in the October 18, 1993, issue of THE NEW REPUBLIC, "Most "hard-core" pornography--approximately, the photographic depiction of actual sex acts or of an erect penis--is illegal." even though it is also widely available. (Let me emphasize the word "approximately"--Posner knows that there are countless exceptions to this general rule.) That is, distribution of most of this material is prohibited under state or federal anti-obscenity law because it probably would meet the Supreme Court's test for defining obscenity.

But what precisely is the Court's definition of obscenity? In Miller v. California (1973), the Court stated that material is "obscene" (and therefore not protected by the First Amendment) if 1) the average person, applying contemporary community standards, would find the materials, taken as a whole, arouse immoral lustful desire (or, in the Court's language, appeal to the "prurient interest"), 2) the materials depict or describe, in a patently offensive way, sexual conduct specifically prohibited by applicable state law, and 3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

This is a fairly complex test, but most laymen remember only the "community standards" part of it, which is why some system operators are under the mistaken impression that if the material is common and available, "community standards" and the law must allow it.

In layman's terms, a jury (or a judge in a nonjury case) would ask itself something like these four questions:
1) Is it designed to be sexually arousing?
2) Is it arousing in a way that one's local community would consider unhealthy or immoral?
3) Does it depict acts whose depictions are specifically prohibited by state law?
4) Does the work, when taken as a whole, lack significant literary, artistic, scientific, or social value?

If the answer to all four questions is "yes," the material will be judged obscene, and it will be Constitutional to prosecute someone for distributing it. (It should be noted in passing that pictures of the "hardness" of Playboy and Penthouse photography have never been found to be obscene--their appearance in digital form on Usenet sites may create copyright problems, but they won't create obscenity problems.)

The perils of online obscenity

In theory, most "hardcore" pornography qualifies as "obscenity" under the supreme Court's test. Yet theoretically obscene material is commonly available in many urban areas--this signifies, perhaps, that the relevant laws, when they do exist, are underenforced. At EFF, however, we have been telling system operators that there is no *legal* basis for their assuming that the laws will remain underenforced when it comes to online forums.
For one thing, most of this country's law-enforcement organizations have only recently become aware of the extent that such material is traded and distributed online—now that they're aware of it, they're aware of the potential for prosecution. In a recent case, an Oklahoma system operator was charged under state law for distribution of obscene materials, based on a CD-ROM of sexual images that he'd purchased through a mainstream BBS trade magazine. He was startled to find out that something he'd purchased through normal commercial channels had the potential of leading to serious criminal liability.

Still another issue, closely related to obscenity law, is whether an online system creates a risk that children will have access to adult materials. States in general have a special interest in the welfare of children, and they may choose to prohibit the exposure of children to adult materials, even when such materials are not legally obscene. (Such materials are often termed "indecent"—that is, they violate some standard of "decency," but nevertheless are Constitutionally protected. If this category seems vague, that's because it is.) In Ginsberg v. State of New York (1968), the Supreme Court held a state statute of this sort to be Constitutional.

Although there is no general standard of care for system operators who want to prevent children from having such access, it seems clear that, for a system in a state with such a statute, an operator must make a serious effort to bar minors from access to online adult materials. (A common measure—soliciting a photocopy of a driver's license—is inadequate in my opinion. There's no reason to think a child would be unable to send in a photocopy of a parent's driver's license.)

It's worth noting that, in addition to the risk, there are also some protections for system operators who are concerned about obscene materials. For example, the system operator who merely possesses, but does not distribute, obscene materials cannot Constitutionally be prosecuted—in the 1969 case Stanley v. Georgia, the Supreme Court held the right to possess such materials in one's own home is Constitutionally protected. Thus, even if you had obscene materials on the Internet node you run out of your house, you're on safe ground so long as they're not accessible by outsiders who log into your system.

And, in the 1959 case Smith v. California, the Court held that criminal obscenity statutes, like the great majority of all criminal laws, must require the government to prove "scienter" (essentially, "guilty knowledge" on the defendant's part) before that defendant can be found guilty. So, if the government can't prove beyond a reasonable doubt that a system operator knew or should have known about the obscene material on the system, the operator cannot be held liable for an obscenity crime.

In short, you can't constitutionally be convicted merely for possessing obscene material, or for distributing obscene material you didn't know about.

Child pornography—visual images that use children
When the issue is child pornography, however, the rules change. Here's one of the federal child-porn statutes:

18 USC 2252: Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who--

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

(N.B. For the purposes of federal law, "minor" means "under age 18"--it does not refer to the age of consent in a particular state.)

This statute illustrates some of the differences between the world of obscenity law and that of child-pornography law. For one thing, the statute does not address the issue of whether the material in question is "obscene." There's no issue of community standards or of "serious" artistic value. For all practical purposes, the law of child pornography is wholly separate from the law of obscenity.

Here's the reason for the separation: "obscenity" laws are aimed at forbidden expression--they assume that some things are socially harmful by virtue of being expressed or depicted. Child-porn laws, in contrast, are not aimed at expression at all--instead, they're designed to promote the protection of children by trying to destroy a market for materials the production of which requires the sexual use of children.
This rationale for the child-pornography laws has a number of legal consequences. First of all, under the federal statute, material that depicts child sex, but in which a child has not been used, does not qualify as child pornography. Such material would include all textual depictions of such activity, from Nabokov's novel LOLITA to the rankest, most offensive newsgroups on Usenet, all of which are protected by the First Amendment (assuming that, in addition to not being child pornography, they're also not obscene).

Secondly, the federal child-porn statute is limited to visual depictions (this is not true for all state statutes), but does not apply to *all* visual depictions: computer-generated or -altered material that *appears* to be child pornography, but which did not in fact involve the sexual use of a real child, would not be punishable under the federal statute cited above. This makes sense in light of the policy—if real children aren't being sexually abused, the conduct these statutes are trying to prevent has not occurred. Although prosecutors have had little trouble up to now in proving at trial that actual children have been used to create the child-porn GIF images at issue, we can anticipate that, as computer-graphics tools grow increasingly powerful, a defendant will someday argue that a particular image was created by computer rather than scanned from a child-porn photograph.

Third, since the laws are aimed at destroying the market for child pornography, and since the state has a very powerful interest in the safety of children, even the mere possession of child porn can be punished. (Compare: mere possession of obscene materials is Constitutionally protected.)

The fourth consequence of the child-protection policy that underlies child-porn statutes is that the federal law, as interpreted by most federal courts, does not require that the defendant be proved to have known that a "model" is a minor. In most jurisdictions, a defendant can be convicted for possession of child porn even if he can prove that he believed the model was an adult. If you can prove that you did not even know you possessed the image at all, you should be safe. If your knowledge falls somewhere in between—you knew you had the image, but did not know what it depicted, or that it was sexual in its content—the law is less clear. (In other words, it's not yet clear whether it is a defense for a system administrator to claim he didn't even know he possessed the image, either because it had been uploaded by a user without his knowledge, or because it had appeared in "pass-through" mail or through a Usenet newsfeed.)

In sum, then, the child-porn statutes create additional problems for the system administrator who wants to avoid criminal liability and minimize the risk of a disruptive search and seizure.

What you can do

The first thing to do is not to overreact at this discussion of the risks. It would amount to a serious "chilling effect" on freedom of expression if a sysadmin—in order to eliminate the risk of prosecution for distribution of obscenity, or for possession or distribution of child-pornography—decided to eliminate all newsgroups with sexual
content. The textual content of such newsgroups is constitutionally protected, as is much of the GIF content.

What's worse is that the tactic wouldn't eliminate the risks--it's always possible for someone to post illegal material to an innocuous newsgroup,.ke sci.astro or rec.arts.books, so that it would get to your system anyway. Similarly, an illegal image might be uuencoded and included in e-mail, which, if you're a system covered by the Electronic Communications Privacy Act, you're not allowed to read.

You should begin with the knowledge that nothing you can do as a sysadmin will eliminate altogether the risks of prosecution or of a disruptive search and seizure. But a few sensible measures can reduce the risks of a search or an arrest, and at the same time preserve the freedom of expression of your users and of those users who transmit material through your system.

* If you plan to carry graphic sexual material, look up your state's obscenity laws. A lawyer or librarian can help you find the relevant state statutes. Find out what, specifically, your state tries to prohibit. (If the state statute seems inconsistent with what I've written here, consider seeking legal advice--it may be that the statute predates the Supreme Court's decisions on obscenity and child pornography but has not yet been challenged.) You may also want to consult local adult bookstores—they often have clear, practical information about avoiding obscenity prosecutions.

If you're running an online forum local to your system, and that forum has an upload/download area, prescreen graphic images before making them publicly available for downloads. While "calendar" and "foldout" images are Constitutionally protected, you may want to consider deleting "hardcore" images that might be found "obscene" in your community. You also want to delete anything that looks like child pornography.

* If you're running a Usenet node, and you are informed by users that an obscene or child-porn image has been posted to a newsgroup you carry, examine it and consider deleting it. If there's any ambiguity, err on the conservative side--remember, if you guess wrong about the age of the model, you can be convicted anyway.

* Take pains on your system to limit childrens' access to adult material, even if that material is not legally obscene (it may still be "indecent"). This includes textual material dealing with adult topics. Hint: asking for a photocopied driver's license in the mail is probably not an adequate safeguard--too easy for industrious minors to circumvent. A good set of rules to follow is spelled out in an FCC regulation applicable to phone-sex providers--47 CFR 64.201. The easiest FCC suggestions for a for-pay BBS, online service, or Internet access provider is to require payment by credit card; the easiest for a nonpay system is have an application process that reasonably ascertains whether an applicant for access is an adult, and to have a procedure whereby one can instantly cut off that access when informed that a user is in fact a minor.

* Don't delete discussions of sexual topics—they're Constitutionally
protected. And even though the Supreme Court has not limited the
definition of "obscenity" to visual depictions, as a practical matter,
there is little legal risk in carrying textual narratives ("stories") on
sexual themes.

* Don't inspect individuals' e-mail without their consent--unless they're
employees of your company, their mail is probably protected by the
Electronic Communications Privacy Act.

* If you're a university site, or if you're simply interested in the law
of freedom of speech, consult the Computers and Academic Freedom (CAF)
archive, which is part of the EFF archive at ftp.eff.org. If you have
gopher, the archive is browsable with the command "gopher -p academic/law
gopher.eff.org"; if you are limited to e-mail access, send e-mail to
archive-server@eff.org, and include the line

   send acad-freedom/law <filename>

where <filename> is a list of the files that you want (start with README,
 a detailed description of the items in the directory). The CAF archive has
a number of instructional materials that deal with obscenity and
child-pornography law.

These measures won't guarantee that you'll never have legal
troubles--nothing can guarantee that. (And if you have particular legal
worries, you should consult a lawyer in your jurisdiction.) But they can
reduce the risks you face as a system administrator and as a carrier and
distributor of information. At the same time, they'll minimize the extent
to which you interfere with your users' freedom to communicate--which is,
after all, one of the chief reasons they're online in the first place.

Mike Godwin (mnemonic@eff.org) is online counsel for the Electronic
Frontier Foundation, where he advises users of electronic networks about
their legal rights and responsibilities, and instructs criminal lawyers,
law-enforcement personnel, and others about computer civil-liberties
issues.

For info on EFF mailing lists, newsgroups & archives, mail eff@eff.org. To
browse EFF's archives, use FTP, gopher, or WAIS to connect to ftp.eff.org,
gopher.eff.org, or waids.eff.org respectively. Look in /pub/EFF. To get
basic EFF info send a message to info@eff.org. Send detailed queries to
ask@eff.org. For membership information, mail membership@eff.org.
SECTION 6

INTELLECTUAL PROPERTY
&sect; 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120 [17 USCS &sect;&sect; 107-120], the owner of copyright under this title [17 USCS &sect;&sect; 101 et seq.] has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.
§ 107. Limitations on exclusive rights: fair use

Notwithstanding the provisions of sections 106 and 106A [17 USCS § 106, 106A] the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[Amended 10/24/92 by Pub. L. No. 102-492 which added this last sentence to § 107.]
Held: The sale of the VTR's to the general public does not constitute contributory infringement of respondents' copyrights. Pp. 428-456.

(a) The protection given to copyrights is wholly statutory, and, in a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Pp. 428-434.

(b) Kalem Co. v. Harper Brothers, 222 U.S. 55, does not support respondents' novel theory that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This [***3] case does not fall in the category of those in which it is manifestly just to impose vicarious liability because the "contributory" infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner. Here, the only contact between petitioners and the users of the VTR's occurred at the moment of sale. And there is no precedent for imposing vicarious liability on the theory that petitioners sold the VTR's with constructive knowledge that their customers might use the equipment to make unauthorized copies of copyrighted material. The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses. Pp. 434-442.

(c) The record and the District Court's findings show (1) that there is a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcast time-shifted by private viewers (i.e., recorded at a time when [***4] the VTR owner cannot view the broadcast so that it can be watched at a later time); and (2) that there is no likelihood that time-shifting would cause nonminimal harm to the potential market for, or the value of, respondents' copyrighted works. The VTR's are therefore capable of substantial noninfringing uses. Private, noncommercial time-shifting in the home satisfies this standard of
noninfringing uses both because respondents have no right to prevent other copyright holders from authorizing such time-shifting for their programs, and because the District Court’s findings reveal that even the unauthorized home time-shifting of respondents’ programs is legitimate fair use. Pp. 442-456.

COUNSEL: Dean C. Dunlavey reargued the cause for petitioners. With him on the briefs were Donald E. Sloan and Marshall Rutter.

Stephen A. Kroft reargued the cause for respondents. With him on the brief was Sondra E. Berchin. *

* Briefs of amici curiae urging reversal were filed for the Virginia Citizens’ Consumer Council, Inc., et al. by William A. Dobrovic; for the American Library Association by Newton N. Minow; for the Consumer Electronics Group by J. Edward Day; for the Educators Ad Hoc Committee on Copyright Law by Michael H. Cardozo, August W. Steinhilber, and Gwendolyn H. Gregory; for General Electric Co. et al. by Alfred B. Engelberg, Morton Amster, Jesse Rothstein, and Joel E. Lutzker; for Hitachi, Ltd., et al. by John W. Armagost and Craig B. Jorgensen; for McCann-Erickson, Inc., et al. by John A. Donovan, A. Howard Matz, and David Fleischer; for Minnesota Mining and Manufacturing Co. et al. by Sidney A. Diamond and Grier Curran Raclin; for the National Retail Merchants Association by Peter R. Stern, Theodore S. Steingut, and Robert A. Weiner; for Sanyo Electric, Inc., by Anthony Liebig; for Sears, Roebuck and Co. by Max L. Gillam and Mary E. Woytek; for TDK Electronics Co., Ltd., by Ko-Yung Tung and Adam Yarmolinsky; for Toshiba Corp. et al. by Donald J. Zoeller and Herve Gouraine; for Pfizer Inc. by Steven C. Kany; and for Viare Publishing by Peter F. Marvin.


Briefs of amici curiae were filed for the State of Missouri et al. by John Ashcroft, Attorney General of Missouri, and by the Attorneys General for their respective States as follows: Charles A. Graddick of Alabama, John Steven Clark of Arkansas, Michael J. Bowers of Georgia, Tany S. Hong of Hawaii, Tyrone C. Fahner of Illinois, Thomas J. Miller of Iowa, William J. Guste, Jr., of Louisiana, William A. Allain of Mississippi, Michael T. Greely of Montana, Rufus L. Edmisten of North Carolina, William J. Brown of Ohio, Jan Eric Cartwright of Oklahoma, Dennis J. Roberts II of Rhode Island, John J. Easton of Vermont, Gerald L. Baliles of Virginia, and Bronson C. La Follette of Wisconsin; and for the Committee on Copyright and Literary Property of the Association of the Bar of the City of New York by Michael S. Oberman and David H. Marks. [***5]

JUDGES: STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, and O’CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion in which MARSHALL, POWELL, and REHNQUIST, JJ., joined, post, p. 457.

OPINIONBY: STEVENS

OPINION: [*419] [**777] JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television [*420] programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners’ copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

... An explanation of our rejection of respondents’ unprecedented attempt to impose copyright liability
upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial [***8] value of their copyrights or has created any likelihood of future harm. Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals holding that respondents are entitled to enjoin the distribution of VTR's, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

I

The two respondents in this action, Universal City Studios, Inc., and Walt Disney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these works in a number of ways: [*422] by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs [***9] on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Petitioner Sony manufactures millions of Betamax video tape recorders and markets these devices through numerous retail establishments, some of which are also petitioners in this action. n2 Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set.

Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that [***779] have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined [*423] times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording. provided, of course, that the viewer is present when the program is recorded. The fast-forward control enables the viewer of a previously recorded program to run [***11] the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was "time-shifting" -- the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes. n3 Sony's survey indicated [*424] that over 80% of the interviewees watched at least as much regular television as they had before owning a
Betamax. n4 Respondents offered no evidence of decreased television viewing by Betamax owners. n5

The District Court concluded that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement. It emphasized the fact that the material was broadcast free to the public at large, the noncommercial character of the use, and the private character of the activity conducted entirely within the home. Moreover, the court found that the purpose of this use served [***15] the public interest in increasing access to television programming, an interest that "is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94; 102." Id., at 454. n8 Even when an entire copyrighted work was recorded, [*426] the District Court regarded the copying as fair use "because there is no accompanying reduction in the market for 'plaintiff's original work.'" Ibid.

As an independent ground of decision, the District Court also concluded that Sony could not be held liable as a contributory infringer [***16] even if the home use of a VTR was considered an infringing use. The District Court noted that Sony had no direct involvement with any Betamax purchasers who recorded copyrighted works off the air. Sony's advertising was silent on the subject of possible copyright infringement, but its instruction booklet contained the following statement:

"Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws." Id., at 436.

The District Court assumed that Sony had constructive knowledge of the probability that the Betamax machine would be used to record copyrighted programs, but found that Sony merely sold a "product capable of a variety of uses, some of them allegedly infringing." Id., at 461. It reasoned:

"Selling a staple article of commerce -- e.g., a typewriter, a recorder, a camera, a photocopying machine -- technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory [*781] beyond precedent [***17] and arguably beyond judicial management.

"... Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on some occasions would use their product [*427] for a purpose which a court later deemed, as a matter of first impression, to be an infringement." Ibid.

Finally, the District Court discussed the respondents' prayer for injunctive relief, noting that they had asked for an injunction either preventing the future sale of Betamax machines, or requiring that the machines be rendered incapable of recording copyrighted works off the air. The court stated that it had "found no case in which the manufacturers, distributors, retailers and advertisers of the instrument enabling the infringement were sued by the copyright holders," and that the request for relief in this case "is unique." Id., at 465.

It concluded that an injunction was wholly inappropriate because any possible harm to respondents was outweighed by the fact that "the Betamax could still legally be used to record noncopyrighted material or material whose owners consented [***18] to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording." Id., at 468.

The Court of Appeals' Decision

The Court of Appeals reversed the District Court's judgment on respondents' copyright claim. It did not set aside any of the District Court's findings of fact. Rather, it concluded as a matter of law that the home use of a VTR was not a fair use because it was not a "productive use." n9 It therefore held that it was unnecessary for plaintiffs to prove any harm to the potential market for the copyrighted works, but then observed that it seemed clear that the cumulative effect of mass reproduction made possible by VTR's would tend to diminish the potential market for respondents' works. 659 F.2d, at 974.
"Without a 'productive use,' i.e. when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." 659 F.2d, at 971-972.

[*428] On the issue of contributory infringement, the Court of Appeals first rejected the analogy to staple articles of commerce such as tape recorders or photocopying machines. It noted that such machines "may have substantial benefit for some purposes" and do not "even remotely raise copyright problems." Id., at 975. VTR's, however, are sold "for the primary purpose of reproducing television programming" and "[virtually] all" such programming is copyrighted material. Ibid. The Court of Appeals concluded, therefore, that VTR's were not suitable for any substantial noninfringing use even if some copyright owners elect not to enforce their rights.

The Court of Appeals also rejected the District Court's reliance on Sony's lack of knowledge that home use constituted infringement. Assuming that the statutory provisions defining the remedies for infringement applied also to the nonstatutory tort of contributory infringement, the court stated that a defendant's good faith would merely reduce his damages liability but would not excuse the infringing conduct. It held that Sony was chargeable with knowledge of the homeowner's infringing activity because the[*429] reproduction of copyrighted materials was either "the most conspicuous use" or "the major use" of the Betamax product. Ibid.

On the matter of relief, the Court of Appeals concluded that "statutory damages may be appropriate" and that the District Court should reconsider its determination that an injunction would not be an appropriate remedy; and, referring to "the analogous photocopying area," suggested that a continuing royalty pursuant to a judicially created compulsory license may very well be an acceptable resolution of the relief issue. Id., at 976.

II

Article I, @ 8, of the Constitution provides:

"The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[*429] The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision [*429] of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

"The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In Fox Film Corp. v. Doyal, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

....

[*430] From its beginning, the law of copyright has developed in response to significant changes in technology. n11 Indeed, it [*783] was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection. n12 Repeatedly, as new developments have [*431] occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. Wheaton v. Peters, 8 Pet. 591, 661-662 (1834). The remedies for infringement "are only those prescribed by Congress." Thompson v. Hubbard, 131 U.S. 123, 151 (1889).

....

n11 Thus, for example, the development and marketing of player pianos and perforated rolls of music, see White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in @ 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see Fortnightly Corp. v. United

n12 "Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas." Foreword to B. Kaplan, An Unhurried View of Copyright vii-viii (1967).

n17 The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works. n16 As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

III

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U.S.C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, § 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. n17 For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

n17 As the District Court correctly observed, however, "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . . ." 480 F.Supp., at 457-458. The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.

Justice Holmes stated that the producer had "contributed" to the infringement of the copyright, and the label "contributory infringement" has been applied in a number of lower court copyright cases involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred. In such cases, as in other situations in which the imposition of vicarious liability is manifestly just, the "contributory" infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner. n18 This case, however, plainly does not fall in that category. The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale. The District Court expressly found that "no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air." 480 F.Supp., at 460. And it further found that "there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were
influenced or encouraged by [Sony's] advertisements." Ibid.

n18 The so-called "dance hall cases," Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F.2d 1213 (CA1 1977) (racetrack retailer infringer to supply music to paying customers); KECA Music, Inc. v. Dingus McGee's Co., 432 F.Supp. 72 (WD Mo. 1977) (cocktail lounge hired musicians to supply music to paying customers); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (CA7 1929) (dance hall hired orchestra to supply music to paying customers), are often contrasted with the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity were found not to be liable for contributory infringement. E. g., Deutsch v. Arnold, 98 F.2d 686 (CA2 1938).

In Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (CA2 1971), the direct infringers retained the contributory infringer to manage their performances. The contributory infringer would contact each direct infringer, obtain the titles of the musical compositions to be performed, print the programs, and then sell the programs to its own local organizations for distribution at the time of the direct infringement. Id., at 1161. The Court of Appeals emphasized that the contributory infringer had actual knowledge that the artists it was managing were performing copyrighted works, was in a position to police the infringing conduct of the artists, and derived substantial benefit from the actions of the primary infringers. Id., at 1163.

In Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F.Supp. 399 (SDNY 1966), the direct infringer manufactured and sold bootleg records. In denying a motion for summary judgment, the District Court held that the infringer's advertising agency, the radio stations that advertised the infringer's works, and the service agency that boxed and mailed the infringing goods could all be held liable, if at trial it could be demonstrated that they knew or should have known that they were dealing in illegal goods.

[*439] If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law. n19

... [**788]

[*440] In the Patent Act both the concept of infringement and the concept of contributory infringement are expressly defined by statute. n20 The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents. Moreover, the Act expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement. 35 U. S. C. @ 271(c).

n20 Title 35 U. S. C. @ 271 provides:

"(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

"(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

"(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by
reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

[End Footnotes] [-***38]

When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated. A [*441] finding of contributory infringement does not, of course, remove the article from the market altogether; it does, however, give the patentee effective control over the sale of that item. Indeed, a finding of contributory infringement is normally the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee.

Footnotes

n21 It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTR’s simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below indicates that respondents seek, in effect, to declare VTR’s contraband. Their suggestion in this Court that a continuing royalty pursuant to a judicially created compulsory license would be an acceptable remedy merely indicates that respondents, for their part, would be willing to license their claimed monopoly interest in VTR’s to Sony in return for a royalty.

[End Footnotes] [-***39]

For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." Dawson Chemical Co. v. Rohm & Hass Co., 448 U.S. 176, 198 (1980). Unless a commodity "has no use except through practice of the patented method," id., at 199, the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention." P. Rosenberg, Patent Law Fundamentals @ 17.02[2] (2d ed. 1982). "[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce." Henry v. A. B. Dick Co., 224 U.S. 1, 48 (1912), overruled on [*440] other grounds, [*442] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517 (1917).

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to [*789] engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

IV

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, [*41] we need not explore all the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court’s
factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

[443] A. Authorized Time-Shifting

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but it is well below 10%. If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period.

The District Court found:

"Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording."

[444] Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses.

"Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." 480 F.Supp., at 468.

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning 'sports, religious, educational and other programming' was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record.

[446] If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third-party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. But in an action for contributory infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use.

The seller of the equipment that expands those producers' audiences cannot be a contributory infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

--- Footnotes ---

n28 It may be rare for large numbers of copyright owners to authorize duplication of their works
without demanding a fee from the copier. In the context of public broadcasting, however, the user of the copyrighted work is not required to pay a fee for access to the underlying work. The traditional method by which copyright owners capitalize upon the television medium—commercially sponsored free public broadcast over the public airwaves—is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues.

In the context of television programming, some producers evidently believe that permitting home viewers to make copies of their works off the air actually enhances the value of their copyrights. Irrespective of their reasons for authorizing the practice, they do so, and in significant enough numbers to create a substantial market for a noninfringing use of the Sony VTR's. No one could dispute the legitimacy of that market if the producers had authorized home taping of their programs in exchange for a license fee paid directly by the home user. The legitimacy of that market is not compromised simply because these producers have authorized home taping of their programs without demanding a fee from the home user. The copyright law does not require a copyright owner to charge a fee for the use of his works, and as this record clearly demonstrates, the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier. It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if respondents' competitors were ill-advised in authorizing home videotaping, that would not change the fact that they have created a substantial market for a paradigmatic noninfringing use of Sony's product.

- - - - - - - End Footnotes- - - - - - [***49]

B. Unauthorized Time-Shifting

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. Twentieth Century Music Corp. v. Aiken, 422 U.S., at 154-155. Moreover, the definition of exclusive rights in @ 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright" "notwithstanding the provisions of section 106." The most pertinent in this case is @ 107, the legislative endorsement of the doctrine of "fair use." n29

[***448] [***792] That section identifies various factors n30 that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement. n31 Although not conclusive, the first [***449] factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. n32 If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U. S. C. @ 107(2) (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact [***450] that the entire work is reproduced, see @ 107(3), does not have its ordinary effect of mitigating against a finding of fair use. n33

[***793] This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." @ 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would [***451] merely inhibit access to ideas without any countervailing benefit. n34

...
a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. The District Court described respondents’ evidence as follows:

"Plaintiffs’ experts admitted at several points in the trial that the time-shifting without librarying [***55] would result in 'not a great deal of harm.' Plaintiffs’ greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'" 480 F.Supp., at 467.

[*452] Later in its opinion, the District Court observed:

"Most of plaintiffs’ predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA’s president, calls a ‘black art’ because of the significant level of imprecision [***794] involved in the calculations." Id., at 469. n35

... On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents’ ‘fear that persons ‘watching’ the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease,” by observing that current measurement technology allows the Betamax audience to be reflected. Id., at 466. n36 It rejected respondents’ prediction "that live television [*453] or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[there] is no factual basis for [the underlying] assumption." Ibid. n37 It rejected respondents’ "fear that time-shifting will reduce audiences for telesat reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." Ibid. n38 And it declared that respondents’ suggestion that "theater or film rental exhibition [***57] of a program will suffer because of time-shift recording of that program" "lacks merit." Id., at 467. n39


[*454] [***795] After completing that review, the District Court restated its overall conclusion several times, in several different ways. "Harm from time-shifting is speculative and, at best, minimal." Ibid. "The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to [***60] plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts." Ibid. "No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date." Id., at 468-469. "Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm." Id., at 469. "Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture." Ibid.

...

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply [*455] supports the District Court’s conclusion that home time-shifting is fair use. In light of the findings of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct. n40

...

[*456] In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of [***796] copyright holders who license their works for broadcast on free
television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

V

. . . Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

DISSENT: [**457] JUSTICE BLACKMUN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

. . .

The making of even a single videotape recording at home [***75] falls within this definition; the VTR user produces a material object from which the copyrighted work later can be perceived. Unless Congress intended a special exemption for the making of a single copy for personal use, I must conclude that VTR recording is contrary to the exclusive rights granted by @ 106(1).

The 1976 Act and its accompanying Reports specify in some detail the situations in which a single copy of a copyrighted work may be made without infringement concerns. Section 108(a), for example, permits a library or archives "to reproduce no more than one copy or phonorecord of a work" for a patron, but only under very limited conditions; an entire work, moreover, can be copied only if it cannot be obtained elsewhere at a fair price. n11 @ 108(e); see also @ 112(a) (broadcaster [**465] may "make no [***76] more than one copy or phonorecord of a particular transmission program," and only under certain conditions). In other respects, the making of single copies is permissible only within the limited confines of the fair use doctrine. The Senate Report, in a section headed "Single and multiple copying," notes that the fair use doctrine would permit a teacher to make a single copy of a work for use in the classroom, but only if the work was not a "sizable" one such as a novel or treatise. 1975 Senate Report 63-64; accord, 1976 House Report 68-69, 71. Other situations in which the making of a single copy would be fair use are described in the House and Senate Reports. n12 But neither the statute nor its legislative history suggests any intent to create a general exemption for a single copy made for personal or private use.

. . .

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 F.Supp., at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. Fox Film Corp. v. Doyal, 286 U.S., at 127. A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may [***102] be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access [**481] to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create. n34 [**809] Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act, Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate Report adds, "[the] committee does
not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" Id., at 66. I cannot disregard these admonitions.


V

Contributory Infringement

From the Studios' perspective, the consequences of home VTR recording are the same as if a business had taped the [***110] Studios' works off the air, duplicated the tapes, and sold or rented them to members of the public for home viewing. The distinction is that home VTR users do not record for commercial advantage; the commercial benefit accrues to the manufacturer and distributors of the Betamax. I thus must proceed to discuss whether the manufacturer and distributors can be held contributorily liable if the product they sell is used to infringe.

It is well established that liability for copyright infringement can be imposed on persons other than those who actually carry out the infringing activity. Kalem Co. v. Harper Brothers, 222 U.S. 55, 62-63 (1911); 3 M. Nimmer, Copyright @ 12.04[A] (1983); see Twentieth Century Music Corp. v. Aiken, 422 U.S., at 160, n. 11; Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198 (1931). Although the liability provision of the 1976 Act provides simply that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright," 17 U. S. C. @ 501(a) (1982 ed.), the House and Senate Reports demonstrate that Congress intended to retain judicial doctrines [***111] of contributory infringement. 1975 Senate Report 57; 1976 House Report 61. n37

[***812] In absolving Sony from liability, the District Court reasoned that Sony had no direct involvement with individual Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the Studios' copyright. 480 F.Supp., at 460. I agree with the Gershwin court that contributory liability may be imposed even when the defendant has no formal control over the infringer. The defendant in Gershwin was a concert promoter operating through local concert associations that it sponsored; it had no formal control over the infringing performers themselves. 443 F.2d, at 1162-1163. See also Twentieth Century Music Corp. v. Aiken, 422 U.S., at 160, n. 11. [***113] Moreover, a finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place. 443 F.2d, at 1162; [***888] see Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F.Supp. 399 (SDNY 1966). n38 In the so-called "dance hall" cases, in which questions of contributory infringement arise with some frequency, proprietors of entertainment establishments routinely are held liable for unauthorized performances on their premises, even when they have no knowledge that copyrighted works are being performed. In effect, the proprietors in those cases are charged with constructive knowledge of the performances. n39

--- Footnotes ---

n38 In Screen Gems, on which the Gershwin court relied, the court held that liability could be imposed on a shipper of unauthorized "bootleg" records and a radio station that broadcast advertisements of the records, provided they knew or should have known that the records were infringing. The court concluded that the records' low price and the manner in which the records were marketed could support a finding of "constructive knowledge" even if actual knowledge were not shown. [***114]

n39 See, e. g., Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F.2d 1213 (CA1 1977); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (CA7 1929); M. Witmark & Sons v. Tremont Social &

Courts have premised liability in these cases on the notion that the defendant had the ability to supervise or control the infringing activities, see, e.g., Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (CA2 1963); KECA Music, Inc. v. Dingus McGee’s Co., 432 F.Supp. 72, 74 (WD Mo. 1977). This notion, however, is to some extent fictional; the defendant cannot escape liability by instructing the performers not to play copyrighted music, or even by inserting a provision to that effect into the performers’ contract. Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F.2d, at 1214-1215; KECA Music, Inc. v. Dingus McGee’s Co., 432 F.Supp., at 75; Shapiro, Bernstein & Co. v. Velten, 47 F.Supp. 648, 649 (WD La. 1942). Congress expressly rejected a proposal to exempt proprietors from this type of liability under the 1976 Act. See 1975 Senate Report 141-142; 1976 House Report 159-160; 1975 House Hearings 1812-1813 (testimony of Barbara Ringer, Register of Copyrights); id., at 1813 (coloquy between Rep. Pattison and Barbara Ringer).

The Court’s attempt to distinguish these cases on the ground of "control," ante, at 437, is obviously unpersuasive. The direct infringer ordinarily is not employed by the person held liable; instead, he is an independent contractor. Neither is he always an agent of the person held liable; Screen Gems makes this apparent.

--- End Footnotes ---

[***115]

[***489] Nor is it necessary that the defendant be aware that the infringing activity violates the copyright laws. Section 504(c)(2) of the 1976 Act provides for a reduction in statutory damages when an infringer proves he "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," but the statute establishes no general exemption for those who believe their infringing activities are legal. Moreover, such an exemption would be meaningless in a case such as this, in which prospective relief is sought; once a court has established that the copying at issue is infringement, the defendants are necessarily aware of that fact for the future. It is undisputed in this case that Sony had reason to know the Betamax would be used by some owners to tape copyrighted works off the air. See 480 F.Supp., at 459-460.

[**813] The District Court also concluded that Sony had not caused, induced, or contributed materially to any infringing activities of Betamax owners. Id., at 460. In a case of this kind, however, causation can be shown indirectly; it does not depend on evidence that particular Betamax owners relied on particular advertisements. In an analogous case decided just two Terms ago, this Court approved a lower court’s conclusion that liability for contributory trademark infringement could be imposed on a manufacturer who "suggested, even by implication" that a retailer use the manufacturer’s goods to infringe the trademark of another. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 (1982); see id., at 860 (opinion concurring in result). I think this standard is equally appropriate in the copyright context.

The District Court found that Sony has advertised the Betamax as suitable for off-the-air recording of "favorite shows," "novels for television," and "classic movies," 480 F.Supp., at 436, with no visible warning that such recording [*490] could constitute copyright infringement. It is only with the aid of the Betamax or some other VTR, that it is possible today for home television viewers to infringe copyright by recording off-the-air. Off-the-air recording is not only a foreseeable use for the Betamax, but indeed is its intended use. Under the circumstances, I agree with [***117] the Court of Appeals that if off-the-air recording is an infringement of copyright, Sony has induced and materially contributed to the infringing conduct of Betamax owners.

--- Footnotes ---

n40 My conclusion respecting contributory infringement does not include the retailer defendants. The District Court found that one of the retailer defendants had assisted in the advertising campaign for the Betamax, but made no other findings respecting their knowledge of the Betamax’s intended uses. I do not agree with the Court of Appeals, at least on this record, that the retailers "are sufficiently engaged in the enterprise to be held accountable," 659 F.2d 963, 976 (1981). In contrast, the advertising agency employed to promote the Betamax was far more actively engaged in the advertising campaign, and petitioners have not argued that the agency’s liability differs in any way from that of Sony Corporation and Sony Corporation of America.
Sony argues that the manufacturer or seller of a product used to infringe [***118] is absolved from liability whenever the product can be put to any substantial noninfringing use. Brief for Petitioners 41-42. The District Court so held, borrowing the "staple article of commerce" doctrine governing liability for contributory infringement of patents. See 35 U. S. C. @ 271. n41 This Court today is much less positive. See ante, [*491] at 440-442. I do not agree that this technical judge-made doctrine of patent law, based in part on considerations irrelevant to the field of copyright, see generally Dawson Chemical Co. v. Rohm & Haas Co., 448 U. S. 176, 187-199 (1980), should be imported wholesale into copyright law. Despite their common constitutional source, see U. S. Const., Art. I, @ 8, cl. 8, [***814] patent and copyright protections have not developed in a parallel fashion, and this Court in copyright cases in the past has borrowed patent concepts only sparingly. See Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 345-346 (1908).

n41 The "staple article of commerce" doctrine protects those who manufacture products incorporated into or used with patented inventions -- for example, the paper and ink used with patented printing machines, Henry v. A. B. Dick Co., 224 U. S. 1 (1912), or the dry ice used with patented refrigeration systems, Carbice Corp. v. American Patents Corp., 283 U. S. 27 (1931). Because a patent holder has the right to control the use of the patented item as well as its manufacture, see Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 509-510 (1917); 35 U. S. C. @ 271(a), such protection for the manufacturer of the incorporated product is necessary to prevent patent holders from extending their monopolies by suppressing competition in unpatented components and supplies suitable for use with the patented item. See Dawson Chemical Co. v. Rohm & Haas Co., 448 U. S. 176, 197-198 (1980). The doctrine of contributory patent infringement has been the subject of attention by the courts and by Congress, see id., at 202-212, and has been codified since 1952, 66 Stat. 792, but was never mentioned during the copyright law revision process as having any relevance to contributory copyright infringement.

I recognize, however, that many of the concerns underlying the "staple article of commerce" doctrine are present in copyright law as well. As the District Court noted, if liability for contributory infringement were imposed on the manufacturer or seller of every product used to infringe -- a typewriter, a camera, a photocopying machine -- the "wheels of commerce" would be blocked. 480 F. Supp., at 461; see also Kalem Co. v. Harper Brothers, 222 U. S., at 62.

I therefore conclude that if a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses. See ante, at 440-441. If virtually all of the product's use, however, is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed. In such a case, the copyright owner's monopoly would not be extended beyond its proper bounds; the manufacturer of such a product contributes to the infringing activities [***120] of others and profits directly thereby, while [*492] providing no benefit to the public sufficient to justify the infringement.

The Court of Appeals concluded that Sony should be held liable for contributory infringement, reasoning that "[videotape] recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," and "[virtually] all television programming is copyrighted material," 659 F. 2d, at 975. While I agree with the first of these propositions, n42 the second, for me, is problematic. The key question is not the amount of television programming that is copyrighted, but rather the amount of VTR usage that is infringing. n43 Moreover, the parties and their amici have argued vigorously about both the amount of television programming that is covered by copyright and the amount for which permission to copy has been given. The proportion of VTR recording that is infringing is ultimately a question of fact, n44 and the District Court specifically declined to make [*493] findings on the "percentage of legal versus illegal home-use recording," 480 F. Supp., at 468. [***815] In light [***121] of my view of the law, resolution of this factual question is essential. I therefore would remand the case for further consideration of this by the District Court.
[*495] The Court’s second stated reason for finding that Sony is not liable for contributory infringement is its conclusion that even unauthorized time-shifting is fair use. Ante, at 447 et seq. This conclusion is even more troubling. The Court begins by suggesting that the fair use doctrine operates as a general "equitable rule of reason." That interpretation mischaracterizes the doctrine, and simply ignores the language of the statute. Section 107 establishes the fair use doctrine "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research." These are all productive uses. It is true that the legislative history states repeatedly that the doctrine must be applied flexibly on a case-by-case basis, but those references were only in the context of productive uses. Such a limitation on fair use comports with its purpose, which is to facilitate the creation of new works. There is no indication that the fair use doctrine has any application for purely personal consumption on the scale involved in this case, n46 and the Court’s application of it here deprives fair use of the major cohesive force that has guided [*496] evolution of the doctrine in the past.

n46 As has been explained, some uses of time-shifting, such as copying an old newspaper clipping for a friend, are fair use because of their de minimis effect on the copyright holder. The scale of copying involved in this case, of course, is of an entirely different magnitude, precluding application of such an exception.

[*496] Having bypassed the initial hurdle for establishing that a use is fair, the Court then purports to apply to time-shifting the four factors explicitly stated in the statute. The first is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." @ 107(1). The Court confidently describes time-shifting as a noncommercial, nonprofit activity. It is clear, however, that personal use of programs that have been copied without permission is not what @ 107(1) protects. The intent of the section is to encourage users to engage in activities the primary benefit of which accrues [*497] to others. Time-shifting involves no such humanitarian impulse. It is likewise something of a mischaracterization of time-shifting to describe it as noncommercial in the sense that that term is used in the statute. As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it -- instead of reselling it -- is noncommercial. n47 Purely consumptive uses are certainly not what the fair use doctrine was designed to protect, and the awkwardness of applying the statutory language to time-shifting only makes clearer that fair use was designed to protect only uses that are productive.


The next two statutory factors are all but ignored by the Court -- though certainly not because they have no applicability. [*498] The second factor -- "the nature of the copyrighted work" -- strongly supports the view that time-shifting is an infringing use. The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," New York Times Co. v. Roxbury Data Interface, Inc., 434 F.Supp. 217, 221 (NJ 1977), require less copyright protection than other original works. Thus, for example, informational [*499] works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment. Sony’s own [*500] surveys indicate that entertainment shows account for more than 80% of the programs recorded by Betamax owners. n48

n48 See A Survey of Betamax Owners, Tr. 2353, Defendants’ Exh. OT, Table 20, cited in Brief for Respondents 52.

The third statutory factor -- "the amount and substantiality of the portion used" -- is even more devastating to the Court’s [*498] interpretation. It is undisputed that virtually all VTR owners record entire works, see 480 F.Supp., at 454, thereby creating an exact substitute for the copyrighted original. Fair use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive
endeavors. Time-shifting bears no resemblance to such activity, and the complete duplication that it involves might alone be sufficient to preclude a finding of fair use. It is little wonder that the Court has chosen to ignore this statutory factor. n49

n49 The Court's one oblique acknowledgment of this third factor, ante, at 447, and n. 30, seems to suggest that the fact that time-shifting involves copying complete works is not very significant because the viewers already have been asked to watch the initial broadcast free. This suggestion misses the point. As has been noted, a book borrowed from a public library may not be copied any more freely than one that has been purchased. An invitation to view a showing is completely different from an invitation to copy a copyrighted work.

The fourth factor requires an evaluation of "the effect of the use upon the potential market for or value of the copyrighted work." This is the factor upon which the Court focuses, but once again, the Court has misread the statute. As mentioned above, the statute requires a court to consider the effect of the use on the potential market for the copyrighted work. The Court has struggled mightily to show that VTR use has not reduced the value of the Studios' copyrighted works in their present markets. Even if true, that showing only begins the proper inquiry. The development [*498] of the VTR has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase VTR recorders to enable them to time-shift. n50 Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. Respondents therefore can show harm from VTR use simply by showing that the value [***131] of their copyrights would increase if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.

n50 The Court implicitly has recognized that this market is very significant. The central concern underlying the Court's entire opinion is that there is a large audience who would like very much to be able to view programs at times other than when they are broadcast. Ante, at 446. The Court simply misses the implication of its own concerns.

Because of the Court's conclusion concerning the legality of time-shifting, it never addresses the amount of noninfringing use that a manufacturer must show to absolve itself from liability as a contributory infringer. Thus, it is difficult to discuss how the Court's test for contributory infringement would operate in practice under a proper analysis of time-shifting. One aspect of the test as it is formulated by the Court, however, particularly deserves comment. The Court explains that a manufacturer of a product [***132] is not liable for contributory infringement as long as the product is "capable of substantial noninfringing uses." Ante, at 442 (emphasis supplied). Such a definition essentially eviscerates the concept of contributory infringement. Only the most unimaginative manufacturer would be unable to demonstrate that a image-duplicating product is "capable" of substantial noninfringing uses. Surely Congress desired to prevent the sale of products that are used almost exclusively to infringe copyrights; [*499] the fact that noninfringing uses exist presumably would have little bearing on that desire.

...
FEIST PUBLICATIONS, INC., Petitioner

v.

RURAL TELEPHONE SERVICE COMPANY, INC.

Decided March 27, 1991.

CASE SYLLABUS

(The syllabus is not a of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader)

Respondent Rural Telephone Service Company, Inc., is a certified public utility providing telephone service to several communities in Kansas. Pursuant to state regulation, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. It obtains data for the directory from subscribers, who must provide their names and addresses to obtain telephone service. Petitioner Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories covering a much larger geographic range than directories such as Rural's. When Rural refused to license its white pages listings to Feist for a directory covering 11 different telephone service areas, Feist extracted the listings it needed from Rural's directory without Rural's consent. Although Feist altered many of Rural's listings, several were identical to listings in Rural's white pages. The District Court granted summary judgment to Rural in its copyright infringement suit, holding that telephone directories are copyrightable. The Court of Appeals affirmed.

Held: Rural's white pages are not entitled to copyright, and therefore Feist's use of them does not constitute infringement. Pp. 1287-1297.

(a) Article I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original and, thus, are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves. This fact/expression dichotomy severely limits the scope of protection in fact-based works. Pp. 1287-1290.

(b) The Copyright Act of 1976 and its predecessor, the Copyright Act of 1909, leave no doubt that originality is the touchstone of copyright protection in directories and other fact-based works. The 1976 Act explains that copyright extends to "original works of authorship," 17 U.S.C. § 102(a), and that "here can be no copyright in facts, § 102(b). A compilation is not copyrightable per se, but is copyrightable only if its facts have been "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." § 101. Thus, the statute envisions that some ways of selecting, coordinating, and arranging data are not sufficiently original
to trigger copyright protection. Even a compilation that is copyrightable receives only limited protection, for the copyright does not extend to facts contained in the compilation. s 103(b). Lower courts that adopted a "sweat of the brow" or "industrious collection" test—which extended a compilation's copyright protection beyond selection and arrangement to the facts themselves—misconstrued the 1909 Act and eschewed the fundamental axiom of copyright law that no one may copyright facts or ideas. Pp. 1290-1295.

(c) Rural's white pages do not meet the constitutional or statutory requirements for copyright protection. While Rural has a valid copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages, there is nothing original in Rural's white pages. The raw data are uncopyrightable facts, and the way in which Rural selected, coordinated, and arranged those facts is not original in any way. Rural's selection of listings—subscribers' names, towns, and telephone numbers—could not be more obvious and lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. In fact, it is plausible to conclude that Rural did not truly "select" to publish its subscribers' names and telephone numbers, since it was required to do so by state law. Moreover, there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. Pp. 1295-1297.

> 916 F.2d 718 (CA 10 1990), reversed.

--------------------------------------------------------------------------------

THE OPINION OF THE COURT

O'CONNOR J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, MARSHALL, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., concurred in the judgment.

Kyler Knobbe, Cimarron, Kan., for petitioner.
James M. Caplinger, Jr., Topeka, Kan., for respondent.

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I.

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical directory, which covers
only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to extend its monopoly in telephone service to a monopoly in yellow pages advertising." Rural Telephone Service Co. v. Feist Publications, Inc., 737 F.Supp. 610, 622 (Kan.1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. App. 54 (P 15-16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "[c]ourts have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. 663 F.Supp. 214, 218 (1987). In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App. to Pet. for Cert. 4a, judgt. order reported at 916 F.2d 718 (1990). We granted certiorari, 498 U.S. 808, 111 S.Ct. 40, 112 L.Ed.2d 17 (1990), to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II.
A.
This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that "[n]o author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556, 105 S.Ct. 2218, 2228, 85 L.Ed.2d 588 (1985). Rural wisely concedes this point, noting in its brief that "[f]acts and discoveries, of course, are not themselves subject to copyright protection." Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—i.e., wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

The key to resolving the tension lies in understanding why facts are not copyrightable. The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See: Harper & Row, supra, at 547-549, 105 S.Ct., at 2223-2224. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright ss 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id., s 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See: Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (CA2 1936).

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, s 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings." In two decisions from the late 19th century-- The Trade-Mark Cases, 100 U.S. 82, 25 L.Ed. 550 (1879); and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884)--this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In The Trade-Mark Cases, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 U.S., at 94. The Court explained that originality requires independent creation plus a modicum of creativity: "[W]hile the word writings may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." Ibid.
In Burrow-Giles, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." 111 U.S., at 58, 4 S.Ct., at 281 (internal quotation marks omitted). As in The Trade-Mark Cases, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 U.S., at 58, 4 S.Ct., at 281, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence of those facts of originality, of intellectual production, of thought, and conception." Id., at 59-60, 4 S.Ct., at 281-282.


It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." Id., s 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from Burrow-Giles, one who discovers a fact is not its "maker" or "originator." 111 U.S., at 58, 4 S.Ct., at 281. "The discoverer merely finds and records." Nimmer s 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum.L.Rev. 516, 525 (1981) (hereinafter Denicola).

Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer s 2.03[E]. The same is true of all facts scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to everyone." Miller, supra, at 1369.

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer ss 2.11[D], 3.03; Denicola 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See: Harper & Row, 471 U.S., at 547, 105 S.Ct., at 2223. Accord, Nimmer s 3.03.

This protection is subject to an important limitation. The mere fact
that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800-802; Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 Colum.L.Rev. 1865, 1868, and n. 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In Harper & Row, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see: 471 U.S., at 556-557, 105 S.Ct., at 2228-2229, but that he could prevent others from copying his "subjective descriptions and portraits of public figures." Id., at 563, 105 S.Ct., at 2232. Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 Com. & Law 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking.... [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." Harper & Row, 471 U.S., at 589, 105 S.Ct., at 2245 (dissenting opinion). It is, rather, "the essence of copyright," ibid., and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 95 S.Ct. 2040, 2044, 45 L.Ed.2d 84 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. Harper & Row, supra, 471 U.S., at 556-557, 105 S.Ct., at 2228-2229. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." Baker v. Selden, 101 U.S. 99, 103, 25 L.Ed. 841 (1880). We reiterated this point in Harper &
"[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work--termed 'expression'--that display the stamp of the author's originality.

[Copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original--for example ... facts, or materials in the public domain--as long as such use does not unfairly appropriate the author's original contributions." 471 U.S., at 547-548, 105 S.Ct., at 2223-2224 (citation omitted).

This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.

B.

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement.

The 1909 Act embodied the originality requirement, but not as clearly as it might have. See Nimmer s 2.01. The subject matter of copyright was set out in ss 3 and 4 of the Act. Section 4 stated that copyright was available to "all the writings of an author." 35 Stat. 1076. By using the words "writings" and "author" -- the same words used in Article I, s 8, of the Constitution and defined by the Court in The Trade-Mark Cases and Burrow-Giles -- the statute necessarily incorporated the originality requirement articulated in the Court's decisions. It did so implicitly, however, thereby leaving room for error.

Section 3 was similarly ambiguous. It stated that the copyright in a work protected only "the copyrightable component parts of the work." It thus stated an important copyright principle, but failed to identify the specific characteristic--originality--that determined which component parts of a work were copyrightable and which were not.

Most courts construed the 1909 Act correctly, notwithstanding the less-than-perfect statutory language. They understood from this Court's decisions that there could be no copyright without originality. See Patterson & Joyce 760-761. As explained in the Nimmer treatise: "The 1909 Act neither defined originality, nor even expressly required that a work be 'original' in order to command protection. However, the courts uniformly inferred the requirement from the fact that copyright protection may only be claimed by 'authors'. ... It was reasoned that since an author is 'the ... creator,originator' it follows that a work is not the product of an author unless the work is original." Nimmer s 2.01 (footnotes omitted) (citing cases).

But some courts misunderstood the statute. See, e.g., Leon v. Pacific Telephone & Telegraph Co., 91 F.2d 484 (CA9 1937); Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (CA2 1922). These courts ignored ss 3 and 4, focusing their attention instead on s 5 of the Act. Section 5, however, was purely technical in nature: It provided that a person seeking to register a work should indicate on the application the type of work, and it listed 14 categories under which the work might fall. One of these
categories was "[B]ooks, including composite and cyclopaedic works, directories, gazetteers, and other compilations." s 5(a). Section 5 did not purport to say that all compilations were automatically copyrightable. Indeed, it expressly disclaimed any such function, pointing out that "the subject-matter of copyright [i]s defined in section four." Nevertheless, the fact that factual compilations were mentioned specifically in s 5 led some courts to infer erroneously that directories and the like were copyrightable per se, "without any further or precise showing of original--personal--authorship."

Ginsburg 1895.

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in Jeweler's Circular Publishing Co., 281 F. at 88:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author."

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement--the compiler's original contributions--to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information." Id., at 88-89 (internal quotations omitted). "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas. See Miller v. Universal City Studios, Inc., 650 F.2d, at 1372 (criticizing "sweat of the brow" courts because "ensur[ing] that later writers obtain the facts independently ... is precisely the scope of protection given ... copyrighted matter, and the law is clear that facts are not entitled to such protection").

Decisions of this Court applying the 1909 Act make clear that the statute did not permit the "sweat of the brow" approach. The best example is International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918). In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. International News Service had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that s 5 of the Act specifically mentioned "periodicals, including newspapers," s 5(b), the Court acknowledged that news articles were copyrightable. Id., at 234, 39 S.Ct., at 70. It flatly rejected, however, the notion that the copyright in an article extended to the factual information it contained: "[T]he news element--the information respecting current events contained in the literary production--is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day."

> Ibid. (FootNote: The Court ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here. See 248 U.S., at 235, 241-242, 39 S.Ct., at 71, 73-74.)

Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." Harper &
Row, 471 U.S., at 563, 105 S.Ct., at 2232. Accord, Gorman, Fact or Fancy: The Implications for Copyright, 29 J. Copyright Soc. 560, 563 (1982). But "sweat of the brow" courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts ... [is] designed to prevent." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (CA2 1966), cert. denied 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967). "Protection for the fruits of such research ... may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.' " Nimmer § 3.04, p. 3-23 (footnote omitted).

C.

"Sweat of the brow" decisions did not escape the attention of the Copyright Office. When Congress decided to overhaul the copyright statute and asked the Copyright Office to study existing problems, see Mills Music, Inc. v. Snyder, 469 U.S. 153, 159, 105 S.Ct. 638, 642, 83 L.Ed.2d 556 (1985), the Copyright Office promptly recommended that Congress clear up the confusion in the lower courts as to the basic standards of copyrightability. The Register of Copyrights explained in his first report to Congress that "originality" was a "basic requisit[e]" of copyright under the 1909 Act, but that "the absence of any reference to [originality] in the statute seems to have led to misconceptions as to what is copyrightable matter." Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., p. 9 (H. Judiciary Comm. Print 1961). The Register suggested making the originality requirement explicit. Ibid.

Congress took the Register's advice. In enacting the Copyright Act of 1976, Congress dropped the reference to "all the writings of an author" and replaced it with the phrase "original works of authorship." 17 U.S.C. § 102(a). In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: "The two fundamental criteria of copyright protection [are] originality and fixation in tangible form.... The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute." H.R.Rep. No. 94-1476, p. 51 (1976) (emphasis added) (hereinafter H.R.Rep.); S.Rep. No. 94-473, p. 50 (1975), U.S.Code Cong. & Admin.News 1976, pp. 5659, 5664 (emphasis added) (hereinafter S.Rep.). This sentiment was echoed by the Copyright Office: "Our intention here is to maintain the established standards of originality...." Supplementary Report of the Register of Copyrights on the General Revision of U.S. Copyright Law, 89th Cong., 1st Sess., pt. 6, p. 3 (H. Judiciary Comm. Print 1965) (emphasis added).

To ensure that the mistakes of the "sweat of the brow" courts would not be repeated, Congress took additional measures. For example, § 3 of the 1909 Act had stated that copyright protected only the "copyrightable component parts" of a work, but had not identified originality as the basis for distinguishing those component parts that were copyrightable from those that were not. The 1976 Act deleted this section and replaced it with § 102(b), which identifies specifically those elements of a work for which copyright is not available: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Section 102(b) is universally understood to prohibit any copyright in facts.
Harper & Row, supra, at 547, 556, 105 S.Ct., at 2223, 2228. Accord,  
Gimmer's 2.03[E] (equating facts with "discoveries"). As with s 102(a),  
Congress emphasized that s 102(b) did not change the law, but merely clarified  
it: "Section 102(b) in no way enlarges or contracts the scope of copyright  
protection under the present law. Its purpose is to restate ... that the basic  
dichotomy between expression and idea remains unchanged." H.R.Rep., at 57;  
Congress took another step to minimize confusion by deleting the  
specific mention of "directories ... and other compilations" in s 5 of the 1909  
Act. As mentioned, this section had led some courts to conclude that  
directories were copyrightable per se and that every element of a directory was  
protected. In its place, Congress enacted two new provisions. First, to make  
clear that compilations were not copyrightable per se, Congress provided a  
definition of the term "compilation." Second, to make clear that the copyright  
in a compilation did not extend to the facts themselves, Congress enacted s  
103.  
The definition of "compilation" is found in s 101 of the 1976 Act. It defines  
a "compilation" in the copyright sense as "a work formed by the collection and  
assembling of preexisting materials or of data that are selected, coordinated,  
or arranged in such a way that the resulting work as a whole constitutes an  
original work of authorship" (emphasis added).  
The purpose of the statutory definition is to emphasize that  
collections of facts are not copyrightable per se. It conveys this message  
through its tripartite structure, as emphasized above by the italics. The  
statute identifies three distinct elements and requires each to be met for a  
work to qualify as a copyrightable compilation: (1) the collection and  
assembly of pre-existing material, facts, or data; (2) the selection,  
coordination, or arrangement of those materials; and (3) the creation, by  
virtue of the particular selection, coordination, or arrangement, of an  
"original" work of authorship. "[T]his tripartite conjunctive structure is  
self-evident, and should be assumed to 'accurately express the legislative  
purpose.'" Patry 51, quoting Mills Music, 469 U.S., at 164, 105 S.Ct., at  
645.  
At first glance, the first requirement does not seem to tell us much. It  
merely describes what one normally thinks of as a compilation -- a collection of  
pre-existing material, facts, or data. What makes it significant  
is that it is the sole requirement. It is not enough for copyright  
purposes that an author collects and assembles facts. To satisfy the statutory  
definition, the work must get over two additional hurdles. In this way, the  
plain language indicates that not every collection of facts receives copyright  
protection. Otherwise, there would be a period after "data."  
The third requirement is also illuminating. It emphasizes that a compilation,  
like any other work, is copyrightable only if it satisfies the originality  
requirement ("an original work of authorship"). Although s 102 states plainly  
that the originality requirement applies to all works, the point was emphasized  
with regard to compilations to ensure that courts would not repeat the mistake  
of the "sweat of the brow" courts by concluding that fact-based works are  
treated differently and measured by some other standard. As Congress explained  
it, the goal was to "make plain that the criteria of copyrightable subject  
matter stated in section 102 apply with full force to works ... containing  
The key to the statutory definition is the second requirement.  
It instructs courts that, in determining whether a fact-based work is an  
original work of authorship, they should focus on the manner in which the
collected facts have been selected, coordinated, and arranged. This is a straightforward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged "in such a way" as to render the work as a whole original. This implies that some "ways" will trigger copyright, but that others will not. See Patry 57, and n. 76. Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. In accordance with "the established principle that a court should give effect, if possible, to every clause and word of a statute," Moskal v. United States, 498 U.S. 103, 109-110, 111 S.Ct. 461, 466, 112 L.Ed.2d 449 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251, 23 S.Ct. 298, 300, 47 L.Ed. 460 (1903) (referring to "the narrowest and most obvious limits"). Such works are incapable of sustaining a valid copyright. Nimmer s 2.01[B].

Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of s 103 of the Act. Section 103 explains that "[t]he subject matter of copyright ... includes compilations," s 103(a), but that copyright protects only the author's original contributions--not the facts or information conveyed:

"The copyright in a compilation ... extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." s 103(b).

As s 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. "The most important point here is one that is commonly misunderstood today: copyright ... has no effect one way or the other on the copyright or public domain status of the preexisting material." H.R.Rep., at 57; S.Rep., at 55, U.S.Code Cong. & Admin. News 1976, p. 5670. The 1909 Act did not require, as "sweat of the brow" courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. See, e.g., Jeweler's Circular Publishing Co., 281 F., at 88-89. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler--the selection, coordination, and arrangement of facts.
In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law. The revisions explain with painstaking clarity that copyright requires originality, s 102(a); that facts are never original, s 102(b); that the copyright in a compilation does not extend to the facts it contains, s 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, s 101.

The 1976 revisions have proven largely successful in steering courts in the right direction. A good example is Miller v. Universal City Studios, Inc., 650 F.2d, at 1369-1370: "A copyright in a directory ... is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. Copyright protection does not extend to the facts themselves, and the mere use of information contained in a directory without a substantial copying of the format does not constitute infringement" (citation omitted). Additionally, the Second Circuit, which almost 70 years ago issued the classic formulation of the "sweat of the brow" doctrine in Jeweler's Circular Publishing Co., has now fully repudiated the reasoning of that decision. See, e.g., Financial Information, Inc. v. Moody's Investors Service, Inc., 808 F.2d 204, 207 (CA2 1986), cert. denied, 484 U.S. 820, 108 S.Ct. 79, 98 L.Ed.2d 42 (1987); Financial Information, Inc. v. Moody's Investors Service, Inc., 751 F.2d 501, 510 (CA2 1984) (Newman, J., concurring); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (CA2 1980).

Even those scholars who believe that "industrious collection" should be redefined seem to recognize that this is beyond the scope of existing copyright law. See Denicola 516 ("The very vocabulary of copyright is ill suited to analyzing property rights in works of nonfiction"); id., at 520-521, 525; Ginsburg 1867, 1870.

III.

There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. See Harper & Row, 471 U.S., at 548, 105 S.Ct., at 2224. The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet. for Cert. 9.

The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "'ow[e] its origin" to Rural. Burrow-Giles, 111 U.S., at 58, 4 S.Ct., at 281. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory. The originality requirement "rule[s] out protecting ... names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author." Patterson & Joyce 776.
Rural essentially concedes the point by referring to the names, towns, and telephone numbers as "preexisting material." Brief for Respondent 17. Section 103(b) states explicitly that the copyright in a compilation does not extend to "the preexisting material employed in the work."

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. See Patterson & Joyce 760, n. 144 ("While this requirement is sometimes characterized as modest, or a low threshold, it is not without effect") (internal quotation marks omitted; citations omitted). As this Court has explained, the Constitution mandates some minimal degree of creativity, see The Trade-Mark Cases, 100 U.S., at 94; and an author who claims infringement must prove "the existence of ... intellectual production, of thought, and conception." > Burrow-Giles, supra, 111 U.S., at 59-60, 4 S.Ct., at 281-282.

The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information-name, town, and telephone number-about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly "select" to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. See 737 F.Supp., at 612. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. See Brief for Information Industry Association et al. as Amici Curiae 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not "possess the minimal creative spark required by the Copyright Act and the Constitution.

We conclude that the names, towns, and telephone numbers copied by Feist were
not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U.S.C. s 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'" Baker v. Selden, 101 U.S., at 105.

The judgment of the Court of Appeals is Reversed.

Justice BLACKMUN concurs in the judgment.
Selling Wine Without Bottles: The Economy of Mind on the Global Net

by John Perry Barlow

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. --Thomas Jefferson

Throughout the time I've been groping around Cyberspace, there has remained unsolved an immense conundrum which seems to be at the root of nearly every legal, ethical, governmental, and social vexation to be found in the Virtual World. I refer to the problem of digitized property.

The riddle is this: if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued reation and distribution of such work?

Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship.

This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as without.

Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial.

Intellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum. (Which, in fact, rather resembles what is being attempted here.) We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.

Most of the people who actually create soft property—the programmers, hackers, and Net surfers—already know this. Unfortunately, neither the companies they work for nor the lawyers these companies hire have enough direct experience with immaterial goods to understand why they are so problematic. They are proceeding as though the old laws can somehow be made to work, either by grotesque expansion or by force. They are wrong.

The source of this conundrum is as simple as its solution is complex. Digital technology is detaching information from the physical plane, where property law of all sorts has always found definition.
Throughout the history of copyrights and patents, the proprietary assertions of thinkers have been focused not on their ideas but on the expression of those ideas. The ideas themselves, as well as facts about the phenomena of the world, were considered to be the collective property of humanity. One could claim franchise, in the case of copyright, on the precise turn of phrase used to convey a particular idea or the order in which facts were presented.

The point at which this franchise was imposed was that moment when the "word became flesh" by departing the mind of its originator and entering some physical object, whether book or widget. The subsequent arrival of other commercial media besides books didn't alter the legal importance of this moment. Law protected expression and, with few (and recent) exceptions, to express was to make physical.

Protecting physical expression had the force of convenience on its side. Copyright worked well because, Gutenberg notwithstanding, it was hard to make a book. Furthermore, books froze their contents into a condition which was as challenging to alter as it was to reproduce. Counterfeiting or distributing counterfeit volumes were obvious and visible activities, easy enough to catch somebody in the act of doing. Finally, unlike unbounded words or images, books had material surfaces to which one could attach copyright notices, publisher's marques, and price tags.

Mental to physical conversion was even more central to patent. A patent, until recently, was either a description of the form into which materials were to be rendered in the service of some purpose or a description of the process by which rendition occurred. In either case, the conceptual heart of patent was the material result. If no purposeful object could be rendered due to some material limitation, the patent was rejected. Neither a Klein bottle nor a shovel made of silk could be patented. It had to be a thing and the thing had to work.

Thus the rights of invention and authorship adhered to activities in the physical world. One didn't get paid for ideas but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not the thought conveyed.

In other words, the bottle was protected, not the wine.

Now, as information enters Cyberspace, the native home of Mind, these bottles are vanishing. With the advent of digitization, it is now possible to replace all previous information storage forms with one meta-bottle: complex—and highly liquid—patterns of ones and zeros.

Even the physical/digital bottles to which we've become accustomed, floppy disks, CD-ROM's, and other discrete, shrink-wrappable bit-packages, will disappear as all computers jack in to the global Net. While the Internet may never include every single CPU on the planet, it is more than doubling every year and can be expected to become the principal medium of information conveyance if, eventually, the only one.

Once that has happened, all the goods of the Information Age—all of the expressions once contained in books or film strips or records or newsletters—will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions which one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to "own" in the old sense of the word.

Some might argue that information will still require some physical manifestation, such as its magnetic existence on the titanic hard disks of distant servers, but these are bottles which have no macroscopically discrete or personally meaningful form.

Some will also argue that we have been dealing with unbottled expression since the advent of radio, and they would be right. But for most of the history of broadcast, there was no convenient way to capture soft goods from the electromagnetic ether and reproduce them in anything like the quality available in commercial packages. Only recently has this changed and little has been done legally or technically to address the change.
Generally, the issue of consumer payment for broadcast products was irrelevant. The consumers themselves were the product. Broadcast media were supported either by selling the attention of their audience to advertisers, using government to assess payment through taxes, or the whining mendicancy of annual donor drives.

All of the broadcast support models are flawed. Support either by advertisers or government has almost invariably tainted the purity of the goods delivered. Besides, direct marketing is gradually killing the advertiser support model anyway.

Broadcast media gave us a another payment method for a virtual product in the royalties which broadcasters pay songwriters through such organizations as ASCAP and BMI. But, as a member of ASCAP, I can assure you this is not a model which we should emulate. The monitoring methods are wildly approximate. There is no parallel system of accounting in the revenue stream. It doesn't really work. Honest.

In any case, without our old methods of physically defining the expression of ideas, and in the absence of successful new models for non-physical transaction, we simply don't know how to assure reliable payment for mental works. To make matters worse, this comes at a time when the human mind is replacing sunlight and mineral deposits as the principal source of new wealth.

Furthermore, the increasing difficulty of enforcing existing copyright and patent laws is already placing in peril the ultimate source of intellectual property, the free exchange of ideas.

That is, when the primary articles of commerce in a society look so much like speech as to be indistinguishable from it, and when the traditional methods of protecting their ownership have become ineffectual, attempting to fix the problem with broader and more vigorous enforcement will inevitably threaten freedom of speech.

The greatest constraint on your future liberties may come not from government but from corporate legal departments vying to protect by force what can no longer be protected by practical efficiency or general social consent.

Furthermore, when Jefferson and his fellow creatures of The Enlightenment designed the system which became American copyright law, their primary objective was assuring the widespread distribution of thought, not profit. Profit was the fuel which would carry ideas into the libraries and minds of their new republic. Libraries would purchase books, thus rewarding the authors for their work in assembling ideas, which otherwise "incapable of confinement" would then become freely available to the public. But what is the role of libraries in the absense of books? How does society now pay for the distribution of ideas if not by charging for the ideas themselves?

Additionally complicating the matter is the fact that along with the physical bottles in which intellectual property protection has resided, digital technology is also erasing the legal jurisdictions of the physical world, and replacing them with the unbounded and perhaps permanently lawless seas of Cyberspace.

In Cyberspace, there are not only no national or local boundaries to contain the scene of a crime and determine the method of its prosecution, there are no clear cultural agreements on what a crime might be. Unresolved and basic differences between European and Asian cultural assumptions about intellectual property can only be exacerbated in a region where many transactions are taking place in both hemispheres and yet, somehow, in neither.

Even in the most local of digital conditions, jurisdiction and responsibility are hard to assess. A group of music publishers filed suit against Compuserve this fall for it having allowed its users to upload musical compositions into areas where other users might get them. But since Compuserve cannot practically exercise much control over the flow of bits which pass between its subscribers, it probably shouldn't be held responsible for unlawfully "publishing" these works.

Notions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at any
time since the Sumerians first poked cuneiform into wet clay and called it stored grain. Only a very few people are aware of the enormity of this shift and fewer of them are lawyers or public officials.

Those who do see these changes must prepare responses for the legal and social confusion which will erupt as efforts to protect new forms of property with old methods become more obviously futile, and, as a consequence, more adamant.

From Swords to Writs to Bits

Humanity now seems bent on creating a world economy primarily based on goods which take no material form. In doing so, we may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others may find in their works.

Without that connection, and without a fundamental change in consciousness to accommodate its loss, we are building our future on furor, litigation, and institutionalized evasion of payment except in response to raw force. We may return to the Bad Old Days of property.

Throughout the darker parts of human history, the possession and distribution of property was a largely military matter. "Ownership" was assured those with the nastiest tools, whether fists or armies, and the most resolute will to use them. Property was the divine right of thugs.

By the turn of the First Millennium A.D., the emergence of merchant classes and landed gentry forced the development of ethical understandings for the resolution of property disputes. In the late Middle Ages, enlightened rulers like England's Henry II began to codify this unwritten "common law" into recorded canons. These laws were local, but this didn't matter much as they were primarily directed at real estate, a form of property which is local by definition. And which, as the name implied, was very real.

This continued to be the case as long as the origin of wealth was agricultural, but with dawning of the Industrial Revolution, humanity began to focus as much on means as ends. Tools acquired a new social value and, thanks to their own development, it became possible to duplicate and distribute them in quantity.

To encourage their invention, copyright and patent law were developed in most western countries. These laws were devoted to the delicate task of getting mental creations into the world where they could be used--and enter the minds of others--while assuring their inventors compensation for the value of their use. And, as previously stated, the systems of both law and practice which grew up around that task were based on physical expression.

Since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression. And since it is likewise now possible to create useful tools which never take physical form, we have taken to patenting abstractions, sequences of virtual events, and mathematical formulae--the most un-real estate imaginable.

In certain areas, this leaves rights of ownership in such an ambiguous condition that once again property adheres to those who can muster the largest armies. The only difference is that this time the armies consist of lawyers.

Threatening their opponents with the endless Purgatory of litigation, over which some might prefer death itself, they assert claim to any thought which might have entered another cranium within the collective body of the corporations they serve. They act as though these ideas appeared in splendid detachment from all previous human thought. And they pretend that thinking about a product is somehow as good as manufacturing, distributing, and selling it.

What was previously considered a common human resource, distributed among the minds and libraries of the world, as well as the phenomena of nature herself, is now being fenced and deeded. It is as though a new class of enterprise
had arisen which claimed to own air and water.

What is to be done? While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of this grave is even deceased and are trying to up by force what can no longer be upheld by popular consent.

The legalists, desperate over their slipping grip, are vigorously trying to extend it. Indeed, the United States and other proponents of GATT are making adherence to our moribund systems of intellectual property protection a condition of membership in the marketplace of nations. For example, China will be denied Most Favored Nation trading status unless they agree to uphold a set of culturally alien principles which are no longer even sensibly applicable in their country of origin.

In a more perfect world, we'd be wise to declare a moratorium on litigation, legislation, and international treaties in this area until we had a clearer sense of the terms and conditions of enterprise in Cyberspace. Ideally, laws ratify already developed social consensus. They are less the Social Contract itself than a series of memoranda expressing a collective intent which has emerged out of many millions of human interactions.

Humans have not inhabited Cyberspace long enough or in sufficient diversity to have developed a Social Contract which conforms to the strange new conditions of that world. Laws developed prior to consensus usually serve the already established few who can get them passed and not society as a whole.

To the extent that either law or established social practice exists in this area, they are already in dangerous disagreement. The laws regarding unlicensed reproduction of commercial software are clear and stern...and rarely observed. Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or conscience, to obey them.

Sometimes give speeches on this subject, and I always ask how many people in the audience can honestly claim to have no unauthorized software on their hard disks. I've never seen more than ten percent of the hands go up.

Whenever there is such profound divergence between the law and social practice, it is not society that adapts. And, against the swift tide of custom, the Software Publishers' current practice of hanging a few visible scapegoats is so obviously capricious as to only further diminish respect for the law.

Part of the widespread popular disregard for commercial software copyrights stems from a legislative failure to understand the conditions into which it was inserted. To assume that systems of law based in the physical world will serve in an environment which is as fundamentally different as Cyberspace is a folly for which everyone doing business in the future will pay.

As I will discuss in the next segment, unbounded intellectual property is very different from physical property and can no longer be protected as though these differences did not exist. For example, if we continue to assume that value is based on scarcity, as it is with regard to physical objects, we will create laws which are precisely contrary to the nature of information, which may, in many cases, increase in value with distribution.

The large, legally risk-averse institutions most likely to play by the old rules will suffer for their compliance. The more lawyers, guns, and money they invest in either protecting their rights or subverting those of their opponents, the more commercial competition will resemble the Kwakiutl Potlatch Ceremony, in which adversaries competed by destroying their own possessions. Their ability to produce new technology will simply grind to a halt as every move they make drives them deeper into a tar pit of courtroom warfare.

Faith in law will not be an effective strategy for high tech companies. Law adapts by continuous increments and at a pace second only to geology in its stateliness. Technology advances in the lunging jerks, like the punctuation of
biological evolution grotesquely accelerated. Real world conditions will continue to change at a blinding pace, and the law will get further behind, more profoundly confused. This mismatch is permanent.

Promising economies based on purely digital products will either be born in a state of paralysis, as appears to be the case with multimedia, or continue in a brave and willful refusal by their owners to play the ownership game at all.

In the United States one can already see a parallel economy developing, mostly among small fast moving enterprises who protect their ideas by getting into the marketplace quicker than their larger competitors who base their protection on fear and litigation.

Perhaps those who are part of the problem will simply quarantine themselves in court while those who are part of the solution will create a new society based, at first, on piracy and freebooting. It may well be that when the current system of intellectual property law has collapsed, as seems inevitable, that no new legal structure will arise in its place.

But something will happen. After all, people do business. When a currency becomes meaningless, business is done in barter. When societies develop outside the law, they develop their own unwritten codes, practices, and ethical systems. While technology may undo law, technology offers methods for restoring creative rights.

A Taxonomy of Information

It seems to me that the most productive thing to do now is to look hard into the true nature of what we're trying to protect. How much do we really know about information and its natural behaviors?

What are the essential characteristics of unbounded creation? How does it differ from previous forms of property? How many of our assumptions about it have actually been about its containers rather than their mysterious contents? What are its different species and how does each of them lend itself to control? What technologies will be useful in creating new virtual bottles to replace the old physical ones?

Of course, information is, by its nature, intangible and hard to define. Like other such deep phenomena as light or matter, it is a natural host to paradox. And as it is most helpful to understand light as being both a particle and a wave, an understanding of information may emerge in the abstract congruence of its several different properties which might be described by the following three statements:

Information is an activity.
Information is a life form.
Information is a relationship.

In the following section, I will examine each of these.

I. INFORMATION IS AN ACTIVITY

Information Is a Verb, Not a Noun.

Freed of its containers, information is obviously not a thing. In fact, it is something which happens in the field of interaction between minds or objects or other pieces of information.

Gregory Bateson, expanding on the information theory of Claude Shannon, said, "Information is a difference which makes a difference." Thus, information only really exists in the $\Delta$ [delta]. The making of that difference is an activity within a relationship. Information is an action which occupies time rather than a state of being which occupies physical space, as is the case with hard goods. It is the pitch, not the baseball, the dance, not the dancer.
Information Is Experienced, Not Possessed

Even when it has been encapsulated in some static form like a book or a hard disk, information is still something which happens to you as you mentally decompress it from its storage code. But, whether it's running at gigabits per second or words per minute, the actual decoding is a process which must be performed by and upon a mind, a process which must take place in time.

There was a cartoon in the Bulletin of Atomic Scientists a few years ago which illustrated this point beautifully. In the drawing, a holdup man trains his gun on the sort of bespectacled fellow you'd figure might have a lot of information stored in his head. "Quick," orders the bandit, "Give me all your ideas."

Information Has To Move

Sharks are said to die of suffocation if they stop swimming, and the same is nearly true of information. Information which isn't moving ceases to exist as anything but potential...at least until it is allowed to move again. For this reason, the practice of information hoarding, common in bureaucracies, is an especially wrong-headed artifact of physically-based value systems.

Information is Conveyed by Propagation, Not Distribution

The way in which information spreads is also very different from the distribution of physical goods. It moves more like something from nature than from a factory. It can concatenate like falling dominos or grow in the usual fractal lattice, like frost spreading on a window, but it cannot be shipped around like widgets, except to the extent that it can be contained in them. It doesn't simply move on. It leaves a trail of itself everywhere it's been.

The central economic distinction between information and physical property is the ability of information to be transferred without leaving the possession of the original owner. If I sell you my horse, I can't ride him after that. If I sell you what I know, we both know it.

II. INFORMATION IS A LIFE FORM

Information wants to be free.

Stewart Brand is generally credited with this elegant statement of the obvious, recognizing both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a "desire" in the first place.

English Biologist and Philosopher Richard Dawkins proposed the idea of "memes," self-replicating, patterns of information which propagate themselves across the ecologies of mind, saying they were like life forms.

I believe they are life forms in every respect but a basis in the carbon atom. They self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. Like any other life form they evolve to fill the possibility spaces of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us.

Indeed, the sociobiologists like Dawkins make a plausible case that carbon-based life forms are information as well, that, as the chicken is an egg's way of making another egg, the entire biological spectacle is just the DNA molecule's means of copying out more information strings exactly like itself.

Information Replicates into the Cracks of Possibility
Like DNA helices, ideas are relentless expansionists, always seeking new opportunities for lebensraum. And, as in carbon-based nature, the more robust organisms are extremely adept at finding new places to live. Thus, just as the common housefly has insinuated itself into practically every ecosystem on the planet, so has the meme of "life after death" found a niche in most minds, or psycho-ecologies.

The more universally resonant an idea or image or song, the more minds it will enter and remain within. Trying to stop the spread of a really robust piece of information is about as easy as keeping killer bees South of the Border. The stuff just leaks.

Information Wants To Change

If ideas and other interactive patterns of information are indeed life forms, they can be expected to evolve constantly into forms which will be more perfectly adapted to their surroundings. And, as we see, they are doing this all the time.

But for a long time, our static media, whether carvings in stone, ink on paper, or dye on celluloid, have strongly resisted the evolutionary impulse, exalting as a consequence the author's ability to determine the finished product. But, as in an oral tradition, digitized information has no "final cut."

Digital information, unconstrained by packaging, is a continuing process more like the metamorphosing tales of prehistory than anything which will fit in shrink wrap. From the Neolithic to Gutenberg, information was passed on, mouth to ear, changing with every re-telling (or re-singing). The stories which once shaped our sense of the world didn't have authoritative versions. They adapted to each culture in which they found themselves being told.

Because there was never a moment when the story was frozen in print, the so-called "moral" right of storytellers to keep the tale their own was neither protected nor recognized. The story simply passed through each of them on its way to the next, where it would assume a different form. As we return to continuous information, we can expect the importance of authorship to diminish. Creative people may have to renew their acquaintance with humility.

But our system of copyright makes no accomodation whatever for expressions which don't at some point become "fixed" nor for cultural expressions which lack a specific author or inventor.

Jazz improvisations, standup comedy routines, mime performances, developing monologues, and unrecorded broadcast transmissions all lack the Constitutional requirement of fixation as a "writing". Without being fixed by a point of publicatoin the liquid works of the future will all look more like these continuously adapting and changing forms and will therefore exist beyond the reach of copyright.

Copyright expert Pamela Samuelson tells of having attended a conference last year convened around the fact that Western countries may legally appropriate the music, designs, and biomedical lore of aboriginal people without compensation to their tribe of origin since that tribe is not an "author" or "inventor."

But soon most information will be generated collaboratively by the cyber-tribal hunter-gatherers of Cyberspace. Our arrogant legal dismissal of the rights of "primitives" will be back to haunt us soon.

Information is Perishable

With the exception of the rare classic, most information is like farm produce. Its quality degrades rapidly both over time and in distance from the source of production. But even here, value is highly subjective and conditional. Yesterday's papers are quite valuable to the historian. In fact, the older they are, the more valuable they become. On the other hand, a commodities broker might consider news of an event which is more than an hour old to have lost any relevance.
III. INFORMATION IS A RELATIONSHIP

Meaning Has Value and Is Unique to Each Case

In most cases, we assign value to information based on its meaningfulness. The place where information dwells, the holy moment where transmission becomes reception, is a region which has many shifting characteristics and flavors depending on the relationship of sender and receiver, the depth of their interactivity.

Each such relationship is unique. Even in cases where the sender is a broadcast medium, and no response is returned, the receiver is hardly passive. Receiving information is often as creative an act as generating it.

The value of what is sent depends entirely on the extent to which each individual receiver has the receptors—shared terminology, attention, interest, language, paradigm—necessary to render what is received meaningful.

Understanding is a critical element increasingly overlooked in the effort to turn information into a commodity. Data may be any set of facts, useful or not, intelligible or inescrutable, germane or irrelevant. Computers can crank out new data all night long without human help, and the results may be offered for sale as information. They may or may not actually be so. Only a human being can recognize the meaning which separates information from data.

In fact, information, in the economic sense of the word, consists of data which have been passed through a particular human mind and found meaningful within that mental context. One fellow's information is all just data to someone else. If you're an anthropologist, my detailed charts of Tasaday kinship patterns might be critical information to you. If you're a banker from Hong Kong, they might barely seem to be data.

Familiarity Has More Value Than Scarcity,

With physical goods, there is a direct correlation between scarcity and value. Gold is more valuable than wheat, even though you can't eat it. While this is not always the case, the situation with information is usually precisely the reverse. Most soft goods increase in value as they become more common. Familiarity is an important asset in the world of information. It may often be the case that the best thing you can do to raise the demand for your product is to give it away.

While this has not always worked with shareware, it could be argued that there is a connection between the extent to which commercial software is pirated and the amount which gets sold. Broadly pirated software, such as Lotus 1-2-3 or WordPerfect, becomes a standard and benefits from Law of Increasing Returns based on familiarity.

In regard to my own soft product, rock and roll songs, there is no question that the band I write them for, the Grateful Dead, has increased its popularity enormously by giving them away. We have been letting people tape our concerts since the early seventies, but instead of reducing the demand for our product, we are now the largest concert draw in America, a fact which is at least in part attributable to the popularity generated by those tapes.

True, I don't get any royalties on the millions of copies of my songs which have been extracted from concerts, but I see no reason to complain. The fact is, no one but the Grateful Dead can perform a Grateful Dead song, so if you want the experience and not its thin projection, you have to buy a ticket from us. In other words, our intellectual property protection derives from our being the only real-time source of it.

Exclusivity Has Value

The problem with a model which turns the physical scarcity/value ratio on its head is that sometimes the value of information is very much based on its scarcity. Exclusive possession of certain facts makes them more useful. If
everyone knows about conditions which might drive a stock price up, the information is valueless.

But again, the critical factor is usually time. It doesn't matter if this kind of information eventually becomes ubiquitous. What matters is being among the first who possess it and act on it. While potent secrets usually don't stay secret, they may remain so long enough to advance the cause of their original holders.

Point of View and Authority Have Value

In a world of floating realities and contradictory maps, rewards will accrue to those commentators whose maps seem to fit their territory snugly, based on their ability to yield predictable results for those who use them.

In aesthetic information, whether poetry or rock 'n' roll, people are willing to buy the new product of an artist, sight-unseen, based on their having been delivered a pleasurable experience by previous work.

Reality is an edit. People are willing to pay for the authority of those editors whose filtering point of view seems to fit best. And again, point of view is an asset which cannot be stolen or duplicated. No one but Esther Dyson sees the world as she does and the handsome fee she charges for her newsletter is actually for the privilege of looking at the world through her unique eyes.

Time Replaces Space

In the physical world, value depends heavily on possession, or proximity in space. One owns that material which falls inside certain dimensional boundaries and the ability to act directly, exclusively, and as one wishes upon what falls inside those boundaries is the principal right of ownership. And of course there is the relationship between value and scarcity, a limitation in space.

In the virtual world, proximity in time is a value determinant. An informational product is generally more valuable the closer the purchaser can place himself to the moment of its expression, a limitation in time. Many kinds of information degrade rapidly with either time or reproduction. Relevance fades as the territory they map changes. Noise is introduced and bandwidth lost with passage away from the point where the information is first produced.

Thus, listening to a Grateful Dead tape is hardly the same experience as attending a Grateful Dead concert. The closer one can get to the headwaters of an informational stream, the better his chances of finding an accurate picture of reality in it. In an era of easy reproduction, the informational abstractions of popular experiences will propagate out from their source moments to reach anyone who's interested. But it's easy enough to restrict the real experience of the desirable event, whether knock-out punch or guitar lick, to those willing to pay for being there.

The Protection of Execution

In the hick town I come from, they don't give you much credit for just having ideas. You are judged by what you can make of them. As things continue to speed up, I think we see that execution is the best protection for those designs which become physical products. Or, as Steve Jobs once put it, "Real artists ship." The big winner is usually the one who gets to the market first (and with enough organizational force to keep the lead).

But, as we become fixated upon information commerce, many of us seem to think that originality alone is sufficient to convey value, deserving, with the right legal assurances, of a steady wage. In fact, the best way to protect intellectual property is to act on it. It's not enough to invent and patent, one has to innovate as well. Someone claims to have patented the microprocessor before Intel. Maybe so. If he'd actually started shipping microprocessors before Intel, his claim would seem far less spurious.

Information as Its Own Reward
It is now a commonplace to say that money is information. With the exception of Krugerands, crumpled cab-fare, and the contents of those suit-cases which drug lords are reputed to carry, most of the money in the informatized world is in ones and zeros. The global money supply sloshes around the Net, as fluid as weather. It is also obvious, as I have discussed, that information has become as fundamental to the creation of modern wealth as land and sunlight once were.

What is less obvious is the extent to which information is acquiring intrinsic value, not as a means to acquisition but as the object to be acquired. I suppose this has always been less explicitly the case. In politics and academia, potency and information have always been closely related.

However, as we increasingly buy information with money, we begin to see that buying information with other information is simple economic exchange without the necessity of converting the product into and out of currency. This is somewhat challenging for those who like clean accounting, since, information theory aside, informational exchange rates are too squishy to quantify to the decimal point.

Nevertheless, most of what a middle class American purchases has little to do with survival. We buy beauty, prestige, experience, education, and all the obscure pleasures of owning. Many of these things can not only be expressed in non-material terms, they can be acquired by non-material means.

And then there are the inexplicable pleasures of information itself, the joys of learning, knowing, and teaching. The strange good feeling of information coming into and out of oneself. Playing with ideas is a recreation which people must be willing to pay a lot for, given the market for books and elective seminars. We'd likely spend even more money for such pleasures if there weren't so many opportunities to pay for ideas with other ideas.

This explains much of the collective "volunteer" work which fills the archives, newsgroups, and databases of the Internet. Its denizens are not working for 'nothing," as is widely believed. Rather they are getting paid in something besides money. It is an economy which consists almost entirely of information.

This may become the dominant form of human trade, and if we persist in modeling economics on a strictly monetary basis, we may be gravely misled.

**Getting Paid in Cyberspace**

How all the foregoing relates to solutions to the crisis in intellectual property is something I've barely started to wrap my mind around. It's fairly paradigm-warping to look at information through fresh eyes—to see how very little it is like pig iron or pork bellies, to imagine the tottering travesties of case law we will stack up if we go on treating it legally as though it were.

As I've said, I believe these towers of outmoded boilerplate will be a smoking heap sometime in the next decade and we mind miners will have no choice but to cast our lot with new systems that work.

I'm not really so gloomy about our prospects as readers of this jeremiad so far might conclude. Solutions will emerge. Nature abhors a vacuum and so does commerce.

Indeed, one of the aspects of the electronic frontier which I have always found most appealing--and the reason Mitch Kapor and I used that phrase in naming our foundation--is the degree to which it resembles the 19th Century American West in its natural preference for social devices which emerge from it conditions rather than those which are imposed from the outside.

Until the west was fully settled and "civilized" in this century, order was established according to an unwritten Code
of the West which had the fluidity of etiquette rather than the rigidity of law. Ethics were more important than rules. Understandings were preferred over laws, which were, in any event, largely unenforceable.

I believe that law, as we understand it, was developed to protect the interests which arose in the two economic "waves" which Alvin Toffler accurately identified in The Third Wave. The First Wave was agriculturally based and required law to order ownership of the principal source of production, land. In the Second Wave, manufacturing became the economic mainspring, and the structure of modern law grew around the centralized institutions which needed protection for their reserves of capital, manpower, and hardware.

Both of these economic systems required stability. Their laws were designed to resist change and to assure some equability of distribution within a fairly static social framework. The possibility spaces had to be constrained to preserve the predictability necessary to either land stewardship or capital formation.

In the Third Wave we have now entered, information to a large extent replaces land, capital, and hardware, and as I have detailed in the preceding section, information is most at home in a much more fluid and adaptable environment. The Third Wave is likely to bring a fundamental shift in the purposes and methods of law which will affect far more than simply those statutes which govern intellectual property.

The "terrain" itself--the architecture of the Net--may come to serve many of the purposes which could only be maintained in the past by legal imposition. For example, it may be unnecessary to constitutionally assure freedom of expression in an environment which, in the words of my fellow EFF co-founder John Gilmore, "treats censorship as a malfunction" and re-routes proscribed ideas around it.

Similar natural balancing mechanisms may arise to smooth over the social discontinuities which previously required legal intercession to set right. On the Net, these differences are more likely to be spanned by a continuous spectrum which connects as much as it separates.

And, despite their fierce grip on the old legal structure, companies which trade in information are likely to find that in their increasing inability to deal sensibly with technological issues, the courts will not produce results which are predictable enough to be supportive of long-term enterprise. Every litigation becomes like a game of Russian roulette, depending on the depth the presiding judge's clue-impairment.

Uncodified or adaptive "law," while as "fast, loose, and out of control" as other emergent forms, is probably more likely to yield something like justice at this point. In fact, one can already see in development new practices to suit the conditions of virtual commerce. The life forms of information are evolving methods to protect their continued reproduction.

For example, while all the tiny print on a commercial diskette envelope punctiliously requires much of those who would open it, there are, as I say, few who read those provisos, let alone follow them to the letter. And yet, the software business remains a very healthy sector of the American economy.

Why is this? Because people seem to eventually buy the software they really use. Once a program becomes central to your work, you want the latest version of it, the best support, the actual manuals, all privileges which are attached to ownership. Such practical considerations will, in the absence of working law, become more and more important in important in getting paid for what might easily be obtained for nothing.

I do think that some software is being purchased in the service of ethics or the abstract awareness that the failure to buy it will result in its not being produced any longer, but I'm going to leave those motivators aside. While I believe that the failure of law will almost certainly result in a compensating re-emergence of ethics as the ordering template of society, this is a belief I don't have room to support here.
Instead, I think that, as in the case cited above, compensation for soft products will be driven primarily by practical considerations, all of them consistent with the true properties of digital information, where the value lies in it, and how it can be both manipulated and protected by technology.

While the conundrum remains a conundrum, I can begin to see the directions from which solutions may emerge, based in part on broadening those practical solutions which are already in practice.

**Relationship and Its Tools**

I believe one idea is central to understanding liquid commerce: Information economics, in the absence of objects, will be based more on relationship than possession.

One existing model for the future conveyance of intellectual property is real time performance, a medium currently used only in theater, music, lectures, stand-up comedy and pedagogy. I believe the concept of performance will expand to include most of the information economy from multi-casted soap operas to stock analysis. In these instances, commercial exchange will be more like ticket sales to a continuous show than the purchase of discrete bundles of that which is being shown.

The other model, of course, is service. The entire professional class--doctors, lawyers, consultants, architects, etc.--are already being paid directly for their intellectual property. Who needs copyright when you're on a retainer?

In fact, this model was applied to much of what is now copyrighted until the late 18th Century. Before the industrialization of creation, writers, composers, artists, and the like produced their products in the private service of patrons. Without objects to distribute in a mass market, creative people will return to a condition somewhat like this, except that they will serve many patrons, rather than one.

We can already see the emergence of companies which base their existence on supporting and enhancing the soft property they create rather than selling it by the shrink-wrapped piece or embedding it in widgets.

Trip Hawkins' new company for creating and licensing multimedia tools, 3DO, is an example of what I'm talking about. 3DO doesn't intend to produce any commercial software or consumer devices. Instead, they will act as a kind of private standards setting body, mediating among software and device creators who will be their licensees. They will provide a point of commonality for relationships between a broad spectrum of entities.

In any case, whether you think of yourself as a service provider or a performer, the future protection of your intellectual property will depend on your ability to control your relationship to the market—a relationship which will most likely live and grow over a period of time.

The value of that relationship will reside in the quality of performance, the uniqueness of your point of view, the validity of your expertise, its relevance to your market, and, underlying everything, the ability of that market to access your creative services swiftly, conveniently, and interactively.

**Interaction and Protection**

Direct interaction will provide a lot of intellectual property protection in the future, and, indeed, it already has. No one knows how many software pirates have bought legitimate copies of a program after calling its publisher for technical support and being asked for some proof of purchase, but I would guess the number is very high.

The same kind of controls will be applicable to "question and answer" relationships between authorities (or artists) and those who seek their expertise. Newsletters, magazines, and books will be supplemented by the ability of their subscribers to ask direct questions of authors.
Interactivity will be a billable commodity even in the absence of authorship. As people move into the Net and increasingly get their information directly from its point of production, unfiltered by centralized media, they will attempt to develop the same interactive ability to probe reality which only experience has provided them in the past. Live access to these distant "eyes and ears" will be much easier to cordon than access to static bundles of stored but easily reproducible information.

In most cases, control will be based on restricting access to the freshest, highest bandwidth information. It will be a matter of defining the ticket, the venue, the performer, and the identity of the ticket holder, definitions which I believe will take their forms from technology, not law.

In most cases, the defining technology will be cryptography.

**Crypto Bottling**

Cryptography, as I've said perhaps too many times, is the "material" from which the walls, boundaries--and bottles--of Cyberspace will be fashioned.

Of course there are problems with cryptography or any other purely technical method of property protection. It has always appeared to me that the more security you hide your goods behind, the more likely you are to turn your sanctuary into a target. Having come from a place where people leave their keys in their cars and don't even have keys to their houses, I remain convinced that the best obstacle to crime is a society with its ethics intact.

While I admit that this is not the kind of society most of us live in, I also believe that a social over-reliance on protection by barricades rather than conscience will eventually wither the latter by turning intrusion and theft into a sport, rather than a crime. This is already occurring in the digital domain as is evident in the activities of computer crackers.

Furthermore, I would argue that initial efforts to protect digital copyright by copy protection contributed to the current condition in which most otherwise ethical computer users seem morally untroubled by their possession of pirated software.

Instead of cultivating among the newly computerized a sense of respect for the work of their fellows, early reliance on copy protection led to the subliminal notion that cracking into a software package somehow "earned" one the right to use it. Limited not by conscience but by technical skill, many soon felt free to do whatever they could get away with. This will continue to be a potential liability of the encryption of digitized commerce.

Furthermore, it's cautionary to remember that copy protection was rejected by the market in most areas. Many of the upcoming efforts to use cryptography-based protection schemes will probably suffer the same fate. People are not going to tolerate much which makes computers harder to use than they already are without any benefit to the user.

Nevertheless, encryption has already demonstrated a certain blunt utility. New subscriptions to various commercial satellite TV services sky-rocketed recently after their deployment of more robust encryption of their feeds. This, despite a booming backwoods trade in black decoder chips conducted by folks who'd look more at home running moonshine than cracking code.

Another obvious problem with encryption as a global solution is that once something has been unscrambled by a legitimate licensee, it may be openly available to massive reproduction.

In some instances, reproduction following decryption may not be a problem. Many soft products degrade sharply in value with time. It may be that the only real interest in some such products will be among those who have purchased
the keys to immediacy.

Furthermore, as software becomes more modular and distribution moves online, it will begin to metamorphose in direct interaction with its user base. Discontinuous upgrades will smooth into a constant process of incremental improvement and adaptation, some of it man-made and some of it arising through genetic algorithms. Pirated copies of software may become too static to have much value to anyone.

Even in cases such as images, where the information is expected to remain fixed, the unencrypted file could still be interwoven with code which could continue to protect it by a wide variety of means.

In most of the schemes I can project, the file would be "alive" with permanently embedded software which could "sense" the surrounding conditions and interact with them. For example, it might contain code which could detect the process of duplication and cause it to self-destruct.

Other methods might give the file the ability to "phone home" through the Net to its original owner. The continued integrity of some files might require periodic "feeding" with digital cash from their host, which they would then relay back to their authors.

Of course files which possess the independent ability to communicate upstream sound uncomfortably like the Morris Internet Worm. "Live" files do have a certain viral quality. And serious privacy issues would arise if everyone's computer were packed with digital spies.

The point is that cryptography will enable a lot of protection technologies which will develop rapidly in the obsessive competition which has always existed between lock-makers and lock-breakers.

But cryptography will not be used simply for making locks. It is also at the heart of both digital signatures and the pre-mentioned digital cash, both of which I believe will be central to the future protection of intellectual property.

I believe that the generally acknowledged failure of the shareware model in software had less to do with dishonesty than with the simple inconvenience of paying for shareware. If the payment process can be automated, as digital cash and signature will make possible, I believe that soft product creators will reap a much higher return from the bread they cast upon the waters of Cyberspace.

Moreover, they will be spared much of the overhead which presently adheres to the marketing, manufacture, sales, and distribution of information products, whether those products are computer programs, books, CD's, or motion pictures. This will reduce prices and further increase the likelihood of non-compulsory payment.

But of course there is a fundamental problem with a system which requires, through technology, payment for every access to a particular expression. It defeats the original Jeffersonian purpose of seeing that ideas were available to everyone regardless of their economic station. I am not comfortable with a model which will restrict inquiry to the wealthy.

An Economy of Verbs

The future forms and protections of intellectual property are densely obscured from the entrance to the Virtual Age. Nevertheless, I can make (or reiterate) a few flat statements which I earnestly believe won't look too silly in fifty years.

In the absence of the old containers, almost everything we think we know about intellectual property is wrong. We are going to have to unlearn it. We are going to have to look at information as though we'd never seen the stuff before.
The protections which we will develop will rely far more on ethics and technology than on law. Encryption will be the technical basis for most intellectual property protection. (And should, for this and other reasons, be made more widely available.) The economy of the future will be based on relationship rather than possession. It will be continuous rather than sequential. And finally, in the years to come, most human exchange will be virtual rather than physical, consisting not of stuff but the stuff of which dreams are made. Our future business will be conducted in a world made more of verbs than nouns.

Ojo Caliente, New Mexico, October 1, 1992
New York, New York, November 6, 1992
Brookline, Massachusetts, November 8, 1992
New York, New York, November 15, 1993
San Francisco, California, November 20, 1993
Pinedale, Wyoming, November 24-30, 1993
New York, New York, December 13-14, 1993

This expression has lived and grown to this point over the time period and in the places detailed above. Despite its print publication here, I expect it will continue to evolve in liquid form, possibly for years.

The thoughts in it have not been "mine" alone but have assembled themselves in a field of interaction which has existed between myself and numerous others, to whom I am grateful. They particularly include: Pamela Samuelson, Kevin Kelly, Mitch Kapor, Mike Godwin, Stewart Brand, Mike Holderness, Miram Barlow, Danny Hillis, Trip Hawkins, and Alvin Toffler.

However, I should note in honesty that when Wired sends me a check for having temporarily "fixed" it on their pages, I alone will cash it...
The idea that intellectual property in a Net-based economy can lose its value horrifies most owners and creators. They'd better get over it.

**Intellectual Value**

In a Net-based economy of easy replication, the trick is to control not the copies, but the relationship with the customer.

Think of content as an advertisement for more personal, higher-value products, processes, and services. In short, the ancillary market is the market.

**Esther Dyson** offers a radically new way to look at compensation for intellectual effort in the Net-based economy.
What happens to intellectual property when it gets on the Internet?

The Net dramatically changes the economics of content. Because it allows us to copy content essentially for free, the Net poses interesting challenges for owners, creators, sellers, and users of intellectual property. In this new world of the Net, it is easy to copy information but hard to find it. It is easy to program software to solve problems but hard to define those problems and questions precisely.

In the new communities of the Net, the intrinsic value of content generally will remain high, but most individual items will have a short commercial half-life. Creators will have to fight to attract attention and get paid. Creativity will proliferate, but quality will be scarce and hard to recognize. The problem for providers of intellectual property in the future is this: although under law they will be able to control the pricing of their own products, they will operate in an increasingly competitive marketplace where much of the intellectual property is distributed free and suppliers explode in number.

What will almost-free software and proliferating content do to commercial markets for content? How will people—writers, programmers, and artists—be compensated for creating value? What business models will succeed in this foreign economy?

In a new environment, such as the gravity field of the moon, laws of physics play out differently. On the Net, there is an equivalent change in “gravity” brought about by the ease of information transfer. We are entering a new economic environment—different as the moon is from the earth—where a new set of physical rules will govern what intellectual property means, how opportunities are created from it, who prospers, and who loses.

Chief among the new rules is that “content is free.” While not all content will be free, the new economic dynamic will operate as if it were. In the world of the Net, content (including software) will serve as advertising for services such as support, aggregation, filtering, assembly and integration of content modules, or training of customers in their use. Intellectual property that can be copied easily likely will be copied. It will be copied so easily and efficiently that much of it will be distributed free in order to attract attention or create desire for follow-up services that can be charged for. Advertising has a poor reputation in many quarters because most advertising is designed for a broad market. But in the one-to-one world the Net promises, advertising will often be tailored and of higher quality. Those with more money to spend will get higher-quality advertising.

What should content makers do in such an inverted world? The likely best course for content providers is to exploit that situation, to distribute intellectual property free in order to sell services and relationships. The provider’s vital task is to figure out what to charge for and what to give away—all in the context of what other providers are doing and what customers will grow to expect.

Of course, there still will be ways for content creators to be paid. Much content will be developed under service contracts. A supplier will create high-value content, such as a market research study directly for a paying customer (or a limited set of customers). Newspapers and online news services will pay reporters and editors to produce content, which will then be resold cheaply in conjunction with advertising that covers most costs; that same content may also be distributed “free” as part of a subscription service. Certainly, advertisers will continue to pay people to develop advertising content for them, even if that content is to be distributed free.

I am not saying that content is worthless, or that you will always get it for free. Content providers should manage their businesses as if it were free, and then figure out how to set up relationships or develop ancillary products and

SOFTWARE METERING

“We’re turning the infobahn into a toll road,” claims Peter Sprague, the avuncular CEO of Wave Systems Inc. It may sound like just one more overwrought metaphor, but it precisely describes the future Sprague and competing Infosafe Systems Inc. are racing to build. Both New York-based companies have recently announced data metering systems—hardware devices that attach to your computer and act as toll collectors, charging you for the data you download and the programs you use. Infosafe and Wave are betting that such a system will fundamentally transform information economics by making unauthorized copying more difficult while taking advantage of information’s natural tendency to spread far and wide.

The concept is simple: instead of charging a flat fee for a software program, or an hourly fee for access to a database, data metering allows companies to charge per use. So, if you need to use a CAD program only a couple times a year, you could pay just a few dollars each time rather than hundreds of dollars to buy the program. Or, if you need to look up a statistic, instead of buying an entire reference CD-ROM, you could pay just for the facts you need. Think of this metering device as an electricity meter that keeps track of the flow of data into your computer and bills you accordingly.

The meters developed by Infosafe and Wave are similar in every way but their dimensions. While Infosafe’s device is a small box attached to a computer and a phone line, Wave’s solution is a single chip that must be integrated into a computer. With either system, a user can transfer mon-
services that cover the costs of developing content. Or players may simply try their hands at creative endeavors based on service, not content assets: filtering content, hosting online forums, rating others’ (free) content, custom programming, consulting, or performing. The creator who writes off the costs of developing content immediately—as if it were valueless—is always going to win over the creator who can’t figure out how to cover those costs. The way to become a leading content provider may be to start by giving your content away. This “generosity” isn’t a moral decision: it’s a business strategy.

The half-life of value
Imagine you’re a farmer in the 19th century headed into the 20th. The intrinsic value of food won’t go away in the new century, but as food becomes cheaper and cheaper to produce, the share of economy devoted to agriculture will shrink, and so will your margins. Better to get into manufacturing, or at least into food processing. (But fast-food restaurants. That may be a little premature.)

Now imagine you are a content maker in the 20th century headed into the 21st. Until now, content has always been manifested physically—first in people who knew how to do things; then in books, sheet music, records, newspapers, loose-leaf binders, and catalogs; and most recently in tapes, discs, and other electronic media. At first, information could not be “copied”: it could only be reimplemented or transferred. People could build new machines or devices that were copies of or improvements on the original; people could tell each other things and share wisdom or techniques to act upon. (Reimplementation was cumbersome and re-use did not take away from the original, but the process of building a new implementation—a new machine or a trained apprentice—took considerable time and physical resources.) Later, with symbols, paper, and printing presses, people could copy knowledge, and it could be distributed in “fixed” media; performances could be transcribed and re-created from musical scores or scripts. Machines could be mass-produced.

With such mechanical and electronic media, intellectual value could easily be reproduced—and the need (or demand from creators) to protect intellectual property arose. New laws enabled owners and creators to control the production and distribution of copies of their works. Although reproduction was easy, it was still mostly a manufacturing process, not something an individual could do easily. It took time and money. Physical implementation contributed a substantial portion of the cost.

Now we face a new situation: not only is it easy for individuals to make duplicates of many works or to re-use their content in new works, but the physical manifestation of content is almost irrelevant. Over the Net, any piece of electronically represented intellectual property can be almost instantly instantiated anywhere in the world.

Controlling copies (once created by the author or by a third party) becomes a complex challenge. You can either

---

People want to pay only for what is perceived as scarce—a personal performance or a custom application, or some tangible manifestation of that.

---

ey onto the meter by providing a credit card number, which the meter then verifies by modem. When a user requests a program off a CD-ROM or an online database, the meter subtracts the appropriate amount from the user’s credit balance and then downloads and decrypts the data. Downloaded programs may be set so that they live for only a few days or uses.

Sprague likes to illustrate how data metering will change the software business with this challenge: “Go out and try to find a spell checker for German. Chances are you won’t be able to find it in any store.” His point is that with limited shelf space, stores can stock only the products they know will attract a large audience. But metering schemes afford infinite shelf space, because the store is virtual. That means niche applications are economically viable. And it means customers can instantly obtain almost any program they want.

Data metering exploits the fundamental ease of distributing digital information. By collecting a toll at the user’s computer rather than at some distribution point, you can cut out a lot of the middlemen, as well as the costs of packaging. And that means cheaper software.

Metering systems will also help eliminate software piracy, says Thomas Lipscomb, CEO of Infosafe. Software will have built-in hooks that start the meter ticking. So, it doesn’t matter if you copied the program from a friend—you’ll still have to pay to use it. These software hooks also allow a wide variety of charging policies. Five dollars, say, every time you print, or US$20 every time the program is run.

The advantages of data metering have been known for a long time. Ryoichi Mori, a professor at the University of Tsukuba, in Japan, first came up with the idea more than 10 years ago. But now only has the technology become cheap enough and secure enough to be practical. This isn’t to say all the problems have been solved: there remain nagging technological, social, and business issues, any one of which could stop these metering schemes in their tracks.

Surprisingly, it’s the technical issues Infosafe and Wave worry the least about. True, both products use powerful encryption schemes and patented security techniques to protect the user’s credit balance and the data being delivered. But neither Infosafe nor Wave claims its system is impervious to a determined hacker. Instead, the two are staking their reputations on the belief that if it is hard enough to break the system’s security, most people will just pay. As Lipscomb points out, the existence of the copy machine hasn’t destroyed the publishing industry. Besides, argues Sprague, “total security would require a complete change of computer architecture. And that isn’t going to happen.”

Infosafe and Wave are only slightly more worried about social issues, such as privacy concerns. True, metering systems keep close track of what programs you use and what data you download. But, as metering advocates are quick to point out, the same can be said of credit cards. Nonetheless, computer users are notorious for their dislike of anything that smells like “Big Brother inside.”
control something very tightly, limiting distribution to a small, trusted group, or you can rest assured that eventually your product will find its way to a large nonpaying audience—if anyone cares to have it in the first place.

But creators of content on the Net still face the eternal problem: the value of their work generally won't receive recognition without wide distribution. Only by attracting broad attention can an artist or creator hope to attract high payment for copies. Thus, on the Net, the creators give first performances or books (or whatever) away widely in hopes of recouping with subsequent works. But that breadth of distribution lessens the creator's control—of who gets copies and what they do with them. In principle, it should be possible to control and charge for such widely disseminated works, but it will become more and more difficult. People want to pay only for what is perceived as scarce—a personal performance or a custom application, or some tangible manifestation that can't easily be reproduced (by nature or by fiat; that's why the art world has numbered lithographs, for example).

The trick is to control the copies of your work but instead a relationship with the customers—subscriptions or membership. And that's often what the customers want, because they see it as an assurance of a continuing supply of reliable, timely content.

You can, of course, charge a small amount for mass copies. Metering schemes will allow vendors to charge—in fractions of a penny if desired—according to usage or number of users rather than copies. (See “Software Metering,” page 137.) Yet much as I find the approach of metering and tagging information intellectually appealing—and I especially like Mark Stefik's “rights language” (see “Tracking Usage Rights,” page 140)—it won't much change the overall approaching-zero trend of content pricing. At best, it will make it much easier to charge those low, low prices.

**Seen one, seen them all**

There are other hurdles on the Net for content creators. One is the rise of a truly efficient market for information. Content used to be fungible: it was difficult to replace one item with another. But most information is not unique, though its creators like to believe so; there are now “specs” for content such as stock prices, search criteria, movie ratings, and classifications.

In the world of software, for instance, it's becoming easier to define and create products equivalent to a standard. Unknown vendors who can guarantee functionality will squeeze the prices of the market leaders. Of course the leaders (such as Microsoft) will continue to win because they can use almost-free content to sell ancillary products or upgrades, and because they've reinvested in loyal distribution channels (even though they don't own them). In a sense, the content is advertising for the dealers who resell as well as for the vendors who create.

Overall, it will become easier either to reimplement the use of a software product—or, more significantly, to implement the solution to a particular problem in an alternative way. The definition of the problem, rather than its solution, will be the scarce resource in the future.

In entertainment and art, pricing will drop likewise, as more creators compete for attention with content they make using low-cost, easy-to-use production tools. Rather than hitting the big time, more artists will find their audiences within their local communities—geographical or Net-based. Local barriers to entry will be low, but global competition will be strong. There's the odd movie star or work of art for which no substitute is acceptable, but most entertainment is a way of spending time—not a unique experience. As Mark Stahlman of New Media Associates Inc. points out, almost every variety of recreation—from reading a book to going out on a date—converges on the same amount when figured in dollars per hour of experience (currently between US$1 and $2 per hour). People unwittingly value entertainment content by the hour as if it were all an interchangeable commodity.

**Paradise lost and regained**

The idea that intellectual property on the Net can lose its value horrifies most of its owners and creators, but it's
not new. It's happening already in the software business. Most software products are becoming commodities, not because they are easy to duplicate precisely (which is illegal), but because they are easy to imitate. Customers tend to want the original product; that forces prices down as knock-offs attempt to gain market share and the original attempts to maintain it by lowering prices.

Overall, in each market, there are likely to be a few leaders who create and protect content with a strong identity (perhaps promoting it with free content). Other players in each market will have a difficult time selling content as assets and will have to find new ways to collect rewards for their creativity. Owning the intellectual property is like owning land: you need to keep investing in it again and again to get a payoff; you can't simply sit back and collect rent. To some, this state of affairs may seem unfair. It certainly is if you grew up by the old rules and don't want to play in a new game. But if you look at the new rules by themselves, they have a certain moral grounding: people will be rewarded for personal effort - process and services - rather than for mere ownership of assets.

Owning land gives you the right to charge for the value you put into it. But the business of real estate is increasingly concerned with location and ancillary conditions such as zoning rights and obligations. Yes, land ownership matters, but it's not the most interesting factor in real estate today. The same is true in the Net world: content ownership matters, but it's hardly the key factor in intellectual commerce.

**The curve of intellectual value**

The value of content follows strange curves. When only a few people are interested enough to attend the party, watch the TV show, shop at the mall - it's generally not very valuable. When or if an item becomes a standard, it gains in value, both in the aggregate and per user. Users can cooperate with each other and share data: Juan and Alice can share the experience of watching John Malkovich in *In the Line of Fire*; the price of gold goes up as more people believe the price of gold will go up and start buying it in hopes of getting rich; the party's more fun when all your friends are there. But at some point that value peaks: the party's too crowded; the star is passé.

By contrast, other kinds of value are greater when they're exclusive: you're the only one in the market, you have a special formula for toothpaste, or you know a particular place to find oil. But many kinds of information flow from one bucket to the other; the first guy gets the advantage, but after that, the value is maximized by spreading the knowledge widely or by postprocessing - adding synergistic value on top of it.

---

**What makes any kind of real estate valuable?**

It's not mere buildings and facilities. There's a complex services, as well as location.

---

**TRACKING USAGE RIGHTS**

According to Mark Stefik, a scientist at California-based Xerox PARC, "the seeming conflict between digital publishing and commerce can be overcome by fundamentally redesigning computer systems. In his paper "Letting Loose the Light," Stefik proposes a solution reminiscent of software metering, but far more radical. It rests on two key components: trusted systems to store information, and usage rights to define exactly what a user can do with a digital work. Think of a trusted system as a device that can be trusted to follow the law. The device might be a computer or a CD player - whatever medium, the owner would be unable to use it to make an illegal copy. By storing unencrypted digital information only on these trusted systems, the fluidity of information can be controlled.

In Stefik's scheme every digital work is assigned several levels of usage rights. For example, the usage rights for a CD might allow the user to listen to 25 cents, or make a copy for $5. These usage rights can be nested, one within another, so that a digital work can include other people's work while ensuring everyone gets paid. A music compilation might have a separate usage right for each track, defined by that track's creator, as well as a usage right for the entire CD, defined by the CD's publisher. Stefik isn't stopping with the paper description of his scheme; he's filed for a number of patents on the underlying technology and has put together a business team. But Stefik admits that compromises are in order to make his scheme economically viable.

Mark Stefik: stefik@parc.xerox.com.

- Steve G. Steinberg
or at least in individual response. Intellectual property is the embodiment or automation of effort, replicable easily for all. Intellectual value, on the other hand, is the effort, service, or process itself; it can sometimes be shared, but the effort can't be replicated without another person around to do the same task.

Precisely because it is scarce and unreplicable, this unreplicable kind of content is likely to command the highest rewards in the commercial world of the future.

**Approaching zero**

These trends are already beginning to play out. For example, while most packaged software vendors continue to fight the perennial battle against software piracy, others have chosen to begin adopting a different business model. Except for the leader in each field (Microsoft Corp., Oracle Corp., Autodesk Inc., and a select other few), not many software companies can survive on the sale of intellectual property alone. The price of most packaged software tends toward (although it rarely reaches) zero.

So, what happens in a world where software is basically free? Successful companies are adopting business models in which they are rewarded for services rather than for code. Developers who create software are rewarded for showing users how to use it, for installing systems, for developing customer-specific applications. The real value created by most software companies lies in their distribution networks, trained user bases, and brand names—not in their code.

What Novell Inc. really is selling is its investment in training certified NetWare engineers, instructors, and administrators, and its perceived ability to produce and sell widely the next release of NetWare. (Selling the next release is essentially selling vaporware, but note that vaporware is not just a spurious form of advertising. Well-managed vaporware enables developers and customers to plan effectively; it is part of the value a software vendor can provide. But it works in the long run only if it is legitimate.)

Packaged software is a property, but in many ways it is becoming simply an advertisement for follow-up goods and services—bug-fixing, support, upgrades, training, implementation, and development services. The price of the software covers production and distribution; the intellectual content is free.

Consider Cygnus Support, a profitable five-year-old company (on whose board I sit); had 1994 revenues of more than $5 million and whose customers include Cisco Systems, Hitachi America Ltd., Motorola Inc., and Sun Microsystems Inc. Cygnus successfully sells support and implementation services, along with free copies of software from the Free Software Foundation (GNU C compilers, Unix, tools, etc.).

Much of its work is porting free system software to a particular vendor’s hardware implementation, a task paid for by the hardware vendor, or by the customer. The resulting implementation is freely redistributable (as provided by the rules under which the free software is distributed). Of course, the hardware vendor gets the benefit of its existence, since it makes his hardware products more attractive and “advertises” them. A single company, or individual, may create the intellectual property, while others may provide support services.

A similar situation often crops up in publishing. “Give us your information,” a publisher says to an author, “and we’ll classify it, put it online, and send you a royalty depending on how many people access it or how long they spend with it.” Yes, the content creator is selling intellectual property, but unless this creator has a very strong identity, the balance of power will shift to the publisher, who controls the channel to the customer.

**The bifurcation of content**

Would you pay more for Michael Crichton’s words, or for the ability to suggest a new plot to him or name a hero? How much was his book worth?
Net Value

and processes built around free or cheap content. The middle disappears.

To many people, such a world is frightening, since it does not require any laws to change or be broken. It's simply the unfolding expression of economic laws - of demand and scarcity - applied in the future world of electronic content and commerce. It's not the world most creators and intellectual property owners have been planning for, contracting for, securing rights for.

Of course, this new world will distribute its benefits differently than how they are distributed today. But as long as the rules are the same for everyone - and predictable - the game is fair. The big issue is the transition.

And there will be rules: copying content will be easy and acceptable in most cases; protected content will be "special," presumed to be of high value. (And it will have to be if the creators want to keep their reputations.) Protected content will be tagged and monitored (for one method, see "Digital Watermarks," page 141), and use will be metered. Some payments will be for content, some for time, some for transactions. This system of control will be managed by efficient, well-designed computer systems - a delightful intellectual engineering challenge that will keep many programmers and companies busy for years, and that will reward some venture capitalists.

There will also be strong legal and social pressures for authenticity, integrity, trademarks, and identification. Most often, you will be able to copy something freely, but you can't claim for it an identity or origin it doesn't have. Discrete works must be attributed; derivative works (assembled or modified from identified original components) will have to find their own value.

A market of visibility

All these emergent economic pressures and social conventions will spill over into the framework of organizations in this new world. What's a company's greatest asset, according to many annual reports? People and partners, of course, not computers or even intellectual property. In the new world of the Net, much will change. Everyone should be true. It's not just outsiders peering in, it's your own employees out in the electronic world: they are the company. As both physical and intellectual products lose their value (in the manner described above), the interactions with your company will be what you sell. And the quality of the interactions you foster will be what draws employees to your firm or community. People want to buy information-based services and products from visible companies that operate as partners. They do not want commodity products from black boxes.

The question of what happens to intellectual property on the Net may be summed up like this: value shifts from the transformation of bits rather than bits themselves, to services, to the selection of content, to the presence of other people, and to the assurance of authenticity - reliable information about sources of bits and their future flows. In short, intellectual assets and property depreciate while intellectual processes and services appreciate.

Excerpted with permission from the December 1994 issue of Release 1.0. Copyright 1994 E-Dventure Holdings (info@edventure.com).
The Emperor's Clothes Still Fit Just Fine

By Lance Rose

Copyright is dying, some say. It is too old to run on the Net; it can only grasp feebly at streams of electrons spraying through cyberspace. Copyrights are relics of the crude physical world, best suited to brute things like books, tapes, floppy disks, and CDs.

But new challenges threaten to overload the copyright system. How can we balance efficiently the rights of multimedia developers to sample, alter, and incorporate older works against the rights of copyright owners to be paid whenever their works are used? Who should be responsible when copyrighted works are infringed online - those who create the infringing copies, or the online services which act, often unwittingly, as vehicles for mass distribution? Is copyright law and its copy-based model a sensible way to govern computer networks, where making copies is easy as flicking a light switch, or should creators look to new noncopyright schemes for controlling use of their works, such as the usage-metering schemes now surfacing for CD-ROM and online publishing?

These are all important issues, but another debate is underway: can copyrights be enforced on the Net at all? For traditional physical goods, the factories that produce pirate books, T-shirts, and records don't move around much, making them easy targets for investigators. Once found, the large profits reaped by infringers make a tantalizing prize for copyright owners, fueling lawsuits and even leaving a little over for the owners after paying off the lawyers. There is also a natural cap on the universe of infringing activities in the physical world. The hefty start-up investment needed for copying equipment and setting up distribution channels limits big-time bootlegging to a few rich players. Pursuing these mass infringers is the copyright owners' version of one-stop shopping: you can collect legal damages for many small rip-offs by suing just one mass infringer. The small-time infringers are all but ignored.

In contrast, on the Net, you don't need heavy equipment to infringe. Any college kid with a tuition-paid account can readily copy any digital work and send it to thousands of places online for no fee. Add to this the recently developed Net service known as the "anonymous remailer," and no one will be able to identify that kid as the wrongdoer. For instance, I can scan this issue of Wired into digitized form, zip it up, and pump it out anonymously to thousands of newsgroups and bulletin boards. No one will ever track me down. If others do the same, why would anyone want to pay for Wired, or anything else we can digitize? The field of potential infringers, once limited to a few well-heeled players, has broadened to everyone with access to computer networks and services - as many as 25 to 50 million Net users worldwide at the moment. The new ease of infringement and difficulty of enforcement bring us inexorably to the conclusion that copyright is dead.

This is a seductive view among those captivated by the idea that "information wants to be free." But it is wrong. Businesses built on copyrighted products - record companies, book publishers, film producers, and the like - never depended on stopping all infringements. On city sidewalks and in country flea markets across the nation, you will find truckloads of bootleg music tapes, videos, and software, as well as knockoff T-shirts and watches. Infringements galore! Visit some foreign countries, especially in Asia, and you will find whole economies based on ripping off US software. Surging trade in knockoffs and bootlegs is a fact of life for the music, film, publishing, computer, and other copyright-based industries.

The Net did not introduce low-cost, anonymous infringement to the world. Anyone can buy a copier, tape deck, or computer and become a small-time infringer who's almost impossible to detect. Yet many companies in hard-copy industries enjoy year after year of record profits. Look at shareware companies, which are based on the idea of rampant, out-of-control copying of their products. They are making thousands, millions, in market niches where even the most wildly optimistic observers estimate no more than 5 percent of the people who use shareware pay for it.

How do these companies stay in business? It's simple: copyright law succeeds in maintaining public markets for copyrighted products. In markets where the owners can charge and receive a substantial profit for those products. It is irrelevant whether any one infringement goes unpunished - as long as it is kept inside the public marketplace. This is easy. Copiers, whether of experience in sweeping the public marketplace clean enough for business. Now they are washing their hands regularly in the online public markets: newsgroups, bulletin boards, and the Internet.

For instance, the Software Publishers Association reportedly has about 2,000 computer bulletin boards under continuing surveillance, while the FBI readily sorts anywhere it suspects wrongdoing. These groups, as well as large copyright-hoarding corporations, bust notorious online services every now and then, and wave their fists at lots of others (major fist wavers include LucasArts, Lotus, Novell, Playboy, Paramount, etc.).
and Walt Disney). Playboy recently won a court order against the Georgia bulletin board Tech's Warehouse for trafficking in digital images of its magazine pinups; Sega, of video-cartridge fame, obtained a well-publicized shutdown of the Maphia pirate BBS in California. Not content with such small fry, the Harry Fox Agency in New York (a major music-rights licensing group) is suing CompuServe for millions of dollars because CompuServe's users were supposedly using the online service to trade large quantities of infringing songs. These legal tactics and others will keep online systems scared straight. They will discourage organized copyright infringement on their systems, especially infringements out in the open.

The anti-infringement drumbeat is pounding ever more loudly. Criminal indictments were recently charged against system operator David LaMacchia of MIT and the Davey Jones Locker bulletin board. Other criminal actions are pending: against Rusty and Edie's bulletin board in Ohio, and a group of five bulletin boards recently raided in Texas. Such legal scare tactics assure that online systems who are more interested in business than playing cops and robbers will discourage organized copyright infringement on their systems, especially infringements out in the open.

OK, so the public thoroughfares can be kept honest, but won't criminals and pirates continue to operate elsewhere? Sure, but only if they stay deep underground, where they won't interfere with public markets where the copyright owners make their profits. If a pirate operation drifts close enough to the surface that it threatens legitimate markets, the Net cops will infiltrate and bust it before it can make a dent in the copyright owner's profits, regardless of whether the pirates are using encryption to cloak their identities. Net users who aren't at least mildly familiar with the underworld will never even hear about such systems before they are dismembered, and will confine their purchasing to the legitimate above-ground markets for copyrighted goods.

The Software Publishers Association and Business Software Alliance maintain the distance between public and pirate markets. Despite their constant public relations bombast about billions of dollars in sales lost to software piracy, these vigilante groups know they have zero chance of capturing those would-be revenues. Their real job is patrolling the border territory between mainstream software markets and pirate lands, running down anyone foolish enough to breach the neutral zone. Don't ever expect the Software Publishers Association and Business Software Alliance to admit to their lowly border guard status, however. Their fangs are bared at all times, hissing, "don't copy that floppy." As markets for all sorts of digital industries other than software move online, we are seeing the organizations for those industries move in to perform functions similar to the SPA, including BMI for musical performance rights and the Writers Union for copy-rights in both newspaper and magazine articles.

Fine, so the black markets can be kept deep underground. But who needs black markets? Can't we all use anonymous remailers to keep the Net knee-deep in infringing copies? No. Net cops can swiftly clean each new infringement out of the major online markets as soon as it appears. They will soon become better at it when copyright owners begin deploying software agents that can roam the entire Net, searching out anonymous infringements. Every time a pirated work is spread to the four corners of the Internet by an anonymous user, software agents will quickly sniff it out.

Anonymous infringements will arc across the Net like shooting stars, and disappear from sight just as quickly. Those who want the latest freebie will have to scramble for it before the cops and their software agents go out to sweep up the mess.

Any college kid with a tuition-paid account can readily copy any digital work and send it to thousands of places online for no fee.

One of the limits on enforcing copyright on the Net is the ease of setting up private, informal exchanges of works between friends. Not black markets exactly, but "friend-to-friend markets." If one of my friends has a video, song, book, or piece of software that I want, I can easily get it privately through the Net, and the cops won't be any the wiser. There will be no stopping these personal exchanges online, just as home taping could not be stopped.

Indeed, just last year, Congress threw in the towel on physical taping and added a provision to the Copyright Act making it legal for us to make noncommercial music tapes for our friends.

Can the Net be leveraged to extend friend-to-friend exchanges to include far larger groups of people? Can we all get the works we want cheaply or for free among private, interlocking circles of friends? This is a tempting thought, but friend-to-friend markets are far more likely to remain small and self-limiting. We might refer to an extended circle of trading acquaintances as "friends," but in fact few or none of the participants will know everyone else in the circle. This makes such groups ripe for infiltration by the cops, who will do so readily if enough freebies pass within these expanded groups that they noticeably reduce sales in the legitimate markets. A symbolic legal attack every now and then will keep these groups in check, using the recently increased criminal provisions of the Copyright Act to send digital traders to jail for the felony of possessing 10 or more illicitly made copies of copyrighted works worth a total of US$2,500 or more.

Yet another prediction for the Net is that online media are moving toward "narrowcasting" – targeting smaller and smaller audiences with highly defined preferences. Examples today would include high-priced industry newsletters for company executives, with cir-
calculations measured in the hundreds or low thousands, and prices of several hundred dollars per year for a subscription; and industry and demographic studies that may sell a few dozen copies or less, but at a price of thousands of dollars for each copy. The audiences for these media products may be small enough, and their members familiar enough with each other, that they may be able to defeat enforcement of narrowcasted content copyrights by trading through friend-to-friend networks that never become extended enough for easy infiltration by the cops. This prospect is real, but largely irrelevant for such media products. Copyright law is aimed primarily at protecting mass-market works, not high-priced, small-circulation specialty products. The small size of the audience that makes copyright enforcement difficult also springs loose other legal protections, such as distributing the narrowcasted materials under confidentiality restrictions and strong copy protection. These mechanisms don't work in mass-market environments like Blockbuster and Kmart, but they are routinely used and accepted among those who use small-market, specialized products.

Another way to understand the relationship between legal copyright markets and illegal markets such as black markets and friend-to-friend markets is to consider the question: What is the consumer's true cost of obtaining digital works? Say I'm looking for the latest Madonna single in digitized form; it costs a few dollars at an authorized store, but in an illicit market I could get it for a buck, or even for free. In this scenario, doesn't online piracy knock the legs out under copyright-based marketing after all?

Not at all, when we consider what you or I may have to go through to get a copy. To get the illicit version, you need to find someone who has it, which means keeping up with the whereabouts of those who collect the kinds of music you like. It's not easy to stay informed about these people. Anyone making an array of digital works available for infringement by large groups of people will be easily found and quickly busted by the Net cops. The survivors will be those deep enough underground that the cops can't readily find them, moving as necessary from dark corner to dark corner. Keeping track of these shady characters will require becoming part of an underground information network yourself, and maintaining strong enough security to keep out the copyright narcotics.

Now we can compare the true costs of the aboveground Madonna single to the pirated version. The official Madonna single still costs a few bucks. The pirated version's cost is: (1) a buck or for free, plus (2) all the time and effort needed to track down pirate dealers with the stuff you want (and who are so deep underground even the cops can't find them), plus (3) more time and effort on security procedures for dealing with pirates and avoiding detection, plus (4) the legal risks of being involved in clandestine criminal activities. Given this choice, consumers who just want the Madonna single will flock to the stores with large and organized inventories, pay a few bucks, and conduct their business relaxed and in the light of day. The adventure and risk of hunting down pirate suppliers and avoiding the cops will be left to cyberpunk romantics and belligerent information-freedom fighters for whom the game of getting the goods illicitly is the object anyway. Make no mistake, though. Those playing cops and robbers are paying for their entertainment.

Say I'm looking for the latest Madonna single in digitized form; it costs a few dollars at an authorized store, but in an illicit market I could get it for a buck, or even for free.

So copyright law will continue in its traditional role of promoting markets for copyrighted goods on the Net, as it does in the tangible world. This does not mean, though, that the market will be unchanged. There is a vast movement afoot—the great and rapidly increasing abundance of information on the Net, far more than we can ever use—which may ultimately reduce our tendency to hoard information under the copyright laws. Information loses its value when there is so much we can't pick apart the useful data from the chaff. The valuable online services of the future will be those that bring order out of the chaos.

In some cases, the creators of valuable organizing tools will be able to control them under copyright, and their owners will profit. In many other cases, though, we will see a shift toward information services instead of information hoarding. For instance, it would not be surprising if much of what is sold today as "products"—recorded songs, books, films—become no more than cheap promotional tools for premium services, such as live online concerts and direct interactions between audiences and artists. Such new services and more will undoubtedly appear as we venture deeper online. In any event, the shift from information hoarding to information services will be based entirely on our increasingly desperate need to organize overabundant information resources. Killing off copyright law has nothing to do with it.

Each of us can now perform widespread copyright infringement without getting caught, if we're careful. However, none of this will make a hair's breadth of difference to most of those who wish to sell copyrighted goods in the electronic age because the traditional copyright system is fully Net-capable. We may eventually see a societal move away from information hoarding, but it will not happen because copyright law does not work. There will simply be more money in helping people use information than in metering the stuff out.

Lance Rose is an attorney and writer who focuses on the law of online communities.
1. **INTRODUCTION:**

"For copyright, the implications are fundamental. Established notions about copyright become obsolete, rooted as they are in the technology of print. The recognition of a copyright and the practice of paying royalties emerged with the printing press. With the arrival of electronic reproduction, these practices become unworkable. Electronic publishing is analogous not so much to the print shop of the eighteenth century as to word-of-mouth communication, to which copyright was never applied." Ithiel de Sola Pool, *Technologies of Freedom* (1983) at 214.

The scope of digital infringement is huge and largely unquantifiable. Software company associations routinely put out numbers in the billions trying to quantify the losses suffered by their constituents to pirates. Online, the 1980s saw a robust community of "pirate boards" trading in copyrighted software. While many of these boards went out of business or became legit, there is still a healthy amount of infringing activity taking place. To copyright holders, this infringing activity looms ominously as a threat to their ability to reap economic value from their creations.

"Intellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum." (Barlow).

Ironically, attempts to quantify economic losses due to infringing activity tend to overstate the problem. The predicate assumption is that infringers would have paid full retail price for the material, an unlikely proposition given that their reservation price may have been substantially lower—perhaps even zero. While we do know that losses occur, just how serious is the problem?

In analyzing this problem in the digital age, the NII Task Force concluded that "[t]he coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations." (Footnote omitted). Others have responded that "the Emperor’s clothes still fit just fine." (Rose, Emperor’s Clothes). As we will examine in this paper, it appears that many of the threats online are overstated, and with some clear rules and easy legal and technological solutions, online activity may prove not to be the economic death knell for copyright holders.
2. **Features of the Net.**

The Net has some unique technological and sociological characteristics that affect the types of rules appropriate there. As a result, I make the following presumptions about the future technology applicable to the Net.

a. Unlimited, costless (or nearly costless) distribution of information. This includes the primary distribution of the information between users and correspondence between software program or information file and a home base located on the Net.

b. Users' ability to make identical copies. I presume copy protection will not be meaningful except as noted.

c. Anonymous remailers will allow distribution without identification. I also presume the availability of digital cash or an equivalent, which will be untraceable.

d. Tamper-proof or difficult-to-tamper-with encryption mechanisms will be available, including a digital signature.

e. Smart agents with ability to perform actions in any publicly accessible space on the Net, at low or no cost.

3. **Culture of the Net.**

To craft an intellectual property regime tailored to the digital age, it is important to evaluate the context to see how users actually behave. This provides a clue to whether it is realistic to expect users to conform their conduct to existing or proposed intellectual property protection regimes.

There are multiple perspectives about intellectual property rights on the Internet (see Rose, Is Copyright Dead?). These perspectives include:

- *"Information Wants to be Free."* These people believe there should be no copyrights or other protections of intellectual property; everything made publicly available should be public domain.
- *"Right of Attribution."* These people believe that the only rights owed to authors and creators is the right of attribution; otherwise, all information is free.
- *"Limited Use Rights."* These people believe that copyright has validity but minor infringing behavior, whether "fair use" or not, should be legal.
- *"Strong IP Regimes."* These people adhere strictly to intellectual property protections.

(Note that there is also the moral rights perspective, which exists on a different scale but is most closely aligned with the Strong IP Regimes category.)

As Lance Rose has pointed out, no one segment dominates the other; rather, we can expect that each segment will continue to attract adherents well into the future. The issue then becomes whether we want to craft our laws to override the beliefs of people in the first two categories, or if we want to primarily conform the behavior of people in the latter two categories.

Lance Rose has argued that we should acknowledge that there will always be people in the first category, regardless of the intellectual property protection regime (Rose, Emperor's Clothes).
As a result, it probably does not make sense to craft laws that try to coerce their behavior, if in fact no amount of coercion will produce a different result. Instead, it makes more sense to focus on other categories of users, particularly the "limited use" users who believe that some use is not infringing. Because these people make judgments every day about the extent and seriousness of the use, we may be better served by establishing clearer guidelines for defining use that is and is not infringing.

There are a couple of other Net cultural aspects worth noting:

- "Correction of Errors." The Net culture promotes discussion of acceptable behavior. If someone submits a violating post, the Net's response is egalitarian and swift: the poster may be publicly flamed, privately chastised, or even added to the user's "bozo filter" and henceforth silenced from reaching that user. This holds true in the context of intellectual property violations (Samuelson—arguing that such behavior is an extension of netiquette). An infringing posting may be subject to the Net's rebuke, and if the venue is moderated, may not be posted at all—not because of legal liability, but because it violates the collective sensibilities. Note that as the Net population has exploded, this trait has not yet abated. Rather, it appears to have remained an integral part of the socialization process (i.e., Newbies, once flamed, realize the value of conforming to the social norms). This suggests that some "supra-legal" rules exist and will guide behavior.

- "Censorship is a malfunction." (EFF co-founder John Gilmore, quoted in Barlow). The Net routes around barriers to the free flow of information, whether legal or technological. As Barlow asserts, the result is that information "more perfectly adapts" to its environment. This suggests that legal mechanisms that attempt to control behavior will face severe challenges, as the Net environment tries to circumvent these mechanisms.

4. **Categories of Intellectual Property:**

There are different types of intellectual property circulating on the Net that raise similar but distinct issues.

I draw a distinction between "software" and "content." This is not a rigid distinction. As I conceptualize it, software can be used to create content. This is somewhat tautological. For a more rigorous analysis of the distinction, see Samuelson et al., where they describe software as possessing "behavior."

   a. **Software**

In determining a proper protection regime for software, it is useful to assess exactly what "property" exists in software. This is not as obvious as it appears.

Samuelson et al. argue that software is more like a machine than an authored text. This suggests that copyright regimes are inherently unsuited to protect the value of software; rather, software is more like "industrial knowhow."
As a result, Samuelson et al. argue that one possible solution is to create a "registration depository" where creators of significant advances can register innovations and receive some protection for such registered concepts.

Contrast the Samuelson et al. position with Dyson's assertion that the software market has become so competitive that little value is created from the software functions themselves. Dyson believes that currently value from software is being generated from the distribution chain, which ultimately is likely to also lose value as Net distribution becomes costless (or nearly so).

In Dyson's world, software will become valueless because neither the functions nor the distribution warrant value. In such a world, creators will derive value from software creations by using such creations to create demand for ancillary services (technical support, skilled technicians, systems integration, customized proprietary programming).

Note that such a model is predicated on proper attribution, or else the creator will not be recognized and therefore not solicited for the ancillary services. Attribution may be facilitated by digital signatures. The NII task force also recognized the importance of attribution, even in the context of infringing behavior, by proposing to criminalize the fraudulent removal of identifying information from a creation.

As should be clear by now, the judgement over the created value in software completes affects the choice of a proper model. In Samuelson et al.'s world, the proper response is essentially more regulation. In Dyson's world, existing copyright models are adequate; if anything, "infringing" distribution/redistribution of software should be encouraged.

Choosing between the two models, and their offspring and derivatives, is difficult. However, as Lance Rose has noted, we have seen numerous successes of existing copyright laws of protecting the interests of creators while recognizing "normal" human behavior. As Rose's piece is entitled, "the Emperor's Clothes Still Fit Just Fine."

Furthermore, we should recognize that many creators will not need to rely on ex post facto suits for infringement to recoup value. Rather, there is some technology and logistical processes, of uncertain efficacy, in the pipeline that could result in extra-judicial prospective protection of software. Some examples:

**Technical Support**
- Limit technical support to registered users. This is the philosophy of many (all?) shareware companies offering technical support, including most prominently Netscape. This is a corollary of the principle of deriving value from ancillary services: Unregistered users can use the product for free, but will have to pay for support.
- Limit technical help built into the software and rely instead on hard-copy documentation. Many shareware companies also offer hard-copy documentation as part of the benefits of registration. There is nothing to prevent photocopying or scanning of the documentation to defeat this decidedly low-technology approach, but it will require infringers to go through some extra steps that may not be worth the effort.
Usage Metering and Encryption
• "Superdistribution" (Cox). Cox’s approach is to use a hardware component that calculates fees based on usage and then submits periodic reports to a home base. (This could also be done as a debit card approach--each use would offset credits on a card; when the credits are zero, the user would have to recharge the card). This approach’s advantages include that it would encourage free distribution of software and allow appropriate royalties to flow to creators of components. However, some serious concerns exist: the approach would impose hardware costs, misuse of the metering information could result in privacy invasions, and the hardware would be potentially subject to tampering.
• Authorization codes. Software would require an authorization code that would permit the software to operate for a certain period of time. Authorization codes would be obtained (for a fee, of course) from a home base. While this does not impose hardware costs, the concerns about privacy and tampering exist here as well.
• Software envelopes (Griswold). Copyrighted material would be contained in an encrypted software envelope that would periodically communicate with a home base upon use. The software would require authorization from the home base to continue functioning. If the user has not paid for the use, authorization would be denied and the software would be disabled. (This is somewhat analogous to the process used for satellite transmission feeds). The periodic communication could be counted to determine a metering charge. Again, the privacy and tampering concerns remain.
• Centralized software. Software could be centralized in one location and users access the program remotely via the Net on a subscription or per-use basis. This is analogous to the old timeshare models. Once again, there are privacy and tampering concerns. It also remains to be seen if consumers, accustomed to walking out of a software store with a tangible product, will adapt to lacking any possessory interest in software.

Note that in the metering models, there will be a tremendous increase in the amount of information transmitted back and forth on the Net. These transmission demands will create costs that must be borne by someone--ultimately, the user.

Software-based controls
• Limited functionality programs. These are frequently used in software programs today, with limits such as disabled printing and saving or "time bombs." Chances are that these limited functionality approaches will merge with the metering approaches described above, since the Net will be an efficient way to remove the limits. As with the other proposals, these are subject to tampering.
• Build "bugs" into the software, requiring users to get updated, bug-free versions (suggested and rejected by Dyson). This is a crude way to disable software and likely to produce ill-will. Furthermore, without other protections there is nothing to prevent the dissemination of the non-buggy versions once released.
• Copy protection. Among other approaches, software could have a sensor that causes the software to self-destruct if user tries to copy (Barlow). While highly effective when it works, copy protection has fallen into disfavor with consumers and is rarely seen now.
Post hoc infringement control

- Agents could scour the Net looking for publicly available infringing copies. This will not prevent private piracy but could be extremely effective at preventing unauthorized public distribution. Of course, as in the Cold War, we could see countermeasures by the pirates, leading to a classic arms race—the person with the mightiest agent wins!

b. Files ("content").

There are two key types of information: loosely, information that creates value from being known, and information that creates value from being kept confidential. The latter group includes information that loses value over time (i.e., market information).

Without intellectual property protection, it is likely that information not for public consumption will be made available either by subscription/encryption or by patronage. Either way, the result will be stratification into the information poor and the information rich. In turn, this stratification will be highly correlated with wealth, leading to perpetuation of society classes.

Note that the stratification will not necessarily result from superior information, but from superior access to information. In "drinking from a firehose," it is helpful to have someone controlling the spigot. The spigot will be controlled by indexers, who will reap much value from their expertise.

Many creators fear the leakage of "exclusive" information. Some have suggested that leakage should be supported, because it has the same effect as marketing and creating demand for access to the complete proprietary information (Dyson). There is an emerging trend of giving away valuable information to become recognized as the leader in the industry; once again, rewards come from the sale of ancillary services (ex: allowing people to tape Grateful Dead concerts to create demand for attending Grateful Dead concerts and purchasing Grateful Dead paraphernalia; Fenwick & West's promotion of the Multimedia Law Primer, which is a promotion piece to induce browsers to buy the book, which in turn is a promotion piece to induce readers to hire Fenwick as attorneys). Others have argued that leakage is not an exclusively a threat on the Net, given the piracy that takes place with T-shirts, etc., but that there are limits to such piracy because someone engaging in the business of infringement will face much greater odds of being caught (Rose, The Emperor's Clothes).

The issue boils down to whether copyright laws are intended to prevent all forms of infringing behavior. In the context of information intended to be kept secret, there are probably other more efficient mechanisms to control infringing behavior: a combination of trade secret law, contractual provisions, and perhaps "pipe-narrowing" to make infringement costly: charging high connect times, restricting searches, and permitting access only with proprietary programs that disable certain features (Rose, SysLaw).

In the context of information that benefits from being known, there will continue to be much benefit from distributing such information as an entree to ancillary services. Again, the most
important feature in such contexts will be the right of attribution. Presumably, appropriation by indexers and other data pirates will not pose a problem so long as the attribution remains.

Much information designed for public consumption will be advertiser-supported. Perhaps we will finally see the long-rumored merger of advertising and information. Perhaps the intermixing of advertising and content, such as we see on TV and in magazines, will remain robust. So long as the value comes from ancillary services (whatever is being advertised), the right to attribution remains fundamental.

Copyright laws still have a place, but as they do today, they will only protect the very valuable copyrighted materials. To the extent these are not protected by technology, infringers will face steep penalties and holders will have incentives to protect their interests. This suggests that the existing regime has its place, as it currently has, without modification and recognizing the limitations.

For those copyrights that have very high value, the proposed copyright clearance process may prove valuable.

One other approach to revitalize existing copyright laws is to recognize the ability of copyright holders to impose "shrinkwrapped" online use licenses on content. These might say, "I give the right for distribution for educational and research purposes only." Infringement of such licenses would give holders a right of action; one that would probably rarely be enforced, but would enhance the power of motivated holders.

Finally, there may be technology solutions to assist in preventing infringement. For example, Bell Labs has created a method to insert "serial numbers" for documents. This would imbed unique codes in documents, so that each and every copy could be traced to the original source, without being immediately obvious to any infringer. While this would not disable copying, it would provide disincentives if everyone knew the risk that the infringing copy could be traced back to them. (Voss). (See also Jim Warren, proposing a similar concept.).

5. OTHER PROBLEMS.

There are a few other problems worth considering in the intellectual property arena.

a. Joint Efforts. The copyright scheme is not especially well-suited to assigning ownership interests when there is collective development. We have already seen this problem in multimedia, to which the copyright clearance process could provide some relief, but there remains the difficult issues arising from "message bases," digital sampling, and product produced by groupware.

Another analogous problem arises in assigning the ownership of programs created by programs.

b. Jurisdiction. The global nature of the Net, cutting across jurisdiction boundaries, creates an inevitable conflict of laws. For example, in some jurisdictions, accessing a web-
accessible document might be deemed making and distributing an infringing copy. If a user from a jurisdiction without such a law browses the document, there has been unintentional and (IMO) harmless infringement.

This problem is especially acute in the context of moral rights, which are not universally recognized in all jurisdictions. Could a holder of moral rights assert that someone lacks the right to browse their document? Note that Pepper and Corrizini have placed a remark on their Website that commercial sites lacked the right to link to their site. Would such a restriction be more enforceable in a moral rights jurisdiction?

6. CONCLUSION.

The intent of this paper is to raise some of the difficult issues facing copyright holders in the online digital age. There are no easy resolutions; however, with some modest revisions in copyright law, the strengthening of technology-based controls, and a sensitivity to the Net community, solutions are available that may result in a harmonious balance of the interests of copyright holders and users.

7. BIBLIOGRAPHY.


John S. Erickson, "A Copyright Management System for Networked Interactive Multimedia" (available online at http://picard.dartmouth.edu/~oly/DAGS95.html).


Critiques:


Lance Rose, "Is Copyright Dead on the Net?," *Wired*, November 1993 at 112. (Available online at www.hotwired.com)


Also, check out articles at ftp.research.att.com/dist

8. **ABOUT THE AUTHOR.**

Eric Schlachter is an attorney practicing in cyberspace law with the Silicon Valley law firm of Cooley Godward Castro Huddleson & Tatum. He has a law degree and an MBA in entrepreneurial finance from UCLA. He is an adjunct professor of Cyberspace Law at the University of San Francisco School of Law. He can be reached at schlachtere@cooley.com.
New Wine, Old Bottles: The Case of the Evanescent Copy

_American Lawyer_, May 1995
David G. Post

There may be no more significant legal question
surrounding the emerging computer and communication
technologies than this: how do copyright and other intellectual
property rules apply in the age of the Internet -- where
unimaginably vast amounts of information are stored in digital
form and can be copied and transmitted, instantaneously and for
little more than the price of a local phone call, to virtually any
other computer on the globe?

Shortly after the Betamax case (Sony v. Universal Studios),
where the Supreme Court held that the use of VCRs for home
taping of television broadcasts does not constitute copyright
infringement, representatives of the Motion Picture Association of
America met with a number of Congressmen to discuss possible
legislative responses to what the industry saw as a serious threat
to its continued profitability. According to James Lardner (in
"Fast Forward: Hollywood, the Japanese, and the Onslaught of
the VCR"), one of the participants at that meeting, Senator Charles
Mathias, scribbled the following on a piece of paper as the
discussion proceeded:

<table>
<thead>
<tr>
<th>Era of Monastic Manuscript</th>
<th>Copyright unnecessary to authors or publishers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Era of Gutenberg Press</td>
<td>Copyright necessary to authors and publishers</td>
</tr>
<tr>
<td>Era of Promiscuous Publication</td>
<td>Copyright enforcement doubtful</td>
</tr>
</tbody>
</table>

This is the law's version of the Laffer Curve: just as tax
revenues increase and then drop off as tax rates rise, so too, as
copying becomes easier and easier, laws to protect an author's
right to prevent unauthorized copying become more and more
valuable -- until, perhaps, a point is reached at which copying has
become so simple, so costless, that regulation becomes virtually
impossible.

Not surprisingly, this issue is currently the subject of
vigorous debate. In one corner are the Incrementalists: in their
eyes, the basic foundations of copyright law will survive intact
because the fundamental need to which it responds -- the need to
provide protection to authors so as to give them an incentive to
invest the time and effort required to produce creative works -- is
still with us, perhaps more than ever. With appropriate fine-tuning,
copyright will accommodate these new technological
developments as it has accommodated earlier innovations, ranging
from the invention of the planola (the subject of much
copyright-related wrangling at the turn of the century) to the VCR
and the digital tape machine. Thus, the federal government's
National Information Infrastructure Working Group on Intellectual
Property, considering possible revisions to the Copyright Act,
"The [copyright] coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations."

In the other corner are the Radical Revisionists: copyright law, based as it is on the notion that the creator of an original work should be allowed to exercise exclusive control over the reproduction of his or her creative output, is an anachronism in the face of technologies that make the act of copying so easy -- technologies whose very essence, one might say, is to copy information and move it from one place to another. Canonical texts for the Revisionists are Ithiel de Sola Pool's "Technologies of Freedom" ("Established notions about copyright become obsolete, rooted as they are in the technology of print...with the arrival of electronic reproduction, the recognition of a copyright and the practice of paying royalties become unworkable.") and John Perry Barlow's "The Economy of Ideas: Why Everything You Know About Intellectual Property is Wrong" (Wired, March 1994) ("Intellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum.")

Who will prevail in this contest? That's the multibillion-dollar question for those who own valuable intellectual property and rely on copyright protection to realize a return on that property, a category that increasingly includes some very large and powerful entities in the "information economy." But whatever the outcome, the copyright battle well illustrates some of the difficult issues that arise when we try to apply venerable legal doctrine to new technologies.

Senator Mathias was surely at least partially right; copyright enforcement is going to prove difficult and costly in this new environment. But it is not simply the fact that copyrights can be so easily violated in cyberspace that is putting increasing strain on our current copyright regime. After all, the photocopier constituted an enormous assault on the notion of copyright, making it easy and cheap for anyone to duplicate copyrighted works on paper. The Internet and other electronic means of publishing and communication not only surpass the photocopier as vehicles for copying and distributing information, they threaten more fundamental concepts, integral to the very notion of copyright.

Consider, for instance, the basic building block of any copyright system: the concept of copying itself. Copyright law, fundamentally, about granting authors exclusive control over the production of copies of their works; the basic principle is that John Grisham, and only John Grisham, can make (or authorize the making of) copies of The Firm, and I infringe his copyright if I make copies without his permission.

Copyright law must therefore delineate with at least some degree of clarity the activities that do, or do not, constitute the "making of a copy." There are plenty of nice questions cropping here, of course, to keep copyright lawyers busy. But a relatively easy line can, and has, been drawn, requiring that a reproduction of a copyrighted work be tangible before the law will recognize it as a potentially infringing copy; the U.S. copyright
statute, for example, defines a copy as a "material object...in
which a work is fixed...and from which the work can be
perceived."

This means that I do not need Mr. Grisham's authorization
to enter my local bookstore and flip through the pages of his
novel, or to memorize a passage or two, or to imagine alternative
endings to his book; the law, wisely, does not consider reading,
and whatever that entails in the left temporal lobe of my brain, to
constitute the activity -- the making of a tangible copy of the work
-- over which Grisham is permitted to exercise control. Phrased
differently, the right to produce tangible copies of The Firm
belongs to Grisham; the right to read it, to use and manipulate the
information that he has placed into the stream of commerce for the
production of new creative works, belongs to the public. By this
allocation will copyright, in the Constitution's words, "promote the
Progress of Science and useful Arts."

This simple but fundamental concept is, however, proving
troublesome when translated into cyberspace because the
fundamental notion of "making a copy" slides too easily in and out
of focus. When you log into your firm's e-mail system, or onto
Lexis Counsel Connect or Prodigy or any other commercial online
service provider, or -- watch those metaphors! -- when you
"move" around the Internet to "visit" different sites in order to
view the material there on display, what really happens is that you
are sending a message to a remote computer requesting the transfer
of a file -- a file containing the list of all messages in your inbox,
or a recent comment posted on some discussion forum, or the
latest Supreme Court opinion or Microsoft's price list. The file is
them transmitted back to your computer, loaded into memory, and
displayed.

Have you for legal purposes made a "copy" of the file that
was sent back to you? From the average user's perspective, it
may seem most analogous to browsing through a hardcopy version
of The Firm. The only difference, you might think, is that you
are reading on a computer screen instead of on paper. But two
courts -- the Ninth Circuit in MAI Sys. Corp., 991 F.2d 511 and
the Eastern District of Virginia in Advanced Computer Services,
845 F.Supp. 356 -- have in fact concluded that this transitory
"fixation" of a computer file in memory constitutes copying within
the meaning of the Copyright Act, and this view has been adopted
by the government's intellectual property working group.

If the very act of getting a document to your screen is
considered the "making of a copy" within the meaning of the
Copyright Act, then a high proportion of the millions of messages
travelling over the Internet each day potentially infringes on the
right of some file creator -- an "author" in copyright terms -- to
control the making of copies. And, if the very act reading such
documents on line involves copying, then some form of a license --
permission from the copyright holder -- would, in this view, be
required for virtually every one of those message transmissions.

Of course, if I send an e-mail message that I have authored
to a friend, I have impliedly authorized my friend to copy the file
into his computer. Likewise, if I pay whatever subscription fee is
required to view an online version of today's Wall Street Journal,
Dow Jones won't call me an infringer for reading its dispatches. But
a legal regime that requires you to prove that you have received
specific authorization for each of these commonplace acts lest you
be deemed an infringer is surely going to bog down in uncertainty
(and therefore endless litigation).

What happens when I find an article in the Journal that is
particularly interesting, and post it to a Usenet discussion group on
the Internet? In this view, not only am I infringing by re-transmitting
this material, but so too are all of the discussion group
participants, none of whom, after all, have received a license from
Dow Jones authorizing their "copying." Are these people really
subject to the Copyright Act's statutory damage provisions? Can
we possibly keep track of this endlessly complex trail of
"authorizations"?

Under these decisions, cyberspace is not merely an
environment where widespread copyright infringement is possible:
the medium itself looks like little more than a colossal worldwide
copying engine. These decisions cannot merely be dismissed as
idiosyncracies, however, because -- and herein lies our problem --
this file transfer does look a great deal like the kind of activity that
falls squarely within the copyright law's sights. After all, once the
transfer is completed, where there was once one file, now there
are two, each indistinguishable from the other. How different is
that from making a photocopy?

The question copyright law will have to settle is whether
browsing on the Internet is more akin to browsing at your local
bookstore, or is more analogous to surreptitiously placing a copy
of Grisham's novel on my Xerox machine or scanning its pages
into my computer's memory.

These two views of this most rudimentary question are
 incompatible with one another, though each is perfectly logical; a
 sure sign that a paradigm shift may be in order. Copying remains
 a means by which free-riders can appropriate the creative output
 of others, and to that extent the law will seek to discourage it; but
 it is also an indispensable component of a new form of
 communication in a digital world, communication that can be
 smothered under a mountain of ruinous and wasteful litigation if
 we are unable to redesign our old bottles to fit the challenges of
 Senator Mathias' "Era of Promiscuous Publication."
GENERATING REVENUES FROM WEBSITES

by Eric Schlachter, Esq.
e-mail://schlachter@cooley.com

About the author: Eric Schlachter is an attorney practicing in cyberspace law with the Silicon Valley law firm of Cooley Godward Castro Huddleson and Tollman. He has a law degree and an MBA in Entrepreneurial Finance from UCLA. He is an adjunct professor of Cyberspace Law at the University of San Francisco School of Law.

The hoopla surrounding the Internet is slowly being tempered by the realities of the marketplace. Everyone talks about making money on the Internet, but actually achieving profit has required a clear plan of attack and marketing strategy. The former mantra, “There is easy money to be made!”, is slowly being replaced by a new mantra, “How?”

This article will summarize some of the trends I have been seeing in my practice of representing Website entrepreneurs. The outcomes may be surprising. While there is a robust and energetic cadre of Web entrepreneurs, many of them are unprepared for the realities of the Net economy. However, this article should provide the savvy Web entrepreneur with ways to identify and maximize the viability of their Website concept.

OVERVIEW

There are competing “physical space” models for Website concepts that will dictate which sources of revenue are most viable for your concept. The models include:

- The subscription model. This approach relies on revenue streams generated from end users.
- The shopping mall model. This approach simulates the revenue streams a shopping mall landlord might see, which includes a fixed fee plus performance incentives. This model also includes what I call the “travel agent” model, which more generically represents generating revenues from facilitating and/or closing transactions between end users and vendors.
- The advertising model. This approach relies on revenue streams from advertisers.
- The computer services model. This approach generates revenues from providing computer services, such as storage space, HTML mark up and design services, and consulting services.
- The “ancillary business” model. This new and important model does not have an easily identifiable physical space analogy. In this model, the revenue streams do not come from the Website per se, but rather are generated through sales of goods or services ancillary to the Website.

1. THE SUBSCRIPTION MODEL

This is a classic business approach, which endeavors to collect revenues from end users, presumably based on the value of the service to the end users. Comparable analogies might include newspaper and magazine subscription rates and the monthly and hourly charges now levied by the big online services and the small subscription BBSs.

However, many Website entrepreneurs are not prepared to hear that the subscription model is uniquely UNSUITED for the Web environment.

- Web Culture

First, the nature of the Web dictates that users are accustomed to moving freely from site to site. Sites that require registration, even free, present significant psychological barriers to users’ entry. As a result, these sites must offer special and unique services to attract and retain users.

- No Rewards for Distribution Costs

Second, and more importantly, it is a fallacy that subscription models succeed in physical space. For example, in all but the most specialized publications, magazine and newspaper subscription rates cover only the cost of distribution, such as the cost of printing and delivering the content to the end user. Any “profits” are generated from advertisers, not end users.

Another noteworthy example is software and multimedia materials. Many software and multimedia products are now bundled with the hardware at little or no extra cost to the end users. While some mass market software and multimedia products still command high prices, much of the revenues go back into the distribution chain and not to the content creators.

On the Web, the cost of distribution is approaching zero. Therefore, end users will not be willing to pay for any distribution costs. When distribution value is subtracted, the only value rewarded by users is the value of the content—a surprisingly low value.

- Content is Cheap

Although many entrepreneurs are not prepared for this, content is cheap. The other revenue streams I describe in this article will be enough to support a large and robust industry of content developers. This will mean that content will be widely and freely available to end users. “Subscription to content will soon seem archaic—if you can get good content for free, only extraordinarily high value content will warrant and receive subscriptions.

This is not to say that end users will not pay for “gatekeepers,” or indexers who scan the Net and make the most useful items available. In “drinking from a firehose,” users can easily be overwhelmed by the quantity of information available on the Net. As a result, providing indexing services will remain a “profitable” strategy available to Website entrepreneurs. But this approach has two caveats. First, the potential entrepreneur must find and extract revenues from the end users willing to pay; a formidable feat in the anarchistic Net. Second, as with ultra-specialized periodicals that generate profits from their content (and not just their distribution), the number of competitors on related topics and the hyper-specialization required to be an expert dictate that the size of the market for such services on any one topic will be small. Global visionaries need not apply.

- Net Access is a Commodity

Finally, I can sense some readers focusing on the supposed profits that must be accruing to commercial online services based on their high monthly and hourly fees. The problem is that it is not clear that any profits are going to be available in Webspace by trying to mimic the commercial online services. Prodigy is not and never has been profitable, and neither are most commercial BBSs. CompuServe and AOL are both anxiously awaiting Microsoft Network, which will feature a very low monthly fee and will shift the burden of creating revenues to the constituent vendors. With Microsoft placing extreme price pressure on providing Internet access and the explosion of content providers, the commercial online service industry is not going to be for the faint of heart.

Furthermore, to the extent that these services are getting away with high monthly and hourly fees, consider how much of these revenues are being spent on either providing service access or on “distribution” services. The major online services all have their own proprietary— and expensive—network of distributors computers and telephone PO... Remember, on the Web, end users are not going to pay Websites for this type of infrastructure.
End users will pay for Internet access, but it will be to their Internet service providers. Some Website entrepreneurs will also be Internet service providers—but this is not the same as generating revenues from the Website, and entrepreneurs should not be confused on this point.

- Conclusion

The era of end user subscriptions for content is coming to an end. There will always be subscription services, but they will be small in number and size, profiting purely on the high value of the content to a narrow segment of users. Mass market content producers who relied on making profits from the distribution chain will find the users’ attitudes and the Net economy quite unforgiving.

2. SHOPPING MALL MODEL

For all the Internet hype, there is one certainty: online commerce will become an industry of mind-boggling proportions. According to *Upside Magazine*, home catalog shopping was a $51 BILLION industry in 1993—and economics and convenience dictate that this entire industry alone will probably be handled online in the near future.

There are a number of ways that these and other vendors will reach their target audiences. However, one of the best conceptual models is the regional shopping mall—Website entrepreneurs will bundle vendors together in online malls, and then work with the vendors to bring consumers onsite and facilitate commerce.

In a typical shopping center lease, the landlord has a two-tier revenue stream. The landlord charges a base rent and also receives a percentage of the gross sales the vendor actually makes. This structure makes a lot of sense: the base rent covers fixed expenses, while the percentage kicker gives the landlord incentives to bring consumers onsite and put them in a shopping mood.

Similarly, the crafty Website entrepreneur can find potential profits here. The process of setting up a Website is reasonably simple and not extraordinarily expensive, so over time many potential vendors will set up their own Websites. However, the true entrepreneur will recognize that having a Web presence does not translate into sales, and therefore a market discontinuity exists for entrepreneurs to find better ways to bring to the nbor the right kind of shoppers.

I expect that the base rent with percentage kicker model will become a standard model for compensating Websites. It gives plenty of incentives to the Website entrepreneur while allowing the vendor to pay for results. I like to think of it as a superior model to selling direct marketing mailing lists—the Website is delivering potential customers to the vendor, but the vendor only has to pay for results, not prospective results.

Note, however, that this model works only for transactional relationships. It is easy enough to measure the revenues that come in through transactions made online, but it is difficult to measure when the Website led to other revenues (such as orders through an 800 number or increased in-store sales).

Further, this model is predicated on the availability and security of online financial transactions. There are a number of solutions in the pipeline for credit card encryption and anonymous "digital cash," but at the moment these solutions are not reliable or universally accepted.

3. ADVERTISING MODEL

As juicy a target as online shopping is, the advertising industry is a juicy target in its own right. According to *Upside Magazine*, in 1993 TV, cable, and classified advertising collectively generated $43 BILLION in revenues. Not all of this will translate into the online sphere, but a large chunk of it will.

The advertising industry can be roughly divided into two segments: mass market advertising and special interest advertising. Because of the difficulty of reaching broad segments of the market while online (other than by the disfavored spamming technique), I suspect that much of the mass market advertising will remain with broadcast/one-to-many media for the foreseeable future and the online industry will see only a small chunk of these revenues.

However, the Web truly shines in narrowcasting, and the ability to reach small, self-selected groups of interested consumers will prove very alluring to advertisers.

Extracting revenues from these advertisers is a little more tricky and requires some savvy marketing on the part of Website entrepreneurs. Because advertisers can set up their own Websites, Websites will need to offer an enhanced ability to identify and pull in the potential consumers valued by advertisers, and will need to document or demonstrate this in a tangible way. There are a number of ways to measure the Website’s success, each with its own opportunities and pitfalls.

- "Hits"

One solution I continually encounter in my practice is the use of "hits." Virtually all Website programs allow the sysops to track the number of "hits" the Website is receiving. Some Websites have used this information to indicate the number of "eyeballs" being delivered to the advertisers, and some Websites further charge the advertisers based on the number of hits.

"Hits" is an ambiguous term. Sometimes hits can mean the number of times a screen is displayed. Other times hits means the number of mouse clicks made by users. Either way, hits are a very poor metric.

Frequently, sysop access counts as one or more hits. Unscrupulous sysops can easily run up the tally, but even scrupulous sysops will generate many hundreds of hits a week in the normal course.

Also, hits does not translate into quality viewership. For example, assume that an advertisement is two levels deep. I access the first level and then the second. To exit the second level and return to the introductory screen, I could hit some "go to home" button on the second level screen, or I could just click on the "go back" menu option on Netscape or Mosaic twice. Passing through the first level screen would count as a hit, even if I did not look at the screen a second time (and even if I did, I had seen it previously on my way down to the second level).

There are many other ways to pad the hits count or to register hits without receiving the intended benefits. Although this hits padding is ostensibly more favorable to the Website, I still recommend that Websites do not use this measure at all. Savvy advertisers will clearly not allow it, and unsophisticated advertisers will soon be disenchanted with the dichotomy between charges and results. The Website entrepreneur with an interest in having happy advertisers will use the "hits" measure very judiciously.

- "Per Subscriber"

Currently many Website programs keep data only on the identity of the servers used by individuals who access the Website. This can obscure key data on the number of individuals coming to the site: 500 accesses from a Netcom server could mean accesses by 500 different individuals or 500 accesses by one zealous user.

In the future, Websites will be able break down the aggregated data and
show the number of individuals who accessed the site and the number of accesses per individual. Clearly, potential advertisers will find this information useful, both to see the number of eyeballs they are reaching as well as the depth of interest among those eyeballs. However, even as the technology is developing to do this, Websites are currently having a fair amount of success in generating this information voluntarily. Many Websites have voluntary registration forms that they request users to fill out; surprisingly, users fill the forms out! A central maxim in marketing is to "know your customer" and these forms allow you to do so.

- "Fixed Price" with Bonuses

The other primary approach for charging advertisers is to charge a fixed price per month. This fee is analogous to the advertising fees charged by print periodicals and can and should vary based on the location of the advertisement in the Website and the demographic statistics of the Website.

To develop the demographic statistics, Websites should generate the user information by using registration forms and tracking user/server identity. Hits can be used as a generic metric, so long as this is not the sole measure of Website activity.

We are seeing a cyberspace-unique spin being used in these contexts. Much like the idea of collecting a percentage of transactions generated online, Websites can and should ask for financial compensation if the Website can demonstrate that the user requested and received more information than a generic amount. For example, the Website could use a modified hits metric to charge an increasing amount for each level deeper into an advertisement that a user goes. In such a scheme, if the user goes one level deep, there would be no additional charge; if the user goes a second level, there would be a nominal charge (maybe a nickel per hit); if the user goes deeper, the charge would increase rapidly since this would indicate that the Website has delivered a very interested user. Similarly, if the Website or the advertiser uses a "request for more information" form, the Website should be entitled to a relatively high per form submitted (maybe on the order of $1.00 per form). These progressive payment systems are appropriate in that they again give Websites the incentive to deliver the right kinds of users while the advertiser pays more based on the interest expressed by the user.

Of course, if users are able to order online, the Website should expect to get a percent of the transaction. If your Website can generate results, you should share in the upside!

- Privacy

Websites are uniquely positioned to deliver extremely high-value marketing research information to advertisers. Whether done automatically or based on voluntary user forms, Websites could easily provide advertisers with key information about users: what server they most immediately came from, what server they went to next, or the sequence of mouse clicks and keystrokes each user made. Not only would this information be useful in the aggregate, but it would allow the Websites to provide profiles about each individual user. Websites in turn could sell this information to advertisers and marketing research companies, presumably for significant sums.

There are numerous laws that might govern the disclosure of this information, but consumers and users should not misinterpret this to mean that their information is required to be kept private. On the contrary, it is much more likely that this information can be legally disclosed by Websites, who will have a great deal of financial incentive to do so.

Nevertheless, I believe Websites have an ethical or moral obligation to be circumspect before making these disclosures. My recommendation is that Websites planning to collect and disseminate this information, especially if it involves individual user profiles, should make full and clear disclosure to end users before this information is gathered.

This solution actually should lead to optimal results in a free marketplace, because users who do not wish to receive such information will choose to go to other Websites. Meanwhile, Websites who want to gather and disseminate this information will have incentives to provide extra- valuable information that will attract users. Note, as an analogy, the ability of companies to set up focus groups, do test screenings of movies, and exchange free coupons for filling out surveys. If users have a choice and full disclosure, they will make the decision right for them.

- Conclusion

I think we are going to see an explosion of advertiser-supported Websites, much akin to the oft- rumored 500 cable channels. Websites are uniquely able to attract and segregate users with narrow but well-defined special interests, and advertisers will be willing to pay for access to these potential consumers.

However, Website advertising is an area where I believe the fair and ethical sysops can and should win over those looking to make a quick buck. You can use hits as your metric or sell data about your users, but over the medium run these strategies will prove less profitable than using fair metrics and making full disclosure. Website administration is a multiple iteration process—bending the rules to maximize the value of one iteration will negatively affect the value in the next iteration.

4. COMPUTER SERVICES MODEL

Website sysops can find a lucrative set of revenue streams by offering various forms of computer services. Especially given the volume of technically untrained people and companies seeking to get on the Net, Website entrepreneurs find many opportunities to use their valuable expertise and resources.

- Computer Storage/Personal Web Pages

You may encounter people and companies who want a Web presence. You may have extra storage space and bandwidth capacity. Many Websites are using this to offer "Websites lite"—that is, Website space and Internet connections without the user having to obtain the hardware.

For example, many Internet service providers now offer users the opportunity to create their personal home pages. With the ability to obtain domain names cheaply, the Website can present these personal pages as their own seemingly autonomous Websites.

One client asked me to draft a contract that charged customers "per page." Clearly, "pages" are not a good metric, since a home page could contain a large number of links or items making heavy storage and bandwidth demands (such as sound or video files). The client ultimately used storage space as a metric, a very sensible result.

There is a robust industry of entrepreneurs who help people establish their own Website for an initial service fee (see below) and a monthly "storage and bandwidth" charge. I have seen the monthly fees range from $25 to $200 per month and more, so it will not take many clients to start the cash flow pouring in.

The lawyer in me demands that I point out an important and dangerous legal pitfall here. The legal issue of whether and when a sysop or sysadmin is liable
for the statements and actions of their users is unsettled right now. It is quite possible that users will abuse their rights and create legal liability for the Website. Some of this liability can be allocated or even avoided contractually, so good contracts are a must in this arena. It would be foolish to bet a company on an uncertain legal risk, or to try to protect it with a weak contract.

* HTML Mark up and Design Services*

No matter how technically savvy customers are, there are still many reasons why they will seek HTML mark up and design services. A well-linked and good looking page really stands out, and customers know this. Non-technical customers will almost certainly be willing to pay for the mark up and design services--in the case of corporate customers, they may have no problem spending thousands of dollars on these services. The lesson: expect some revenues from these services, and do not give them away.

* Consulting Services*

Even today, more than 15 years after the introduction of the PC, many consultants make a great living teaching people how to use computers. With the Internet and the Web, the need for support is even greater.

The Website entrepreneur’s computer, Internet and Web expertise will be highly prized by customers running around scrambling to “get on the Information Superhighway.” Even better, the Website can be the perfect marketing tool for the creator’s expertise.

5. ANCILLARY SERVICES

The Net is unique in many ways, but one dimension really stands out. Many users of the Net offer their intellectual product for free, and in the case of personal home pages, sometimes the time investments made are extraordinary.

In some cases this is merely an ego statement; on the Net people can reach a global audience, and some get giddy with the power. In other cases, there is an explicit profit motive that I’ll describe in a moment.

In either event, the result is a commodification of content. So much content is being put out for free that users will pay only for indexing or for ultra-high value information.

Truly savvy entrepreneurs have recognized the profit POTENTIAL of putting information on the Net for free. Time and time again an entrepreneur has started out giving something away for free, only to make countless profits on the next round. A good example is the video game Doom. Other examples have occurred with list moderators who now are the nation’s expert on the topic of their list. Or take the example of a client of mine: they are willing to set up vendor storefronts at nominal cost in order to set up relationships with these vendors for highly profitable software and services. Or consider two Silicon Valley lawyers, who have made their “Multimedia Law Primer” ubiquitous on the Web—as an entree to sell their book at $20.00 a copy, which in turn is an entree to sell their legal services at $200.00+ an hour!

A well-designed, information-packed, topic-specific Website could be the key to making you the expert in your field. A Website giving away your freeware or shareware could be the key to developing demand for version 2.0 (at $50 a copy, maybe). A well-designed and attractive Website could be the key to landing Website consulting and design business. And a few well-considered co-marketing relationships could lead to a bonanza of commissions or revenues.

The maxim “help out your peers on the Net” has become good business. In the many-to-many world of the Net, it will be hard to find your customers. By disseminating something that they value and making it widely available, you will create a reason for them to find YOU.

* Conclusion*

Obviously, the models I have set out do not exist independently. Indeed, good entrepreneurs will find ways to generate revenues from each potential stream. The important lesson is to isolate the revenue streams you are relying on, test whether or not they are sustainable, and find the appropriate ways to maximize them.

We live in a truly amazing era for entrepreneurs. Not since the advent of personal computers in the late 1970s and early 1980s has a $100 billion plus industry been so wide open to anyone and everyone. The industry is raw and full of pitfalls, but this article has given you many ways to generate revenue. Armed with the right tools and attitude, the possibilities seem bright indeed.

used with permission by Boardwatch
www.boardwatch.com
SECTION 7

TRADEMARKS AND DOMAIN NAMES
Trademarks Along the Infobahn:
A First Look at the Emerging Law of Cybermarks

by Dan L. Burk

April 10, 1995


Copyright © 1995 by Dan L. Burk. Portions of this paper were presented at the symposium on Community in Cyberspace: The Emerging Law of Technology," sponsored by the Richmond Law & Technology Association, University of Richmond, February 4, 1995.

Introduction

1) Use of the global Internet computer network is rising exponentially.[1] As Internet subscription increases disagreements between users are expected to arise, just as where any sizeable number of human beings interact, disagreements may be expected to arise. To date, on-line disputes have been primarily dealt with via informal solutions, such as the polite conventions of "netiquette" shared by Internet users.[2] However, as the community of Internet users grows increasingly diverse, formal dispute resolution mechanisms, embodied as law and legal institutions, may be called upon by the parties to resolve disagreements. For example, several acrimonious disputes have already arisen over the use of particular "domain names" on the Internet. This paper discusses how established principles of trademark law may be applied to resolve such controversies. Such a discussion properly begins with a review of the nature and function of the global Internet.

The Internet Experience

2) The Internet has been called a network of networks -- local computer systems hooked to regional systems hooked to national or international high-capacity "backbone" systems.[3] Each link or node in this web is a computer or computer site connected together by a variety of connections: fiber optic cable, twisted-pair copper wire, microwave transmission, or other communications media. Each computer in the network communicates with the others by employing machine-language conventions known as Internet Protocols ("IP").[4] Indeed, these protocols define the network; the Internet is the linked mass of machines which use IP to communicate.

3) Smart Communications: Unlike other communications media that tie up the entire channel during transmission, the Internet breaks information into discrete packets that can be transmitted as capacity allows. The packets follow y of a number of different routes from computer to computer until they reach their destination, where they are reassembled by the recipient machine. Each computer in the network assesses whether to temporarily hold packets or send them on, so that maximum use is made of the available carrying capacity at any given time.[5]
{4} **Decentralization**: There is no centralized control of the Internet. From a technical standpoint, each computer acts autonomously, coordinating traffic with its nearest connected neighbors, and guided only by the "invisible hand" that arises from the sum of millions of such independent actions. From a management standpoint, each node is similarly autonomous, answering only to its own systems administrator. This means that there is no central authority to govern Internet usage, no one to ask for permission to join the network, and no one to complain to when things go wrong.

{5} **Telepresence**: The Internet protocol provides geographically extended sharing of scattered resources. An Internet user may employ her Internet link to access computers, retrieve information, or control various types of apparatus from around the world. These electronic connections are entirely transparent to the user; the "virtual machine" created by the connection appears to be the one at the user's fingertips. Indeed, the user may be completely unaware of the geographic location of the resource being accessed.

{6} These features make available a vast array of interconnected information, including digitized text, graphics, and sound. The totality of this international information structure is commonly referred to as "cyberspace," a cognitive realm that is conceptually separate from the real space that we physically inhabit. "Cybernauts" who traverse this digital landscape find that virtual relationships with other electronic pilgrims blossom into collaboration, friendship, and even romance. Virtual communities coalesce from all corners of the globe to exchange information and reinforce shared values. And, increasingly, the universal human proclivity toward arbitrage and commerce is becoming an important component of on-line interaction.

**Virtual Commerce**

{7} The Internet began as a product of Cold War military technology, linking together researchers involved in a research program sponsored by the U.S. Department of Defense. This system for communicating and sharing computer resources became increasingly important to the scientific community; much of the funding, as well as management of the net's high speed backbone connection became the responsibility of the National Science Foundation ("NSF"). There was little opportunity for commercial Internet traffic in the days of government sponsored research usage. Indeed, the NSF promulgated an acceptable use policy ("AUP"), forbidding such use of the publicly-funded Internet backbone connections.

{8} As the benefits of Internet access became better known, the usefulness of computer networking was not lost on business, or for that matter, on consumers. A crop of private Internet access providers developed, offering network access and facilities for customers outside the research community. In order to route traffic around facilities restricted by the NSF's AUP, these providers formed the Commercial Internet Exchange ("CIX"), which sponsored high-speed links for commercial traffic. In the meantime, NSF slowly began to edge its way out of the Internet management business: first, by funding regional networks; then by contracting oversight duties out to private firms; and finally by encouraging the regional networks to find paying customers. By early 1995, NSF's sole duty will be to fund a few Network Access Points, or NAP's, to act as data traffic exchanges.

{9} Consequently, although the academic and scientific research communities remain an important part of the Internet community as a whole, private and commercial traffic is becoming a dominant force in the development and growth of the "electronic frontier." Businesses of all types routinely use the Internet for a variety of commercial transactions, and consumer services have begun to appear. It is presently possible to access a variety of mail-order catalogs on-line, and arrange for the purchase of music, books, fast food delivery, and even flowers. The variety and availability of similar consumer services is likely to grow. But in order for customers to order commodities, they must first be able to locate and recognize the commodities among the sprawling data connections of cyberspace.

**Internet Locators**

{10} In order for the Internet to function, there must be some manner of distinguishing and locating all the various computers, users, files, and other resources attached to the net. Host machines must know which information
packets are intended for a particular machine; which packets must be passed on; and the ultimate destination of
packets that are passed to the next machine. Machines must also be able to differentiate themselves from other
machines. This is accomplished via Internetworking Protocol Addresses ("IP addresses").[14] Assignment of IP
addresses to users is the responsibility of the Internet Assigned Numbers Authority ("IANA"), a private entity with
ties to international standard-setting bodies such as ANSI. IANA delegates the administration of IP address
applications and registrations via InterNIC Registration Service, operated by a private firm called Network
Solutions.[15]

{11} At the time of this writing, IP addresses are divided into classes A, B, and C; this system may change somewhat
with the introduction of the next anticipated version of the Internetworking Protocols. Classes A and B are, much
like certain frequencies of the electromagnetic spectrum, reserved for special uses. Class C addresses are assigned to
network access providers in blocks of numbers; these blocks may then be divided and subdivided among that
provider's users. Each address within a block is potentially a unique designator for some entity on the network.

{12} IP addresses are represented as strings of digits divided into parts, or fields. By convention, the fields in the IP
address are separated by periods. For example:

124.33.45.112

might be a typical Internet address. Each address contains a network portion, the IP network address, and a local
portion, called the local address. The network portion begins on the left, the local portion ends on the right; the exact
division between these portions is determined by the class of the address.[16] The combination of these local and
network portions uniquely identifies and specifies the location of some interface on the Internet. Unfortunately, using
these numerical strings is somewhat inconvenient and cumbersome; Internet users may find it difficult to routinely
remember and use such addresses. Consequently, the IP Address system has been overlaid with a more
"user-friendly" system of domain names.[17] This overlay allows Internet resources to be assigned a mnemonic
designation that is more easily remembered. Internet applications have been designed to automatically look up the IP
address corresponding to mnemonic designations; this is done through a facility called the Domain Name Service
("DNS") which operates invisibly to the Internet user.[18]

{13} Like IP addresses, domain names are divided into fields separated by periods. An example would be:

dickens.oliver.twist.com

Read from right to left, fields designate the computer, subdomains, and domains of the address in proximity to the
user. The rightmost field is the top-level domain, a standardized designation showing the type of organization or the
country to which the address belongs.[19] There are a variety of such top-level designators. For example, the
designation ".com" indicates a commercial organization, ".gov" indicates a governmental organization; ".net"
designates an organization running a computer site or network; and ".org" is a classifier for miscellaneous
organizations. Country designators include ".uk" for the United Kingdom; ".nl" for the Netherlands; and ".ca" for
Canada.[20]

{14} As with IP addresses, IANA is responsible for assigning domain names, and has delegated the operation of a
name registry to the InterNIC.[21] InterNIC acts merely as a recorder; domain names may be requested by electronic
mail and are assigned on a first-come, first-served basis.[22] Once an organization or a person has registered a
domain name, it may do as it wishes with that name: they can use it, reassign it, or simply hold it unused. Because
domain names are simply mnemonics, and because there is no logical connection between them and the IP address
that in fact locates an Internet resource, domain names are fully portable, and can be transferred to a new machine or
site if the name holder moves.

{15} Given that domain names were instituted as mnemonics to aid recollection of Internet resource locations, one
might expect that the use of such names will become critical where remembering a resource is critical -- as for
example, where money is at stake in Internet commerce. The importance of such names for commerce on the
Internet has been demonstrated most recently by a series of legal and quasi-legal disputes over possession and use of certain domain designations. For example, in one early scuffle, Wired magazine, which maintains the Internet site "wired.com," objected to the use of the domain name "wire.net" by an organization called "Women's Wire." That dispute was quickly settled when Women's Wire changed its domain name to "wwire.net" in order to avoid a legal confrontation. However, subsequent disputes such as those discussed below have been more protracted.

**MTV v. Curry**

{16} Perhaps the most notorious Internet trademark dispute to date is that involving Adam Curry and the MTV cable television channel. Curry was formerly employed as a video jockey, or "VJ" host on MTV. Curry organized an Internet site registered as "mtv.com" during his employment period, apparently with the knowledge and approval of MTV. The site was devoted to discussion of topics related to Curry's vocation, including popular culture, entertainment, and celebrities. He also established a considerable net presence by writing and circulating the "Cybersleaze Report," an electronic newsletter devoted to celebrity gossip. Curry's fame both on and off the Internet generated a high volume of traffic at the mtv.com site.

{17} In 1993, Curry and MTV parted ways, apparently with some rancor. Among other items of dispute, MTV demanded that Curry surrender or disable the mtv.com site because it carried the designation "mtv." Curry, who had registered the site's domain name under his own name, refused to do so. The parties moved their dispute to court. Pending trial, Curry suspended his operations at mtv.com and moved to a new and equally chic site registered as "metaverse.com." The parties quietly settled the dispute on March 24, 1995, and it appears that MTV is now in control of the mtv.com domain.

**Kaplan v. Princeton Review**

{18} Another Internet trademark dispute involved the Princeton Review, a purveyor of courses and materials to prepare students for standardized aptitude tests such as the SAT, LSAT, and GRE. In 1994, Princeton Review determined that its business could benefit from establishing Internet services where students could discuss test-taking strategies, acquire information and materials concerning aptitude tests, and most importantly, obtain promotional literature about Princeton Review's services. The company subsequently established such an Internet site, and registered several domain names with the InterNIC, including "princeton.com" and "review.com."

{19} Princeton Review also registered the domain name "kaplan.com," and established an Internet site under that name. Not surprisingly, the "Stanley Kaplan Review" is Princeton Review's chief competitor in the market for standardized test preparatory courses. The chief executive of the Princeton Review cheerfully admitted that his company registered its chief rival's name in order to mock and annoy the other company. Additionally, Princeton Review hoped that cybernauts hoping to contact the Kaplan Review company would sign on to the kaplan.com site. Individuals who mistakenly did so were offered electronic materials disparaging the quality of Kaplan Review's services and extolling the comparative advantages of the Princeton Review courses.

{20} The Kaplan Review had no on-line presence but became aware of the rogue Internet site in relatively short order. Kaplan Review demanded that Princeton Review cease using the Kaplan name in conjunction with the site. Princeton Review offered to surrender the domain name in exchange for a case of beer -- either domestic or imported. Kaplan Review declined the settlement, opting instead to pursue a legal remedy. The President of Princeton Review quipped in response that his rivals had "no sense of humor, no vision, and no beer." A lawsuit was initially filed but the dispute was subsequently removed to binding arbitration. The arbitrators determined that Princeton Review should surrender the site to Kaplan Review. Princeton Review did so, but vowed to register instead the domain name "kpraplan.com," which, like the kaplan.com during Princeton Review's control, would be devoted to comparative advertising disparaging Princeton's competitor.

**McDonald's v. Quittner**

382
The most recent Internet trademark dispute was created by a magazine writer attempting to generate material for his column on the Internet. In the course of writing about businesses that fail to register their names as Internet domains, writer Joshua Quitter reviewed the list of registered domain names and noted that no one had registered the name of "McDonald's," the renowned fast food chain. Quitter then contacted McDonald's corporation to get a statement regarding their failure to protect their famous name. No statement appeared forthcoming, so Quitter registered the story by registering "McDonalds.com" himself, activating the site, and circulating his new e-mail address as "ronald@mcdonalds.com." Some messages urged him to use the site to promote vegetarianism, other messages urged him to offer the domain name back to McDonalds in return for an exorbitant price.

Quitter did indeed offer the name back to McDonald's in one of his magazine columns, but not in exchange for money. In a manner reminiscent of the Princeton Review, he instead offered to surrender the domain name if McDonald's corporation would underwrite some Internet equipment for a grade school. This and other provoking articles caught the corporation's attention; they responded not by funding grade school computer access, but by pressuring the InterNIC to revoke Quitter's registration of the name. Although the registry had stayed out of previous disputes such as the Adam Curry litigation, sticking tenaciously to its "first-come, first-served" policy, it wavered before this new corporate threat. InterNIC first resisted McDonald's demands, then eventually agreed to revoke the registration, then changed its mind again, leaving the registration with Quitter. McDonald's ultimately agreed to donate $3,500 to purchase the equipment.

Trademark Law

The disputes described above all involve some disagreement over the use of a distinguishing business name. This type of disagreement is by no means limited to the Internet, and in real space has generated a substantial body of law regarding the use, ownership, and infringement of trademarks. Trademarks comprise a type of intellectual property used to identify the source of goods or services. Technically, marks used to identify goods are referred to as "trademarks," and marks used to identify services are referred to as "servicemarks." Generally, however, trademarks and servicemarks are treated as equivalent under federal trademark law. Such rights serve both to protect the public by preventing fraud and confusion regarding the origin of goods, and also to protect the goodwill and name recognition of businesses that have invested in improving and distinguishing their products.

Trademark rights exist at common law, and most states recognize and enforce such rights. The United States Congress has also recognized and extended these rights via federal statute, and this source of trademark rights has become paramount in the United States. The federal trademark statute, or Lanham Act, provides a national registry for trademarks, generating nationwide protection for registered marks. The statute also provides for enforcement of either registered or unregistered marks. Trademark owners who wish to sue for trademark infringement under the statute must first show that they have a protectable mark. Protectability is largely a function of the strength of the mark; some marks are highly distinctive, or "strong" marks, others are less distinctive or "weak." Some marks may be accorded no protection at all.

Trademark strength is usually assessed by reference to five categories: arbitrary, fanciful, suggestive, descriptive, and generic. As listed here, they range in descending order of strength, with arbitrary or fanciful marks receiving the greatest protection. Arbitrary marks are well-known words that are used to identify goods or services to which they have no relation -- "Apple" computers, for example. Fanciful marks are invented words, such as "Exxon," applied to goods or services. Each of these types of marks is considered inherently distinctive because their only association with the marked goods or services is the association gained in the marketplace.

Suggestive marks are also inherently distinctive, but are weaker than an arbitrary or fanciful mark because a consumer with some thought or imagination could discern the nature of the goods from the suggestive mark. Descriptive marks require little imagination to discern the nature of their associated goods, and are not considered inherently distinctive. As such, descriptive marks are not protectable unless the holder can show "secondary meaning," that is, an association in the minds of consumers between the mark and that particular source of the product or service. Where secondary meaning can be shown, the law declines to allow competitors to "free ride" off
of a business' goodwill and recognition by using an otherwise descriptive mark.\[51\]

\{27\} Generic terms are terms commonly descriptive of a class of goods or services, and are unprotectable.\[52\] They simply name the good or product. Generic terms are not recognized as protectable marks because they are terms that all competitors in that market require in order to describe their products. Allowing one business to monopolize the term would hamstring the competitive efforts of all other such businesses.\[53\] Some terms, such as "toothpaste" are born generic; others such as "escalator," have genericness thrust upon them by becoming a common descriptive name in the mind of the public.

\{28\} If the plaintiff in a trademark suit can show that she has a protectable mark, she must then demonstrate that the use of an infringing mark is likely to result in consumer confusion as to the source of the marked goods. Courts evaluating the likelihood of confusion may review a variety of factors, none of which are dispositive. Factors that a court may review include the similarity between the marks, the strength of the plaintiff's mark, the defendant's intent or bad faith in adopting a similar mark, the "proximity" of the goods in advertisement, marketing and distribution, instances of actual confusion, and the sophistication of consumers of the goods.\[54\] Remedies that may be awarded to a plaintiff who successfully demonstrates trademark infringement include injunctive relief, recovery of unjust profits, damages and costs.\[55\]

Names and Addresses

\{29\} The fit between trademark law as developed in real space and domain names used in cyberspace may to some extent depend on the ability to classify domain names as either names or addresses. In general, names are thought of as discrete emblems used to establish or designate identity; addresses are thought of as emblems designating location. Trademarks and servicemarks are clearly names; they designate or identify goods and services. They are not used to locate a good or service, or even to indicate the producer's place of origin -- they indicate the source or affiliation of the item. Trademarks also have the portability associated with an individual designator or name -- when a business moves, the trademark goes with it; the mark is not tied to the particular location.\[56\]

\{30\} Domain names might seem to be unusual because they appear to be both names and addresses; they both locate and identify Internet resources.\[57\] Yet even in real space, this division is not pristine. People's personal names, for example, establish identity, and such identifiers travel with the individual rather than changing when the person changes location. Street addresses or geographic names, by contrast, are more static in order to establish location. Yet such addresses and geographic names also serve to identify the physical place, differentiating it from other places.

\{31\} Geographic names and street addresses also change; indeed, there is no particular reason why a person who moves from one house to another could not take his street address with him -- this might be undesirable in cities, where the address scheme frequently follows some order. But in rural settings, where the address may simply be "Chatham Farm," the name/address could certainly move with its user. Geographic names of all kinds -- street addresses, zip codes, counties -- are in fact overlays on an unchanging numerical system of longitude and latitude, which is a universally recognized designator and locator for a particular place on the earth's surface. In this sense, geographic names are much like Internet domain names, which are an overlay on the "real" IP number designations.

\{32\} Telephone numbers share the same dual nature. At one time, telephone numbers were "hard-wired" and a particular number was associated solely with a particular telephone line. However, as switching technology advanced, numbers became more portable. Telephone numbers are no longer necessarily tied to one place -- it is common for a person or business to take their telephone number with them when they move, especially within the same area code. In this respect, the number seems more like a name. Yet, a telephone set, fax machine or modem that is plugged into a new telephone line changes "address," that is, a different number must be dialed to establish a connection to the instrument. Thus the number establishes the location of a particular endpoint on the telephone network.

\{33\} If trademark law contemplates only the use of a designator as a name, then application of trademark law to
domain names, with their dual nature, might be problematic. However, it appears that a fair number of designators in "real space" share this dual nature of acting as both a name and an address. Domain names may be analogous to real space designators such as geographic names or telephone numbers. To the extent that trademark law recognizes such real space designators as trademarks, it may be readily applicable to domain names as well.

**Geographic Names**

{34} One real space analogy to domain names might be geographic place name; trademark law relating to names such as street addresses might be instructive in determining the proper legal treatment for domain names. As the discussion above suggests, domain names and geographic names share an amenability to be used as either names or addresses. However, trademark law generally seems to assume that geographic names are in fact addresses, and so, like generic terms, are unprotectable because everyone needs them to locate the place in question. [58] Geographic names may be entitled to legal protection if they attain secondary meaning as to the source of goods, but not if they are merely descriptive of the goods' place of origin. [59] As a consequence, under the Lanham Act, geographic place names as such cannot be registered as trademarks, and this has led some experts to opine that street addresses could not be registered as trademarks. [60]

{35} However, this rule assumes that the good or service takes its name from the place or address. This is not the case in the Internet trademark disputes encountered so far. To the contrary, the cyberspace "address," the Internet domain, has been named after goods or services that are well-known in real space. This phenomenon of using an established trademark to name a location is not entirely unknown off-line. Consider the following addresses taken from *Standard & Poor's Registry*:

McDonald's Corp.  
One McDonald Plaza  
Oak Brook, IL 60521-1900

Coca-Cola Corp.  
One Coca-Cola Plaza  
Atlanta, GA 30313

Mohawk Tools Co.  
One Precision Plaza  
Crystal Lake, IL 60014-8263

Wolfermann's  
One Muffin Lane  
P.O. Box 15913  
Shawnee Mission, KS 66285

{36} In each of these examples, the geographic address of the business has incorporated some distinctive name or mark associated with the business located at that address. Thus, the mark appears to have preceded the address. This is quite the inverse of the law cited above -- far from the mark containing a geographic name indicating the source of the goods or services, the geographic name instead contains an indicator of goods or services located there! This seems closely analogous to naming an Internet domain after the business that locates itself at that site.

{37} The marks in the addresses above run the gamut from arbitrary or fanciful to generic. The name "McDonald's" in no way suggests or describes food services, except that it has gained that association in commerce. In the case of Mohawk tools, the address name is significant only if one knows the firm's motto, "A Precision Twist Drill Company," in which case the term "precision," found in the address, appears to be descriptive and protectable if it has secondary meaning with regard to Mohawk tools. Finally, the address for Wolfermann, a purveyor of baked goods well known for their English muffins, carries the term "muffin," which would probably be considered generic. Interestingly enough, this address appears to be a pure mnemonic for Wolfermann's mail order catalogs, and the P.O.

385
Box is the true postal address.

{38} The protectability of such addresses will likely be dependant on the strength of the mark given being employed as a postal or physical locator. But it is not hard to envision situations in which adoption of a similar address would constitute unfair competition. For example, if Pepsi-Cola were to set up an office in the same zip code as the Coca-Cola headquarters, and designate the address as "10 Coca-Cola Plaza," Coca-Cola might well have cause for complaint. This would especially be true if, much like Princeton Review on the Internet, Pepsi-Cola did so in the hopes of intercepting misrouted mail intended for Coca-Cola's headquarters, or perhaps even intercepting confused Coca-Cola clients or customers who had intended to visit "1 Coca-Cola Plaza."

{39} In such an instance, the factors indicating the likelihood of confusion would seem to translate well into an analysis indicating infringement by Pepsi: the name adopted as a postal address is a strong mark associated with a competitor's product, and the addresses differ by only a zero. The locations are in close physical proximity, and more importantly, in close logical proximity. Pepsi's motivation for adopting the address, to capture its rival's mail or clients, seems to be in bad faith, and any misrouted mail or mistaken individuals would supply evidence of actual confusion. This analysis seems equally applicable to confusingly similar designators in cyberspace, particularly where the designation appears to have been adopted to specifically capitalize on anticipated confusion.

Broadcast Designators

{40} Trademark parallels to Internet designators are also found in the identifying names or addresses for broadcast services, albeit subject to the peculiarities of the broadcast medium. Two broad classes of disputes emerge in the area of broadcasting identification marks: those involving call letters, and those involving frequency designations. Each broadcaster carries a designator, similar to the IP addresses and domain names of the Internet. An additional similarity is that domain names and IP addresses are assigned by a central authority, the InterNIC, much like the way the Federal Communications Commission ("FCC") assigns call letters and frequencies to broadcasters. However, unlike the designators on the Internet, the two types of broadcast designators are somewhat uncoupled: there is no equivalent to the Domain Name Service utility for radio or television. If there were, listeners or viewers could enter station's call letters and have the receiver automatically tune to that station's frequency.

{41} As a consequence of this separation, the naming and locating functions of broadcast designators have become somewhat discrete, unlike Internet domain name functions. Call letters in broadcasting tend to function as names rather than as addresses. Radio and television station call letters are assigned by the FCC, with each station receiving a distinctive set of letters.[61] However, broadcasters are able to request particular call letters, subject to the constraint that call letters of stations east of the Mississippi must begin with a "W" and call letters of stations west of the Mississippi must begin with a "K."[62] Much like the assignment of domain names by the InterNIC, call letters are assigned by the FCC on a "first-come-first-served" basis.[63] Stations frequently employ homonyms to identify their call letters, such as "Kiss" for a soft-music station bearing the letters WKSS,[64] or "Warm" for a soft-music station bearing the letters WRMM.[65] Acronyms such as WBCS for "We're Boston's Country Station"[66] are also sought. This is somewhat similar to the way Internet domain names may indicate the domain site operator, but lacks a similar locating function.

{42} Call letters have been treated for the most part as arbitrary marks. The letters chosen tend not to describe or even suggest the nature of the service designated. Instead, they indicate only broadcast music of one sort or another. This tends to put the junior user of a similar call letter set at a severe disadvantage when a court assesses the likelihood of confusion. For example, where a new radio station adopts the letters "WMEE" and an existing station already uses "WMCI,"[67] or where an established television station uses the letters "WBOC" and a new station attempts to use "WBOT,"[68] the factor of trademark strength has tended to favor the prior user.[69]

{43} However, this factor is not necessarily determinative. In addition to the strength of the mark, courts deciding these cases apply the other likelihood of confusion factors. Depending on the particular facts, these factors may either aid or hinder the junior user.
Similarity of marks: Opinions analyzing the likelihood of confusion between call letters have devoted considerable space to evidence on the phonetic and visual similarity of letter combinations. Much of this evidence comes from a particular expert witness who appears to specialize in testifying for plaintiffs in such trials. Some courts find an analysis of call letter similarity persuasive, while others discount it entirely. Courts discounting similarity studies rely on the fact that call letters are frequently used in the context of slogans, phrases, or logos that would distinguish them, and because stations in a given region frequently share two or more of their call letters, listeners are accustomed to distinguishing stations with such overlapping letters.

Similarity of product: In call letter cases, courts have also looked to the similarity of broadcast format when assessing the likelihood of confusion in call letter cases. Stations with similar formats are more likely to be confused with one another, such as the case of two radio stations that each broadcast a "top-forty" music format. Where one station broadcasts a family-oriented country-western music format, and another broadcasts a "bad-boy, iconoclastic" rock n' roll format, listeners are unlikely to confuse the two. Certainly a listener who mistakenly tuned to one of the stations would soon realize her mistake. Medium, too, tends to prevent listeners from confusing stations: one court has held that a television and radio station with almost identical call letters are unlikely to be confused in part because of the clear differences between radio and television.

Area of use: Generally, conflicts between stations with similar call letters only occur when the territories reached by their broadcast signals overlap. However, there seems to be no reason that stations with similar call letters but separate geographic territories might come into conflict. Such a case would present great difficulties for a plaintiff attempting to show a likelihood of confusion: the plaintiff would presumably need to show consumer recognition of his call letters outside his broadcast area.

Sophistication of consumers: The nature of broadcasting has produced an odd twist in analyzing the factor of consumer sophistication: courts have recognized advertisers, rather than listeners, to be the true consumers of broadcast services. Indeed, it has been suggested that consumers are in some sense the "product" of broadcast, by which the courts appear to mean that delivery of messages to a certain audience is the product. Radio advertisers in fact target their programming to appeal to particular niche populations. The cases discussing call letter disputes suggest that advertisers are very sophisticated in selecting broadcast services that are oriented toward the particular demographic market that the advertiser wishes to reach. Consequently, this factor tends to favor defendants, since it seems unlikely that advertisers will mistakenly recruit the wrong station to deliver their messages, even if one station's call letters closely resemble those of another station.

Degree of Care: Given the analysis of consumer sophistication above, it stands to reason that the degree of care exercised by advertisers, the true consumers of broadcast services, is very high. However, in contrast to the "sophistication of consumers" factor, courts assessing the "degree of care" factor tend to apply it to the audience rather than to the advertisers. In general, the courts have postulated that the degree of discrimination between radio stations with similar broadcast formats is not high because, first, the consumer has no direct financial stake in the choice of stations, and second, listeners often play the radio as "background" while engaged in other activities. One court has extended this analysis from the "purely aural" medium of radio to the audiovisual medium of television. This extension is somewhat questionable. Even though television consumers also have no real financial stake in tuning to a particular channel, television clearly requires a greater investment of attention than does radio.

Intent in adopting mark: The existence of "bad faith" or an intent by the junior user to "free ride" off of mistaken association with the prior user's mark is not ostensibly determinative of the outcome of a trademark infringement suit, but courts seem to weigh the question of scienter heavily. Infringers are usually not foolish enough to admit or leave evidence of an intent to appropriate a prior user's reputation, but in instances where the junior user knew of the prior user and showed an awareness of the possibility of confusion, the court was willing to infer an intent to trade on the prior user's goodwill.

Frequency Identifiers
A second type of dispute over broadcast identifiers involves frequency designations, which carry the location function for broadcast services. It may seem surprising that the latter disputes could arise: each broadcaster is assigned a particular frequency within a geographic area by the Federal Communications Commission; otherwise, stations would interfere with one another by broadcasting over each other's signals. However, because FM tuners were analog until recently, radio stations developed the habit of rounding their designators to the nearest whole number on the FM dial in advertisements or for identification purposes. FM frequency assignments lie between 88.1 and 107.9 Megahertz; the FCC has divided this portion of the spectrum into 100 channels 0.2 Megahertz apart -- since the channels begin at 88.1, no station could be assigned to a whole number frequency. Given that only 21 whole numbers are available on the FM spectrum, and since stations can elect to round up or down, several conflicts developed between stations that rounded to the same number.

In deciding these disputes, the courts tend to treat frequency designators as addresses -- that is, as a term describing the approximate location of the broadcast service on the FM dial. This utilitarian function throws the designator into the category of descriptive terms. As such, the designators have been treated much like geographic terms in other trademarks: they lack inherent distinctiveness, and are protectable only upon a showing of secondary meaning. The rounded frequency designator therefore might be distinctive if a plaintiff could show that it was associated in the minds of consumers with the source of a particular broadcast service, rather than as an aid to locating the broadcast frequency. However, as a practical matter, plaintiffs in reported cases have shown a marked inability to offer such proof, perhaps because of the uncoupling of call letters and frequency numbers: distinctiveness is easily shown for call letters because they act almost exclusively as a name, whereas distinctiveness is difficult to show for frequency numbers, because they act almost exclusively as an address.

**Telephone Mnemonics**

A third real space analogy to cyberspace domain names might be that of telephone numbers, which act both as names and logical addresses. Several trademark cases have recently been decided involving the use of "vanity" telephone numbers, which correspond to alphanumeric designators that are easy for consumers to remember and associate with the business at that number. For example, "L-A-W-Y-E-R-S" serves as a mnemonic for 529-9377, the number of a law firm. Such telephone mnemonics bear a close resemblance to the mnemonic domain names associated with IP addresses, and legal decisions regarding their status as trademarks suggest that domain names may be protectable.

Courts have almost unanimously held that telephone mnemonics may be protectable as trademarks, and have readily applied the law regarding the likelihood of confusion to such marks. In *Dranoff-Perlstein Assoc. v. Sklar*, plaintiffs who used the telephone mnemonic "INJURY-1" to advertise their personal injury legal services sought an injunction against defendants who used the mnemonic "INJURY-9" to advertise their legal services. The trial court denied the motion, holding that the plaintiff's marks was generic or at best descriptive without having been shown to have secondary meaning. The appellate court partially agreed, reasoning that the term "INJURY" was so commonly descriptive of personal injury representation that it must be generic.

However, the appellate court in *Dranoff-Perlstein* noted that marks must be assessed "as a whole," and the marks in question differed in their numerical suffixes. It further noted that where two marks share generic portions but differ in non-generic portions, it is presumed that the public tends to distinguish the marks on the basis of the non-generic portions. Thus, any confusing similarity between the marks "INJURY-1" and "INJURY-9" would depend on the likelihood of confusion between the marks, taking each as a whole, with particular emphasis on the likelihood of confusing the suffix "1" with "9." The case was remanded for findings on the likelihood of such confusion, taking into account the familiar factors of confusion analysis.

In some instances, however, there may be no question that a single digit difference will be confusing. In *Holiday Inns v. 800 Reservations*, plaintiff sought to enjoin defendant's use of a telephone mnemonic that differed from plaintiff's "1-800-HOLIDAY INN" mnemonic by one critical digit. The defendant was aware that
telephone users routinely confuse the letter "O" with the numeral "zero" when dialing mnemonic telephone designators. The defendant therefore secured the "complementary" number, 1-800-H-[zero]-LIDAY, that is 1-800-405-4329, expecting that some number of callers intending to contact Holiday Inn reservations would instead dial his number. Callers who did so would be connected to defendant's hotel travel agency, which offered booking for not only Holiday Inn, but other hotel chains. The defendant's business received a fee for placement of reservations.

The court held that this use of a similar telephone mnemonic was "parasitic." The defendant admittedly attempted to avoid passing his service off as that of Holiday Inn, and arranged to have the "complementary" number answered with a recording stating that the caller had not reached Holiday Inn, but a reservation service that would assist in finding the lowest hotel rate at Holiday Inn or elsewhere. This was not persuasive to the court, which found that the recording was in fact likely to increase customer confusion by offering new options at the moment the customer is most confused, having attempted to contact one service and mistakenly contacted another. The court noted further that, "Defendant's use of plaintiff's 1-800-HOLIDAY INN mark involves more than the likelihood of confusion -- our present technology allows defendants to use plaintiff's mark in such a way that they can anticipate actual confusion with absolute accuracy and can profit accordingly." The injunction was issued against 800 Reservations.

Generic Mnemonics

As might be supposed from the analysis in Dranoff-Perlstein, the problem of generic terms runs throughout the telephone mnemonic cases. The fear that a common term might be monopolized by granting it trademark status is in fact exacerbated by the fixed correspondence between numerals and letters on the telephone keypad. There is some redundancy in this code since there is a three to one correspondence between letters and digits. For example, the letters A, B, and C are all assigned to the numeral 2. Thus, although there is redundancy in the code, it is with regard to words, not numbers. Within a given area code, there is only one telephone number that corresponds to a given mnemonic word. Control of that telephone number is tantamount to control of the word as a mnemonic device.

The exception to this exclusivity is, of course, the availability of toll-free "800" numbers, which transcend area codes since they are accessible nationwide. Thus, in the telephone cases, the clash between mnemonics is frequently between a local number and an "800" number with the same or similar mnemonic. In Dial-a-Mattress Franchise Corp. v. Page, the plaintiff held a local exchange number corresponding to the mnemonic "mattres"; the plaintiff successfully enjoined a competitor's use of the analog "800" number within that area code. The trial court's finding that the competing "800" mnemonic could be confusingly similar was upheld on appeal.

In contrast, the case of Bell v. Kidan involved the use of a similar "800" number. This was found unlikely to confuse consumers, in part because it was not a toll call. Plaintiff used the mnemonic "CALL-LAW" in advertising their legal services; they sought to enjoin use of defendant's mnemonic "1-800-LAW-CALL" in the same area. In assessing plaintiff's likelihood of success on the merits, the trial court reviewed the factors indicating likelihood of confusion, and noted that the difference between a toll call and an "800" call was likely to be of significance to consumers, who would expect even a slight difference in numbers to yield a different connection. This analysis similarly weighed the consumer sophistication factor against the plaintiff; the court reasoned that consumers are familiar with the difference between local toll calls and "800" calls.

Transplanted Marks

The emergence of Internet trademarks offers a clear opportunity to come to grips with the issue of names and addresses inherent in the use of designators as trademarks. The real space examples reviewed here show that, overspace is not unique in harboring designators that function as both names and addresses, and these designators will frequently be employed as trademarks or servicemarks. In the case of geographic place names, the distinction between naming and addressing appears to have gone entirely unrecognized. In the case of broadcast designators,
where the two functions have come almost completely uncoupled, the failure to recognize the distinction between naming and addressing has generated a highly idiosyncratic and somewhat confused body of cases. In neither instance have the courts considering these real world designators articulated broad principles that might be readily transferred to new fact patterns, such as those arising on the Internet.

{61} Neither has the distinction between naming and addressing been expressly articulated in the cases considering telephone mnemonics. However, in these cases, factual and technological similarities to the Internet domain name incidents offer a ready comparison from which some general principles may be drawn. As the telephone mnemonic cases reviewed above indicate, the dual nature of a designator such as a telephone number or domain name is no bar to rational application of established trademark law. Such cases are exceptionally helpful in charting the likely progression of trademark law on the Internet. The telephone cases suggest: first, that domain names, like telephone mnemonics, are potentially protectable as trademarks; and second, that domain names, like telephone mnemonics, should be susceptible to the accepted infringement analysis applied to other types of trademarks.

{62} However, this is not to say that consideration of domain names as trademarks will not entail its own idiosyncracies. The calculus of mark strength in the kind of Internet dispute encountered thus far may not be as straightforward as one might initially assume. To date, the domain names in dispute have drawn much of their recognition and goodwill from their use as trade or service marks in real space. This may in some instances turn the usual classification of marks on its head, as they are in essence being applied to a new service. Considered in the abstract, there is no particular reason to suppose that cybernauts happening upon a domain designated "McDonalds.com" or "Kaplan.com" would associate those sites with a source of hamburgers or testing services in real space -- the world is full of individuals named McDonald and Kaplan, any of whom might have registered such domain names with the InterNIC. This seems to weaken the presumption of distinctiveness for arbitrary marks transported to the new medium. By contrast, a site designated with a fanciful name such as "Exxon.com" seems inherently distinctive whether in real space or cyberspace. And a generic mark from real space may become arbitrary when used to designate a domain name such as "muffin.com."

{63} This carry over from real space to cyberspace suggests that a key factor in analyzing the likelihood of consumer confusion will be the "proximity" of the marks. Use of the name "McDonald's" to peddle hamburgers in real space may not necessarily overlap with the use of the same name for a resource locator in cyberspace; the two uses may be in distinctly different markets. They may also involve very different services, as the major commodity on the Internet is information, rather than hamburgers. This is beginning to change, however, as companies begin to use their net presence to allow customers to order products including fast food delivery of pizzas. Consequently, the real and virtual markets may eventually converge.

{64} By contrast, the use of marks like "MTV" or "Kaplan" on the Internet may already entail a high likelihood of confusion, as they are associated with entertainment or information in both real space and cyberspace. In such instances, the use of the Internet becomes a natural extension of the service offered in real space. This increases not only the prospect that the marks overlap in proximity but also the occasion for parasitic or bad faith use of the mark. It seems relatively clear, for example, that at least some of the notoriety of the "mtv.com" site was generated by Curry's real space association with the MTV broadcast channel. Similarly, there is no question, indeed the Princeton Review openly admits, that their use of "kaplan" in their domain name was designed to capture potential rivals of their customer. Additionally, such cases appear to use the technology to anticipate actual confusion, as in the Holiday Inns case.

Emerging Cybermarks

{65} Although the Internet's present trademark disputes appear imported from real space, this will not always be the case; eventually the disputes will be home-grown. The dispute between Wired and Women's Wire is an early precursor to such conflicts: the heart of the dispute was not the appropriation of a well-known mark from real space but the confusing similarity between two marks in cyberspace. As Internet commerce becomes more common, we may expect that certain domains will acquire a reputation based entirely on their Internet activities -- as Adam Curry's "metaverse.com" site seems to be doing. Development of a competing site with a similar mnemonic, such as
"metaverse.net" or "multiverse.com" would raise the possibility of confusing similarity between two cyberspace-based marks -- "cybermarks" if you will.

{66} Such disputes need not be divorced from the law of real space, however, and precedent such as the telephone mnemonic cases will continue to be helpful, so long as it is realized that, at some points, the correspondence between telephone numbers and IP addresses will break down. For example, although the strength of the cybermark will likely be assessed as much as any trademark, the problem of generic terms may be of lesser concern than in the telephone mnemonic cases. Generics in general go unprotected because they are words necessary to all competitors in a given market. At least part of the rationale underlying the policy toward generic telephone mnemonics is the static correspondence between telephone numbers and their associated letters on the telephone key pad -- only one telephone number in an area will correspond to the term. However, unlike telephone mnemonics, domain name mnemonics are entirely separable from their underlying IP addresses, and completely portable to a new Internet resource site. Thus, there is no necessary monopoly of a mnemonic when an IP address is assigned; any alphanumeric string may be chosen as the corresponding domain name.

{67} The problem of confusion between domain names may also be lessened if, as in Dranoff-Perlstein, the domain name must be taken as a whole when assessing the likelihood of confusion. Imagine for example competing computer program vendors who have registered, respectively, "software.net" and "software.com" as their domain sites. Under the analysis of Dranoff-Perlstein, the word "software" must surely be generic as it is a common descriptive term, and likely essential to the advertising and business operations of any purveyor of computer programs. This does not necessarily render the competing domain names unprotectable, however; the analysis will simply shift to whether or not there is a likelihood of confusion between the top-level domain designations ".com" and ".net" when used as part of the full domain names.

{68} Such an analysis suggests that the factor of consumer sophistication may also prove important: a result that is problematic, as the computer literacy of cybernauts is currently in flux. Until very recently, the majority of Internet users were relatively inexperienced in the use of the medium; like consumers who can readily distinguish an "800" telephone number from a toll call, Internet users would likely distinguish a "wired.com" from "wire.net" simply by recognizing the top-level domain designation. However, the recent and burgeoning influx of computer neophytes or "newbies," onto the Internet may have drastically altered the likelihood of domain name discrimination. Ironically, this flood of new net citizens, which appears to have greatly diluted the mean level of user sophistication, is also driving the movement toward commercialization. A large pool of such cyberspace consumers is critical to the viability of any electronic business venture, and in time they will likely become discriminating cybermarket patrons. In the interim, however, their appearance on-line may increase the chances that a court will find a likelihood of confusion between similar domain designations.

Conclusion

{69} As commercial use of the Internet becomes increasingly common, designation of goods and services by on-line trademarks, or "cybermarks" will gain in significance. Businesses that are willing to venture out into cyberspace will wish to advertise and differentiate their services; lack of settled trademark rights may deter them from investing in such ventures. However, the established law of trademarks appears admirably suited to providing such surety. Although cybermarks may in some cases function as both names and addresses, established trademark doctrines are well able to accommodate such designators. As a consequence, doctrines applied to decide disputes in real space over marks such as telephone number mnemonics will be extended to resolve disputes over trademarks in cyberspace.

{{END}}

Go to the Forum
The Forum is where readers have an opportunity to see what others have said about the articles contained in
Footnotes


[7] Id. at 8-11.


[15] Id. at 71.

[16] Id. at 69-70.


[18] Id. at 75-76.

[19] Id. at 73-74.
[20] Id. at 74.

[21] Id. at 71.


[23] Id.


[26] Id.


[32] Id.


[34] Video Jockey Butts Head with MTV over Internet, supra note 25, at 6C.


[38] Quittner, supra note 35, at A05.

[39] Id.


[43] 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 1.02[1][b] (1994).


[52] 1 Id. § 12.1[1].

[53] 1 Gilson, supra note 43, § 12.01[1].


[56] 3 Altmann, supra note 50, § 19.43 (explaining the proposition and citing contrary authority as exceptions).

[57] Cf. Dern, supra note 2, at 67-68.

[58] See generally 3 Altmann, supra note 50, § 19.43 (discussing geographic names as trademarks).

[59] 3 Id.


[61] 47 U.S.C. § 303(o) (1988); see also Allen B. Dumont Lab. v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950) (interpreting the term "radio broadcasting" within the statute to include all forms of television transmission).


[69] But see Virginia Tech Foundation v. Family Group Limited V, 666 F. Supp. 856, 858 (W.D. Va. 1987) (suggesting that call letters assigned by the FCC are not a "strong mark").

[70] See, e.g., Draper Communications, 505 A.2d at 1290-91 (testimony of Daniel A. Dinnsen, Professor of Linguistics, University of Indiana); Pathfinder Communications, 593 F. Supp. at 283-84 (testimony of Professor Dinnsen); Infinity Broadcasting, 1993 WL 343679, at *6 (testimony of Professor Dinnsen).

[71] See, e.g., Virginia Tech Foundation, 666 F. Supp. at 858 ("The experts, in my opinion, did more to obfuscate the problem than they did to clarify it . . . In my judgment, this is a classic misuse of expert testimony, and I give very little weight to any of it.") (Kiser, J.).


[75] Id.


[77] See, e.g., Draper Communications v. Delaware Valley Broadcasters, 505 A.2d 1283, 1294 (Del. Ch. 1985); Pathfinder Communications, 593 F. Supp at 285.


[80] Id. at *3.

[81] Id. at *4.


[83] Id.

[84] Id.


[86] See Draper Communications, 505 A.2d at 1295-96; Pathfinder Communications, 593 F. Supp. at 286.


[89] Walt-West Enters., 695 F.2d at 1052 n.1.

[91] See *Cox Communications*, 620 F. Supp. at 146 (noting that numerical identifiers indicating frequency location act like geographical identifiers).

[92] *Walt-Week Enter.*, 695 F.2d at 1059; *Covenant Radio*, 390 A.2d at 953-54.


[96] *Dranoff-Perlstein*, 967 F.2d at 853.

[97] *Id.* at 860.

[98] *Id.*

[99] *Id.* at 861.

[100] *Id.* at 862.


[102] *Id.* at 1250-51.

[103] *Id.* at 1251, 1253.

[104] *Id.* at 1255.

[105] *Id.* at 1253, 1255.

[106] *Id.* at 1255.

[107] *Id.*


[109] 880 F.2d 675 (2d Cir. 1989).

[110] *Id.* at 678.

[112] Id. at 127.

[113] Id. at 126.

[114] Id. at 127.

[115] Id.

[116] Id. at 128.

MTV NETWORKS, A DIVISION OF VIACOM INTERNATIONAL, INC.,
Plaintiff,
v.
Adam CURRY, Defendant.

No. 94 Civ. 3271 (LMM).

United States District Court,
S.D. New York.

Barbara A. Solomon, Weiss Dawid Fross Zelnick, New York City, for MTV Networks.
Joseph F. Donley, Shereff, Friedman, Hoffman & Goodman, New York City, for Adam Curry.

MEMORANDUM AND ORDER

MCKENNA, District Judge.

Plaintiff, MTV Networks ("MTVN"), brought this action against Defendant, Adam Curry ("Curry"). Plaintiff now moves the Court to dismiss Curry's counterclaims, pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for a more definite statement of the counterclaims, pursuant to Rule 12(e). For the reasons stated below, Plaintiff's motion is granted in part and denied in part.

I. Legal Standard for 12(b)(6) Motion

In the course of resolving a motion to dismiss pursuant to Rule 12(b)(6), the Court reads the complaint generously, accepting the truth of, and drawing all reasonable inferences from, the well-pleaded factual allegations. Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993); accord California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991), cert. denied, --- U.S. ----, 112 S.Ct. 1561, 118 L.Ed.2d 208 (1992); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). When determining the sufficiency of plaintiff['s] claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in ... [the] complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which plaintiff[ ] had knowledge and relied on in bringing suit. Brass, 987 F.2d at 150 (citing Cortec, 949 F.2d at 47-48).

The Court will only dismiss a complaint for failure to state a claim when the Court finds "beyond a doubt that plaintiff "can prove no set of facts" to support the claim that plaintiff is entitled to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). The standards for dismissing claims under Rule 12(b)(6) are identical to the standards for dismissing counterclaims. Schatt v. Curtis Management Group, Inc., 764 F.Supp. 902, 915 (S.D.N.Y. 1991).

Where, as here, the parties have submitted material outside the pleadings, the Court must either exclude those materials from consideration, or convert the motion to one for summary judgment. Fed.

II.

A. Facts

The facts alleged in Curry's Answer and Counterclaims are as follows. Curry served as a video disc jockey ("VJ") for MTVN under a written contract through May 1, 1992. (Countercl. P 2.) He continued to serve as an MTVN VJ through April, 1994, under "informal" terms. (Id. PP 2, 18.) Curry also engaged in activities in the contemporary music industry that were not directly related to his MTVN employment, such as hosting radio programs and live entertainment events. (Id. P 3.)

In approximately June, 1993, Curry met with MTVN Vice President Matthew Farber ("Farber") and discussed, inter alia, an Internet service [FN1] he was developing with the Internet site address [FN2] "mtv.com". (Id. P 9.) Curry alleges that while Farber disclaimed any interest by MTVN in entering a joint venture, he indicated that Curry was free to continue development of the Internet site at his own expense. (Id.)

FN1. The Internet is the world's largest computer network (a network consisting of two or more computers linked together to share electronic mail and files). The Internet is actually a network of thousands of independent networks, containing several million "host" computers that provide information services. The Internet Unleashed 22-23 (Sams Publishing 1994). An estimated 25 million individuals have some form of Internet access, and this audience is doubling each year. Philip Elmer-Dewitt, Battle for the Soul of the Internet, Time, July 25, 1994, at 50. The Internet is a cooperative venture, owned by no one, but regulated by several volunteer agencies.

FN2. Each host computer providing Internet services ("site") has a unique Internet address. Users seeking to exchange digital information (electronic mail ("email"), computer programs, images, music) with a particular Internet host require the host's address in order to establish a connection. Hosts actually possess two fungible addresses: a numeric "IP" address such as 123.456.123.12, and a alphanumeric "domain name" such as microsoft.com, with greater mnemonic potential. See The Internet Unleashed, supra note 1, at 73-75. Internet domain names are similar to telephone number mnemonics, but they are of greater importance, since there is no satisfactory Internet equivalent to a telephone company white pages or directory assistance, and domain names can often be guessed. A domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base. The uniqueness of Internet addresses is ensured by the registration services of the Internet Network Information Center ("Internic"), a collaborative project established by the National Science Foundation. Id. at 460. Internic "hands out the names for free under a very simple rule: First come, first served. Trademark violations are the requestor's responsibility." Joshua Quittner, Making a Name On the Internet, Newsday, October 7, 1994 at A4 (discussing speculation in Internet addresses such as mcdonalds.com).
By approximately August, 1993, Curry had announced the mtv.com address on MTVN broadcasts. (Id. P 8.) On the afternoon of one August taping, Curry claims to have had a conversation about mtv.com with Joel Stillerman ("Stillerman"), a senior MTVN executive. (Id. P 10.) In this conversation Stillerman "made clear that MTVN had no objection to Curry's use and development of the mtv.com address." (Id. P 11.)

Curry alleges that between August, 1993 and April, 1994, he discussed the mtv.com site with other MTVN personnel on "numerous" occasions, receiving encouragement in his continuing development efforts. (Id. P 13.) During the period August, 1993, to mid-January, 1994, Curry claims that MTVN programmers placed the graphic letters "mtv.com" on the television screen for viewers of the MTVN program "Top Twenty Countdown." (Id. P 14.) In reliance on his discussions with MTVN executives and personnel, Curry continued to develop mtv.com at his own expense. (Id. PP 9, 11, 23.)

On January 19, 1994, MTVN formally requested that Curry cease use of the mtv.com address. (Id. P 15.) However Curry alleges not only that MTVN programming continued to make on air references to the address, but that Stillerman asked him, sometime in February, to include certain materials at the mtv.com site. (Id.)

By the spring of 1994, Curry's mtv.com address had been accessed by millions of Internet users. (Id. P 16.) Curry credits this success, in part, to a computer bulletin board [FN3] that facilitates communication between performers and other music professionals—a service he claims to have discussed with MTVN personnel since August, 1993. (Id. P 15.)

FN3. Computer bulletin boards generally offer both private electronic mail services and newsgroups. The latter is essentially email directed to the community at large, rather than a private recipient. See generally John R. Levine & Carol Baroudi, The Internet for Dummies (1993). A bulletin board is an interactive or bidirectional service that cannot currently be offered through cable television transmissions.

Curry argues that MTVN was exploiting his development efforts to "test the waters" for their own interactive service. During the second half of 1993, he alleges that MTVN and Viacom explored their options for developing online services. (Id. P 17.) These efforts culminated in an agreement between MTVN and America On-Line ("AOL") to provide a computer link to MTVN for a fee. (Id. P 19.) The AOL/MTVN service will include a performer-music professional bulletin board similar to the one Curry developed at mtv.com. (Id.)

MTVN brought this action on several grounds, including trademark claims based on Curry's use of registered MTV marks and breach of Curry's employment contracts. Curry has counterclaimed for breach of oral contract, fraud/negligent misrepresentation, and unfair competition. The Court now considers MTVN's motion to dismiss these counterclaims.

B. Breach of Contract Counterclaim

[1] Curry's breach of contract claim is grounded in his conversations with Farber, Stillerman and others, in which he was allegedly promised that MTVN would not interfere with his development of mtv.com. MTVN argues that the purported contract is void as it violates the relevant statute of frauds, New York General Obligations Law § 5-701 (McKinney's 1993). The statute provides in relevant part: a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: 1. By its terms is not to be performed within one year from the making thereof ... In New York, oral agreements violate the statute of frauds only if
"by their very terms [they] have absolutely no possibility in fact and law of full performance within one year." D & N Boening, Inc. v. Kirsch Beverages, Inc., 63 N.Y.2d 449, 454, 483 N.Y.S.2d 164, 472 N.E.2d 992 (1984). The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year." Id. at 454, 483 N.Y.S.2d 164, 472 N.E.2d 992 (quoting Warner v. Texas & Pacific Ry., 164 U.S. 418, 434, 17 S.Ct. 147, 153, 41 L.Ed. 495 (1896)).

MTVN urges the following interpretation of the agreement outlined by Curry's pleadings: Curry would be free to terminate the development of his Internet site at will, but MTVN would forever be obliged not to interfere with Curry's use of the site name mtv.com. Under this view of the contract, Curry's obligations would be susceptible of completion within a year, but MTVN's obligations would continue indefinitely.

The more straightforward reading of Curry's pleadings suggest two performances that are susceptible of completion within one year: Curry's development of the Internet site--terminable by him at any time; and MTVN's forbearance to assert any rights it might have in the site--for so long as the site continued. Under this interpretation the performances are of equal duration, each terminating upon Curry's unilateral decision to discontinue operation of the site.

MTVN further presents the policy argument that Curry's purported contract is of a "classic" type that the statute of frauds was intended to bar, in which the party alleging the contract has already completed its performance, but seeks to impose continuing, indeed, perpetual obligations on the other side. This argument focuses on paragraph 21 of Curry's Answer and Counterclaims, which states: In consideration of its agreement to renounce, or otherwise refrain from claiming rights to, the mtv.com address, Curry agreed that, during such period as he continued to host MTVN programming and was still operating the mtv.com address, he would use such address while on air from time to time for the purpose of facilitating communication between MTVN and its audience. MTVN argues that since Curry no longer hosts MTVN programming, his performance is now complete under the claimed oral contract, while its duties may continue forever. A line of New York cases presents some support for MTVN's position. See, e.g., Zupan v. Blumberg, 2 N.Y.2d 547, 550, 161 N.Y.S.2d 428, 441 N.E.2d 819 (1957); North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 178, 292 N.Y.S.2d 86, 239 N.E.2d 189 (1968). The oral agreements in these cases involve the continuation of a salesman's commissions so long as accounts obtained for their employers remain active. Such agreements bear little similarity to the one alleged in this action.

In any event, the statute of frauds, "designed to guard against fraudulent claims supported by perjured testimony, was never meant to be used as 'a means of evading just obligations' based on contracts 'fairly, and admittedly, made.' " Manhattan Fuel Co. v. New England Petroleum Corp., 422 F.Supp. 797, 801 (S.D.N.Y. 1976) (citation omitted), adhered to, 439 F.Supp. 959 (S.D.N.Y. 1977), aff'd, 578 F.2d 1368 (2d Cir. 1978). Assuming, arguendo, that this contract involved one-sided obligations of indefinite duration, the Court is not convinced by the arguments submitted that the statute of frauds will bar Curry's claim. Development of the record to a fuller degree than what is presented on the present motion is warranted. In June or August, 1993, MTVN may simply have failed to appreciate the commercial potential of an Internet music site, and improvidently (in retrospect), granted Curry all of the rights he has alleged. MTVN now argues that Curry's purported agreement involves a "major property right" which would ordinarily be embodied in a writing (El.'s Mem. at 14), but this characterization may derive from the 20-20 vision of hindsight.

Furthermore, despite the narrowly drawn wording of paragraph 21, the Court can infer from Curry's pleadings a claim of a loose synergetic relationship between a broadcast medium and an interactive computer
service. Consideration would flow to MTVN under the alleged agreement so long as mtv.com materials stimulated interest in MTVN programming. That is, the price of MTVN's forbearance to assert any rights it would otherwise have in mtv.com was not solely Curry's promise to deliver on air promotion.

[2] Finally, the Court notes that the statute of frauds does not present a bar to an agreement that may be characterized as a "joint venture." A joint venture is a "special combination of two or more persons where in some specific venture a profit is jointly sought without any actual partnership or corporate designation." Forman v. Lumm, 214 A.D. 579, 212 N.Y.S. 487, 490 (1st Dept. 1925). It is widely recognized that the statute of frauds is generally inapplicable to joint ventures, because these agreements are terminable at will. Yonofsky v. Wernick, 362 F.Supp. 1005, 1027 (S.D.N.Y. 1973); see, e.g., In re Taub, 4 F.2d 993 (2d Cir. 1924); Eidelberg v. Zellermayer, 5 A.D.2d 658, 174 N.Y.S.2d 300, 304-305 (1st Dept. 1958), aff'd, 6 N.Y.2d 815, 188 N.Y.S.2d 204, 159 N.E.2d 691 (1959).

[3] Although Farber expressly disclaimed MTVN's interest in a joint venture during the June meeting (Countercl. P 9), he may have intended only to convey MTVN's lack of interest in funding the project. A joint venture does not, however, require financial support from the coventurers. Yonofsky, 362 F.Supp. at 1031 ("Each of the coadventurers must make some contribution to the joint undertaking. There must be some combination of property, financial resources, effort, skill or knowledge."). Curry has alleged MTVN contributions of various sorts, including advertising of the mtv.com address on MTVN broadcasts and permission (or at least a request by Stillerman) to place certain MTVN materials on Curry's Internet site.

As New York General Obligations Law § 5-701 presents no bar to this cause of action, Defendant's breach of contract counterclaim survives Plaintiff's motion to dismiss.

C. Fraud/Negligent Misrepresentation Counterclaim

[4][5] Curry's second counterclaim is labeled "Fraud/Negligent Misrepresentation." Under Federal Rule of Civil Procedure 9(b), "[a]ll averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." A claim for fraud must be dismissed under Rule 12(b)(6) if it does not satisfy the Requirements of Rule 9(b). See Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 113-15 (2d Cir. 1982). MTVN argues for dismissal of the fraud claim on the ground that Curry has merely set forth conclusory allegations of fraud "without clearly stating who said what and when." (Pl.'s Mem. at 14.) The Court finds that the details of the Farber and Stillerman conversations are sufficiently set forth in paragraphs 9-11 of Curry's Answer and Counterclaims to meet the Rule 9(b) standard. See Goldman v. Belden, 754 F.2d 1059, 1070 (2d Cir. 1985) (defendant charged with fraud only need be given notice of precisely what he is charged with).

MTVN next argues that Curry has failed to set forth a sufficient factual basis to establish fraudulent intent (sciente) when MTVN executives encouraged Curry to develop his computer service under the mtv.com name. While Rule 9(b) permits scienter to be demonstrated by inference, this "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990).

Curry's fraud claim requires that MTVN personnel had fraudulent intent at the time that they made the statements at issue. Lanzi v. Brooks, 54 A.D.2d 1057, 388 N.Y.S.2d 946, 948 (3d Dept. 1976), aff'd, 43 N.Y.2d 778, 402 N.Y.S.2d 384, 373 N.E.2d 278 (1977). MTVN argues that Curry's pleadings are deficient in this regard, as there is no suggestion that Farber or Stillerman intended, at the time of the June and August conversations, to break the promises they allegedly made. The Court finds Curry's pleadings sufficient in this regard.
Curry's August conversation with Stillerman was critical to his reliance and resulting damages. (Countercl. PP 27-30.) Curry alleges that "during the second half of 1993, MTVN and Viacom explored various options for development of interactive television or on-line computer services" (Id. P 17), resulting in an agreement with America On-Line to provide a computer link to MTVN (Countercl. P 19). Since the "second half of 1993" encompasses August, 1993, the Court only need infer that Stillerman, a "senior executive" at MTVN, would be aware of MTVN's plans to develop a computer-based information service to find a sufficient basis for scienter in Curry's pleadings.

MTVN also argues that Curry fails to plead another required element for his fraud claim, reasonable reliance on the purported oral agreement. The essence of this argument is that Curry, whose previous written employment contracts denied him rights to MTVN's intellectual property, should have known that MTVN would not orally grant him such rights in conjunction with his fledgling service.

Questions of the reasonableness of reliance raise issues of fact that must be resolved at trial. Whitbread Holdings, Inc. v. Baron Philippe de Rothschild, S.A., 630 F.Supp. 972, 978 (S.D.N.Y. 1986). The Court notes only that Curry's pleadings allege a period of services rendered to MTVN, from May, 1992 through April, 1994, that were not based upon a written contract. This oral employment contract may have set the stage for the oral agreement that Curry now asserts. The Court also takes judicial notice of the explosive growth in public and corporate awareness of the commercial potential of the Internet. What seems an unlikely grant of intellectual property rights in the summer of 1994, might have seemed far less valuable to a broadcast media entity such as MTVN even one year ago.

The Court therefore finds that Curry's fraud allegations are sufficient to withstand this motion to dismiss. The Court is similarly unpersuaded by the similar arguments that MTVN raises in opposition to Curry's negligent misrepresentation counterclaim.

D. Unfair Competition Claim

[6] Curry's third counterclaim alleges the New York common law tort of unfair competition, which "bans 'any form of commercial immorality.' A cause of action for unfair competition requires unfairness and an unjustifiable attempt to profit from another's expenditure of time, labor and talent." Coors Brewing Co. v. Anheuser-Busch Cos., 802 F.Supp. 965, 975 (S.D.N.Y. 1992) (citations omitted). This claim is grounded in Curry's theory that MTVN was using his Internet site as a no risk "test bed" for its own on-line service.

MTVN argues that it cannot determine how to interpret Curry's third counterclaim, which in paragraph 33 of his Answer and Counterclaims charges MTVN with "misappropriat[ing] the fruits of Curry's labors and expenditures." The Court agrees that Curry has failed to specify what it is that MTVN has allegedly misappropriated.


Rule 12(e) of the Federal Rules of Civil Procedure states in part: If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement.... There is a tension between Rule 12(e) and Fed. R. Civ. P. 8, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief." While motions for more definite pleadings are generally disfavored, the opposing party must be...
Applying this standard to the amorphous tort of unfair competition, the Court concludes that MTVN is entitled to clarification of Curry's third counterclaim. In particular, MTVN deserves amplification of the phrase in paragraph 33 that charges MTVN with misappropriation of "the fruits of Curry's labors and expenditures." These fruits might involve trademark issues, such as the use of the Internet address "mtv.com," or theft of Curry's idea, or perhaps theft of Curry's mtv.com audience. Given the broad range of defenses involved in opposing these claims, and the potential for unexpected claims at trial, MTVN is entitled to a clarification of Curry's pleadings. Recognizing that MTVN has not been provided with fair notice of Curry's third counterclaim, the Court grants MTVN's motion for a more definite statement.

III. Conclusion

For the foregoing reasons, Plaintiff's motion with regard to counterclaims I and II is denied. As to counterclaim III, Plaintiff's motion for a more definite statement is granted. Defendant shall have thirty (30) days from the date of this Order to file an amended third counterclaim. Plaintiff shall have thirty (30) days from the date of the filing of the amended counterclaim in which to file an answer or other appropriate response to the amended counterclaim.
Billions Registered

Right now, there are no rules to keep you from owning a bitchin' corporate name as your own Internet address.

By Joshua Quittner

I'm waiting for a call back from McDonald's, the hamburger people. They're trying to find me someone - anyone - within corporate headquarters who knows what the Internet is and can tell me why there are no Golden Arches on the information highway.

It's true: there is no mcdonalds.com on the Internet.

No burger_king.com either.

Yet.

"Are you finding that the Internet is a big thing?" asked Jane Hulbert, a helpful McDonald's media-relations person, with whom I spoke a short while ago.

Yes, I told her. In some quarters, the Internet is a very big thing.

I explained a little bit about what the Big Thing is, and how it works, and about the Net Name Gold Rush that's going on. I told her how important domain names are on the Internet ("Kind of like a phone number. It's where you get your e-mail. It's part of your address."); and I explained that savvy business folks are racing out and registering any domain name they can think of: their own company names, obviously, and generic names like drugs.com and sex.com, and silly names that might have some kind of speculative value one day, like roadkill.com.

"Some companies," I told Jane Hulbert, "are even registering the names of their competitors."

"You're kidding," she said.

I am not, I told her, recounting the story of The Princeton Review, the Manhattan-based company that sells SAT prep courses, and how it registered the name of its arch-rival, kaplan.com. Now the lawyers are working it out in court. Very ugly. (We'll get to that later.)

"I could register McDonald's right now," I said, pointing out that the name is still unclaimed.

"You could?" she asked, then quickly answered my silence: "You could."

"So could Burger King," I said, and Jane Hulbert rang off, looking for some MIS person with the answers.

How much do you think mcdonalds.com is worth? What could you sell mtv.com for? Is there gold in them there domains, as a lot of people seem to think, or is it just fool's gold? No one knows the answers to these questions, though they are being asked, very pointedly, in federal court, as well as in the boardrooms of a number of the nation's biggest companies.

In the meantime, a frenzy of domain-name registration is going on at the InterNIC, or Internet Network Information Center, the agency that assigns domain names and rules on requests. It's easy to find an unused domain name, and so far, there are no rules that would prohibit you from owning a bitchin' corporate name, trademarked or not.

The InterNIC staff has neither the time nor the inclination to scrutinize your application. Not too long ago, I spoke to Scott Williamson, the person who supervises InterNIC registration, to find out what criteria the InterNIC uses to deny registration requests.

There are situations that raise two red flags, according to Williamson: "If the name's already taken. Or if we catch an "obvious one."

An "obvious one," he explained, is a blatant attempt to register a name to which you're not entitled. For instance, let's say Sprint Communications wanted to register MCI, a competitor in the long-distance telephone biz. That would be an "obvious one" that even the beleaguered staff of the InterNIC would pick up. But wait a second! In the spring of this year, Sprint did register the call letters MCI, albeit briefly. For a while Sprint owned mci.com.

Why did Sprint want to register its rival's name as a domain name? Sprint won't say, exactly: "For the record, Sprint won't discuss its plans for the domain name," said Evette Fulton, a spokesperson, who added, for anyone too dumb to read Sprint's lips, "We're in an extremely competitive business." As soon as the InterNIC got wind of it a week or so later, mci.com was re-registered to MCI.

How did such an obvious one get by InterNIC?

"It was a fluke," Williamson said, noting that three requests for the domain name mci, came in almost simultaneously. (One request was from MCI itself, one was from Sprint, and one was from another company whose initials were MCI.) "All three came in, and the guy in registration registered the wrong one."

The guy in registration? One person is responsible for assigning domain names on the Internet.

Actually, "We have 2.5 people doing it," Williamson
I could register mcdonalds.com?

"There is nothing that says I can stop you from doing that,"

Williamson said. "We really need some policy."

said, meaning that the half person is really a
full person doing it part-time. Or something.
Regardless, 2.5 humans is not enough people,
or parts of people, to do the job. (Would one
person be assigning quit-claims to a gold
rush?)

Williamson said that a year ago, his agency
received 300 requests a month for domain
names; now, more than 1,500 requests
stream in each month.

Clearly, the InterNIC can't research every
one of those names for trademark violations.
"If we had to research every request for a
domain name right now, I'd need a staff of 20
people," Williamson said. So the policy is
simple: "Trademark problems are the
responsibility of the requester."

Which means, I asked, that I could register
mcdonalds.com?

"There is nothing that says I can stop you
from doing that," he said. "We really need
some policy."

"The problem with the Internet is, who's in
charge?" he added wryly. "When we figure
that out, there will be a meeting."

But even if the InterNIC figures out some
mechanism to more effectively weed out bad
faith registrations, it can't go around protecting
trademarks. That would be too time con-
suming and would be beyond the scope of its
responsibilities.

The situation is analogous to incorporating
a company to do business in a particular
state, explained Bruce Keller, one of the
country's top trademark attorneys, at the
white-shoe Manhattan law firm of Debevoise
& Plimpton. While I was waiting for McDon-
alid's Huibert to call me back, I spoke with
Keller on the telephone.

Keller, who is counsel to the International
Trademark Association, said that "when you
incorporate a company in a state, the state
doesn't bother to see if there are other con-
flicts with trademarks that may be registered
in other states - it just checks with the secrEtary
of state to see if the same name has been
registered." This is the same function, in
effect, that the InterNIC performs. If a name
hasn't been registered, you can take it, he
added, but beware: "That in no way entitles
you to use the name if in fact there is a con-
flict with a federally registered trademark."

It's no different in cyberspace. Keller's
advice to anyone registering a domain name
is to do a careful trademark search, just as
you would before incorporating a business.
"In my view, it's trademark law pure and
simple."

Trademark law, he explained, offers two
general kinds of protection. In the first in-
stance, protection from infringement, when a
customer associates a certain name with a
particular product or services, the law prevents
others from using that name and creating
confusion. You see the name, "McDonald's,"
and what do you think of? (Quarter Pounder
with cheese, medium fries, and medium
Coke is what I think of; you can name your
own poison.) The question is, Would most
people expect to find some connection to
fast-food hamburgers in cyberspace when
they finger mcdonalds.com? Keller says yes.
Trademark protection has to extend from the
physical world to the virtual world.

The second kind of protection seeks to
prevent trademark "dilution." "Trademarks
are valuable corporate assets. You can put
a price tag on them," Keller said. "Coca-cola,
for instance, has a multibillion-dollar value."
If someone else attempted to use that name
— as a joke, for instance, or to be cute — the
value of the trademark would start to dilute.
"This protection comes into play when some-
one takes the word 'McDonald's' and sticks
it on a mailbox" — as in a domain name.
"McDonald's is among the most aggressive
companies in stopping use of its name. It
goes after everybody, whether it's a dentist
calling himself 'McDental,' or a motel calling
itself 'McSleep.'

That, conceivably, might even bar
you from using a domain name such as
bigmac.com.

Trademark infringement cases are usually
settled through a process I've come to think
of as Big Footing. The big company with the
trademark Big Foots the little one, forcing it
to give up the name. Usually, this is achieved
with a Big Foot letter from the big company’s
lawyer, threatening legal action.

McDonald's does it. So does Wired. Last
year, WIRE, a computer network encourag-
ing women to get on the Net, registered the
domain name wire.com. This magazine's
lawyers sent them a Big Foot letter: "That
sounds too much like Wired's online service,
wire.com. Give up the name, or else."

WIRE became Women's Wire, and retreated
to the domain name wwire.com.

Most trademark infringement cases never
get beyond the Big Foot letter. "This is going
to cost you a lot of money if you want to fight
it — that's the way the bulk of cases are set-
tled. Who wants to waste time fighting it?"
said Keller in an obviously rhetorical ques-
tion. Keller's firm is local counsel in the
Kaplan versus The Princeton Review case,
a good example of someone who wants to
fight it.

And here's another: Anyone ever hear of
Adam Curry? In June 1995, Curry, then an
MTV video jockey, registered the domain
name mtv.com with the InterNIC, "partly
because it was a cool address to have, and it
was available," he wrote, in an electronic
message that was hard to miss if you were on
the Net this past May.

Curry hung his own computer on the
Internet and put up a gopher site, which
offered, among other things, a daily enter-
tainment "Cybersleaze Report" and "Adam
Curry's Brain Waves," providing Curry's own
spin on the rock and roll scene. He paid for
the site himself and considered it kind of a
hobby. He said he told his bosses at MTV
what he was doing and encountered no
resistance.

Then, in April, Curry resigned from MTV.
He was promptly sued for copyright infringe-
ment stemming from his ownership and use
of mtv.com.

MTV's lawyer asserted that the case would
be fought on traditional trademark infringe-
ment grounds.

But Curry, who has agreed in the mean-
time not to use the domain name mtv.com
"in a confusing manner," said mtv.com is
his property, and he's not relinquishing it. Until the court battle is resolved, Curry is maintaining a site called metaverse.com. In other words, while he might not use the name, he intends to keep it and not transfer title to MTV.

"I will fight this all the way," he said, adding that the case would be the "Roe v. Wade of the Internet and the information superhighway. There is just no way that MTV has the right to my address. It's my address. Mine."

Curry said his site has become exceptionally popular on the Net and has received millions of visits. Indeed, his lawyer, Joe Donley of the Manhattan firm of Sherriff, Friedman, Hoffman and Goodman, said that Internet users have come to associate mtv.com with Curry alone.

"We believe that if they were allowed to take Adam's mtv.com address and use it for themselves - now that Adam has shown explains to people the difference between Princeton Review and Kaplan... We decided to call it kaplan.com."

Doesn't that domain name make it sound as if the site is maintained by Stanley Kaplan?

"Our position is that the name of the site is descriptive of what's on the site, which is an analysis of the different courses," he said.

Kaplan's former president, Greg Rorke, doesn't see it that way at all. Around January, Rorke's people met with representatives of The Internet Company Inc., which helps businesses get on the Net, and looked into the possibility of registering a kaplan.com domain name. "We figured there was no hurry," Rorke said, adding that it came as quite a shock when someone in Kaplan's technology department found out a few months later that Princeton Review had registered kaplan.com.

Kaplan fired off a Big Foot letter, and initiated legal action that went to US District Court in Manhattan, the same courthouse-arena, by the way, where the Curry-MTV bout is being fought.

Katzman said he intends to hold onto kaplan.com, unless the court tells him otherwise. In the meantime, he said, Kaplan is more than welcome to find its own, unused name and, "if they want to link it from our server both ways, we'll do it."

While awaiting McDonald's call back (I called Jane Hultberg and was informed she was on the other line), I started playing the Whois Game. The Whois Game tells you who, if anybody, owns what domain name. For instance, I found out that there is a god, at least on the Internet. (god.com is registered to Guaranteed Online Delivery in Cambridge, Massachusetts.) There's also plenty of sex and rock, if not roll. (Sex.com is registered to Online Classifieds Inc. of San Francisco, and Rock.net is registered by Rocknet of Cupertino, California.)

From most Unix Internet shell accounts, you can easily play the Whois Game. From your shell prompt just type, "whois <domain name>".

If you type $whois nbc.com, within a few seconds the InterNIC registry will be fingered and you'll see:

National Broadcasting Company Inc. (NBC-DOM)
30 Rockefeller Plaza
New York, NY 10112

plus some other administrative stuff that meant little to me but would probably help a system administrator, lawyer, or someone who spends far too much time in front of the computer and ought to get out more.

While NBC also has an Internet e-mail address for Nightly News, the other three networks haven't even registered their domain names.

But other people have: as I write this, abc.com is registered to ABC Design in Seattle; cbs.com is registered to a consultant in Golden Valley, Minnesota; and fox.com is registered to something called the Flexible Online eXchange, in California. (I couldn't believe that Fox hadn't figured it out. I mean, the Internet was mentioned on an episode of The Simpsons, and Rupert Murdoch was smart enough to grab Delphi, the national Internet gateway service. Fox does, in fact, maintain an address at delphi.com, through which viewers can offer feedback.)

The Whois Game is an interesting gauge of who is paying attention to the Big Thing known as the Internet.

In May, I asked a researcher at Wired to check the list of Fortune 500 company names against registered domain names and found that only one-third of the Fortune 500 had registered an obvious version of their names. More telling was that 14 percent of America's largest corporations had their net.name snapped up by someone else.

That left more than 50 percent of the Fortune 500 names still available to first-comers. The top 15 companies all had their act together and had registered their domain names. But some other very big companies did not. Those include: Nabisco, Sara Lee, Anheuser-Busch, Kellogg, and Coca-Cola, or even Coke. Oops. That was just nabbed as I write by one Rajeev Arora in Campbell, California. Way to go, Rajeev! The Pepsi generation, presumably, is more wired, since pepsi.com is registered. A John Sculley legacy?

Of course, some companies were on the Net with nonobvious, unhappiness addresses at places like America Online and Prodigy.

What will these companies do when they attempt to move onto the Net and reclaim...
their names? Draft Big Foot letters and lawsuits, I guess.

Which made me think of Jane Hulbert, at McDonald's. I called her again and we finally connected.

She was very apologetic. "I don't have anything for you, and I probably won't have anything for you," she confessed. "I've left a lot of voicemail for people, but no one seems to know anything about it."

Jane Hulbert said she'd keep checking around, but she didn't seem hopeful that we could get to the bottom of this domain-name thing. "You'll probably just have to do your story without it," she said. "It probably won't be the end of the world."

She's probably right. I wondered how long it would take 2.5 InterNIC people to process my application for mcdonalds.com.

Not very, it turns out. About two weeks later, after filling out the Net-available domain-name application form, I got e-mail notification from domreg@interNIC.net:

"Registration for the domain MCDONALDS.COM has been completed. The InterNIC database has been updated.... The new information will not be visible via WHOIS until the next business day...."

My fingers trembled, as if ripping open a Big Mac. I checked:

SWHOIS mcdonalds.com
Domain Name: MCDONALDS.COM
Administrative Contact:
Quittner, Josh quit@newsday.com

Oh, that's McCool. I feel like Prometheus. I have stolen McFire.

I need to get comment from someone. But who?

For weeks now, I've been trying to get McJane on the phone, to let her know that I have their name registered if they need it. One week, she's out on vacation. For two others, she's on another line.

Is she avoiding me?

"Can anyone else help you?" someone asks. Yes, I tell her, explaining all over again about the Internet, domain names, the Gold Rush, mcdonalds.com. Still, no one returns my calls. Hamburgeers are what makes this country great. Burgers are the backbone of our economy. It's not so far-fetched to think that McDonald's would be out there on the Net: ISDN, after all, was first used commercially by McDonald's. Also, McD's was expected to perform an online first in August on America Online with a 50-second commercial. I've even heard that the Golden Arches is experimenting with delivery service. What better way to order your Big Mac than over the Net? Over 25 million users served."

This callous indifference to the Internet worries me. Will the Japanese catch on? Isn't there someone in burgerland who cares?

Hold the pickle, hold the lettuce. You can have it your way, at Burger King!

As I said, there's no burger_ king.com either. Still, Burger King seems reasonably wired. The person who answers the phone in communications even has a vague idea about what the Internet is. (Some kind of information thing, like Prodigy? she asks. "Yes!" I tell her. "OK, but what does that have to do with Burger King?" she asks. Exactly.) I'm routed to a guy who promises to look into the matter of domain-name registration. A day later, he leaves me voicemail: "I don't have a definitive answer on the Infoset registration," he says. "The closest thing I've got for you is We are considering it. But no decision has been made." I'd like to ask him more. Hell, I'd like to see if Burger King is interested in buying mcdonalds.com, taking it off my hands, but his message says he will be out for a week or so.

So here's the deal: Let's get interactive. What should I do with mcdonalds.com? You tell me. I could auction it off. I could hold on to it as a trophy, a la Curry and mtv.com. I could set up a Mosaic home page, explaining the difference between McDonald's and Josh "Ronald" Quittner.

Got a suggestion? Send it to ronald@mcdonalds.com.

Observing Netiquette

Trademark Registration on the Internet Raises New Legal Issues

Entity A would not expect a primary competitor, Entity B, to establish a new address for itself using Entity A's name. But this happened to Kaplan Educational Centers on the Internet.

Neither would a business expect an ex-employee to continue offering services to its customers under the company name. But it happened to MTV Networks on the Internet.

An attorney representing an aggrieved trademark owner demanding that a company cease using a confusingly similar trademark on the Internet would not expect the company to reply directly to the owner/client via e-mail, decrying the overlawyering of America and the intrusion of lawyers into cyberspace. (It has happened to me twice already.)

In a virtual society bent on observing its own "netiquette," increasingly frequent (and successful) assertions of trademark infringement and unfair competition signal the beginning of the end of an era of innocence. But it is only the beginning.

Reactions to months of alarmist press coverage about superhighway robbery of trade names and trademarks on the Internet, companies are now turning to their lawyers for everything from determining who owns their company name on the Internet to how to "do a deal" to get the name from someone else (and all the nystagmus in between). Although most inquiries concern domain names — a company's address on the Internet (e.g., apple.com) — a number of companies have found their logos and other trademarks on the graphics pages of the World Wide Web.

Infringements are ignored at the trademark owner's peril. An otherwise strong mark can lose its value as a trademark if it (like aspirin and 386) becomes generic through unpolicd third-party use. Even if a mark retains some distinctiveness, allowing others to use the mark for related goods will undermine the association with a single source that characterizes a strong mark.

As a general rule, a company should register its name as a domain name sooner rather than later. The federally-funded Internet Network Information Center (InterNIC) awards a name to the first to file for that name, and it has declined responsibility for screening applications to determine whether use of a name would violate any other entity's trademark rights. InterNIC encourages registration through a commercial national access provider (e.g., MCI, Sprint, Netcom or FST), but will respond to registration inquiries via e-mail (domreg@interNIC.net), phone (703/742-4777), or fax (703/742/4811). In response to the demand for new domain names that has created nearly a one month backlog, InterNIC now limits registration to one name per company.

Registration alone cannot prevent others from using similar names on the Internet, or even from registering similar names. Domain names consist of two or more parts, and while each name is unique as a whole, that is not true of its parts. Conceivably, the same name could be registered under all of the top level domains (or zones) - Commericial, Network services, ORGanization, EDucational and GOVernment — or in the general US zone. As a practical matter, however, most business rivals will be restricted to the commercial zone, or to a decidedly cumbersome format of company/country.

Gaining control over another company's registration of a similar or identical name in a different zone might be difficult if commercial entities are not eligible to register in that zone. One solution is an agreement pursuant to which inquiries at that the latter address are automatically forwarded to the client.

The administrator of a domain can establish "subdomains" that are not registered with InterNIC, and therefore can be identical to registered domains. For example, General Motors could have created subdomains for each of its divisions — cadillac.gm.com, chevrolet.gm.com, etc. But this approach might not serve a company's marketing goals in differentiating its brands. Presumably, a different kind of car company should be found not at saturn.gm.com, but at saturn.com. (It is at saturnconnection.com: saturn.com was already taken.)

For the same reason, potential infringers seeking to cash in on a company's name recognition most likely would be uninterested in using existing marks in a subdomain name. Franchisors and other licensees of trademarks should anticipate and regulate subdomain uses of licensed marks to avoid losing control of those marks (e.g., use by a local Saturn dealership of saturn.automall.com).

A defensive strategy adopted by many companies — registering many or all of their trademarks as domain names — has been thwarted by InterNIC's single-registration policy. Trademark holders now have no choice but to police their marks through the traditional means: watching the registry, sending a demand letter and, if necessary, bringing suit. There is reason to believe that such efforts will be successful. After learning that its chief rival, the Princeton Review, had registered kaplan.com, Kaplan won back
the name through binding arbitration. MTV settled its claims against its ex-video jockey out of court. In both cases, the trademark holders prevailed, suggesting that traditional likelihood-of-confusion principles extend to domain names.

But what about two companies that use similar or identical names in different fields? The name aba.com was registered to the American Bankers Association, while aba.org was registered to the American Birthing Association. Does the American Bar Association have a basis for dislodging either organization? An existing name or mark is deemed infringed if consumers are likely to believe that the products (or services) of one entity originate from or are associated with or sponsored by another entity due to the similarity of the two entities' respective names or marks.

In making this subjective determination, a court typically would consider several factors, including the strength of the marks, the similarity of the marks (in "sight, sound, and meaning"), the similarity of the goods on which the marks are used, the degree of overlap of the entities' customers, the level of customer sophistication and the case exercised by customers in making the purchase decision, the degree of overlap of marketing channels for the two products, any instances of actual confusion of purchasers or prospective purchasers and any intention of the owner of the second trademark to capitalize on or "trade off" the goodwill associated with the first trademark.

Whether a company is entitled to use a particular domain name, however, presents somewhat different issues. Unlike the three-dimensional world, companies can be difficult to locate in cyberspace if not found under their terrestrial names. Potential customers may be "turned off" by reaching the wrong company and conclude that the trademark holder does not have a presence on the Internet (and therefore is not a desirable company with which to do business). If consumers have bad experiences with whomever is at the offending address, the trademark holder might have a claim for dilution or unfair competition under state law, even in the absence of confusion.

The flip side of trademark enforcement, of course, is advising clients on avoiding infringement liability. Trademark lawyers traditionally counsel clients to determine, before adopting a mark, whether any other entity owns trademark rights in the proposed mark. The scope of such searches, which typically cover unregistered as well as registered marks (in the United States, rights in unregistered marks can be enforced against later-adopted registered marks), might now have to be expanded considerably, since claims might arise from the prior use of marks in cyberspace. Searches of such marks can be conducted in the InterNIC registry and in the usual media — abstracts and full text of the relevant industry press and directories.

For new ventures on the Internet itself, which instantly receive global exposure, international searching might become a costly necessity. Trademark rights stop at the borders of the jurisdiction recognizing or granting them. The degree of risk and the expected return in each market connected to cyberspace should guide the client's search and registration strategy.

Jefferson F. Scher is an associate at Fenwick & West specializing in trademark and copyright protection and enforcement.

Reprinted with permission from the San Francisco Daily Journal © 1995
SECTION 8

PRIVACY, ANONYMITY AND TRANSACTIONS
JOSEPH MCINTYRE, EXECUTOR OF ESTATE OF MARGARET MCINTYRE, DECEASED, PETITIONER v. OHIO ELECTIONS COMMISSION

No. 93-986

SUPREME COURT OF THE UNITED STATES


October 12, 1994, Argued
April 19, 1995, Decided

NOTICE: [*1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

DISPOSITION: 67 Ohio St. 3d 391, 618 N.E.2d 152, reversed.

SYLLABUS:

After petitioner's decedent distributed leaflets purporting to express the views of "CONCERNED PARENTS AND TAXPAYERS" opposing a proposed school tax levy, she was fined by respondent for violating @ 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens @ 3599.09(A) imposed on voters' First Amendment rights were "reasonable" and "nondiscriminatory" and therefore valid. Declaring that @ 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, [*2] libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished Talley v. California, 362 U.S. 60, 4 L. Ed. 2d 559, 80 S. Ct. 536, in which this Court invalidated an ordinance prohibiting all anonymous leafletting.

Held: Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment. Pp. 7-24.

(a) The freedom to publish anonymously is protected by the First Amendment, and, as Talley indicates, extends beyond the literary realm to the advocacy of political causes. Pp. 7-9.

(b) This Court's precedents make abundantly clear that the Ohio Supreme Court's reasonableness standard is significantly more lenient than is appropriate in a case of this kind. Although Talley concerned a different limitation than @ 3599.09(A) and thus does not necessarily control here, the First Amendment's protection of anonymity nevertheless applies. Section 3599.09(A) is not simply an election code provision subject to the "ordinary litigation" test set forth in Anderson v. Celebrezze, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564, and [*3] similar cases. Rather, it is a regulation of core political speech. Moreover, the category of documents it covers is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required information. See, e.g., First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776-777, 55 L. Ed. 2d 707, 98 S. Ct. 1407. When a law burdens such speech, the Court applies "exact scrutiny," upholding the restriction only if it is narrowly tailored to serve an overriding state interest. See, e.g., id., at 786. Pp. 9-14.

(c) Section 3599.09(A)'s anonymous speech ban is not justified by Ohio's asserted interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information. The claimed informational interest is plainly insufficient to support the statute's disclosure requirement, since the speaker's identity is no different from other components of a document's contents that the author is free to include or exclude, and the author's name and address add little to the reader's ability to evaluate the document in the case of a handbill written by a private [*4] citizen unknown to the reader. Moreover, the state interest in preventing fraud and libel (which Ohio vindicates by means of other, more direct prohibitions) does not justify @ 3599.09(A)'s extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden here. Pp. 14-20.
(d) This Court’s opinions in Bellotti, 435 U.S. at 792, n. 32—which commented in dicta on the prophylactic effect of requiring identification of the source of corporate campaign advertising—and Buckley v. Valeo, 424 U.S. 1, 75-76, 46 L. Ed. 2d 659, 96 S. Ct. 612—which approved mandatory disclosure of campaign-related expenditures—do not establish the constitutionality of @ 3599.09(A), since neither case involved a prohibition of anonymous campaign literature. Pp. 20-23.

67 Ohio St. 3d 391, 618 N.E.2d 152, reversed.

COUNSEL: For JOSEPH McINTYRE, EXECUTOR OF ESTATE OF MARGARET McINTYRE, DECEASED, Petitioner: MR. DAVID A. GOLDBERGER, Columbus, Ohio.

For OHIO ELECTIONS COMMISSION: MR. ANDREW I. SUTTER, Asst. Atty. Gen. of Ohio, Columbus, Ohio.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which O’CONNOR, KENNEDY, SOUTER, [*5] GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined.

OPINIONBY: STEVENS

OPINION: JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a "law . . . abridging the freedom of speech" within the meaning of the First Amendment.

I

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre’s opposition to the levy. There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAXPayers." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

n2 The following is one of Mrs. McIntyre’s leaflets, in its original typeface:

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave these what they asked. We knew there was crowded conditions and new growth in the district. Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children’s education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU.

CONCERNED PARENTS

AND

TAX PAYERS

[End Footnotes-]
distribution of unsigned leaflets violated @ 3599.09(A) of the Ohio Code. n3 The Commission agreed and imposed a fine of $100.

n3 Ohio Rev. Code Ann. § 3599.09(A) (1988) provides:

"No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

"The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words 'paid for by' followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title."

The Franklin County Court of Common Pleas reversed. Finding that Mrs. McIntyre did not "mislead the public nor act in a surreptitious manner," the court concluded that the statute was unconstitutional as applied to her conduct. App. to Pet. for Cert. A–34 to A–35. The Ohio Court of Appeals, by a divided vote, reinstated the fine. Notwithstanding doubts about the continuing validity of a 1922 decision of the Ohio Supreme Court upholding the statutory predecessor of § 3599.09(A), the majority considered itself bound by that precedent. Id., at A–20 to A–21, citing State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922). The dissenting judge thought that our intervening decision in Talley v. California, 362 U.S. 60, 4 L. Ed. 2d 559, 80 S. Ct. 536 (1960), in which we invalidated a city ordinance prohibiting all anonymous leafletting, compelled the Ohio court to adopt a narrowing construction of the statute to save its constitutionality. App. to Pet. for Cert. A–30 to A–31.

The Ohio Supreme Court affirmed by a divided vote. . . .

II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Talley v. California, 362 U.S. 60, 64, 4 L. Ed. 2d 559, 80 S. Ct. 536 (1960). Great works of literature have frequently been produced by authors writing under assumed names. n4 Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation [n12] may be, at least in the field of literary endeavor, the interest in having anonymous works enter the
marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. n5 Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

---Footnotes---

n4 American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms. See 2 W. C. Bruce, Benjamin Franklin Self-Revealed: A Biographical and Critical Study Based Mainly on His Own Writings, ch. 5 (2d ed. 1923). Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as "Elia"), and Charles Dickens (sometimes wrote as "Boz"), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon. See C. Ogbum, The Mysterious William Shakespeare: The Myth & the Reality (2d ed. 1992); but see S. Schoenbaum, Shakespeare’s Lives (2d ed. 1991) (adhering to the traditional view that Shaksper was in fact the author). See also Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373 (1992) (commenting on the competing theories).

[1*13]

n5 Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, it is not indispensable. To draw an analogy from a nonliterary context, the now-pervasive practice of grading law school examination papers "blindly" (i.e., under a system in which the professor does not know whose paper she is grading) indicates that such evaluations are possible—indeed, perhaps more reliable—when any bias associated with the author’s identity is prescinded.

---End Footnotes---

The freedom to publish anonymously extends beyond the literary realm. In Talley, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559. Writing for the Court, Justice Black noted that "persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Id., at 64. Justice Black recalled [*14] England’s abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. Id., at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," City of Ladue v. Gilleeo, 512 U.S. , (1994) (slip op., at 13), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court’s reasoning embraced a respected tradition of anonymity in the advocacy of political causes. n6 This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one’s conscience without [*15] fear of retaliation.

....

III

California had defended the Los Angeles ordinance at issue in Talley as a law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." 362 U.S. at 64. We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils. n7 Ibid. We then made clear that we did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils." Ibid. The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify @ 3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in Talley. As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

....

Ohio’s statute does, however, contain a different limitation: It applies only to unsigned documents designed to influence voters in an election. In
contrast, the Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances." Id., at 60-61. For that reason, Ohio correctly argues that Talley does not necessarily control the disposition of this case. We must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.

Indeed, as we have explained on many prior occasions, the category of speech regulated [*21] by the Ohio statute occupies the core of the protection afforded by the First Amendment:

When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. See, e.g., Bellotti, 435 U.S. at 786. Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.

IV

Nevertheless, the State argues that even under the strictest standard of review, the disclosure requirement [*24] in @ 3599.09(A) is justified by two important and legitimate state interests. Ohio judges its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. These two interests necessarily overlap to some extent, but it is useful to discuss them separately.

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. n11 We have already held that the State may not compel a newspaper that prints editorials critical of a particular candidate to provide space for a reply by the candidate. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974). The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.

Moreover, in the case of [*25] a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

n11 "Of course, the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' (Abrams v. United States, [250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) (Holmes, J., dissenting))). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." New York v. Duryea, 76 Misc. 2d 948, 966-967, 351 N.Y.S.2d 978, 996 (1974) (striking down similar New York statute as overbroad).

The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on @ 3599.09(A) to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. Ohio Rev. Code Ann. @@ 3599.09.1(B), 3599.09.2(B) (1988). These regulations apply both to candidate elections and to issue-driven ballot measures. n12 Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. n13 Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify @ 3599.09(A)'s extremely broad prohibition.

VI
Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. S. Mill, On Liberty, in On Liberty and Considerations on Representative Government 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See Abrams v. United States, 250 U.S. 616, 630-31, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly [*38] by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio’s blunderbuss approach than the facts of the case before us.

The judgment of the Ohio Supreme Court is reversed.

CONCURBY: GINSBURG; THOMAS

CONCUR: JUSTICE GINSBURG, concurring.

[omitted]

JUSTICE THOMAS, concurring in the judgment.

[omitted]

DISSENTBY: SCALIA

DISSENT: JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

[omitted]
The spy inside your computer

Electronic marketers can gain private information about Internet users through “Free Offer Outlet.”

‘Free Offer Outlet’ on ’Net can be costly

Every click of mouse helps electronic marketers, worries privacy experts

Do they really give stuff away for free? Actually, no. There is a price—
not in dollars and cents, but in information about yourself.

Every time you click the mouse, hit the “enter” key on your PC or press a button on your interactive-television remote, the signal can be captured by a computer, stored and analyzed.

Electronic marketers call it the “click-stream,” and they’re using it more and more. It gives merchants and advertisers a new way to gather personal information about potential customers who use the Internet, the World Wide Web or commercial online services like Prodigy and CompuServe. And it’s raising new concerns for privacy experts.

Combined with information from other sources, the click-stream can reveal who you are, where you live, and what you buy.

By Robert S. Boyd

Washington Post

WASHINGTON — You’re on-line at your computer, browsing the ‘Net, when you spot a label on your screen:
FREE OFFER OUTLET.


Not in dollars and cents, but in information about yourself...
about ‘click-stream’

CLICK STREAM
from Page 1F

what interests you, what you are willing to pay for and sometimes much more.

“There’s a lot of information that can be obtained about users without asking them to register or provide any information,” says a brochure by Internet Profiles, a recently formed marketing service. If you signed up on your office computer, for example, the tracker can check published databases to build a profile of your business. If you used your home PC or television, census data can provide a picture of the social and economic characteristics of your neighborhood, down to a dozen or so homes.

Such facts are precious to marketers. They can use the data to aim their catalogs, coupons or sales calls at specific households that have shown an interest in their products, instead of scattering them wastefully to a broad, anonymous audience.

Targeted marketing

Targeted marketing, as this process is called, clearly has benefits. It lowers costs. It reduces unwanted junk mail and those cold-calling telephone sales calls at dinner time.

But privacy experts worry that the electronic techniques for collecting personal information from your home or office computer—or even your television set—may threaten your right to be left alone.

Companies are developing tools—called “Nettrackers,” “Internet Profiles” and “Webtrac”—to monitor the click-stream.

Playboy Enterprises, for example, is using the Internet Profiles system to identify people who check out Playboy ads on the Wide Web. Their names and addresses are then be used for future ad campaigns.

In a speech last month, Rich Frank, president of the Academy of Motion Picture Arts and Sciences, pointed out the bright and the dark sides of the new world of electronic marketing saying “instant access.”

“You will have instant access to an enormous database, which will provide you with a consumer’s age, the number of children, color of hair, height, weight, credit card number, Social Security number and favorite soft drink,” added Frank, a former chairman of Walt Disney Television.

“As marketing executives, this is an incredibly exciting prospect,” he added. “You will know intimate details about millions of consumers.”

Then Frank paused. “At least, it’s exciting until you realize that you’ll also know intimate details about the companies and their intimate details will also be accessible to others.”

One of the companies working on the potential gold mine is Venture Communications Electronic Marketing Inc., New York, which runs the “Free Offer Outlet” on CompuServe. Venture also operates a similar “Free Offer Store on Product and a “Free Offer Catalog” on the Internet, the global computer network.

“The Prodigy connection alone , generated over 300,000 leads in four short months,” according to a Venture ad in Direct Marketing News, a weekly trade paper.

“You can use the name only and over again, as many times as you want,” said Ellen Gold, a Venture account manager. “It becomes your name to use.”

Asked if this invasion of privacy, Gold replied: “Consumers who use on-line services are educated and sophisticated. They know if they get something for free, their name is going to be used for marketing purposes.”

Invisible monitors

Nevertheless, the idea of invisible monitors is lurking behind your computer screen makes some people uncomfortable.

“I’d be unhappy if business is going to track me,” said Mark Leuchter, an Internet teaching expert. “They would know your Internet address and what you’re interested in.”

Telephone and cable TV companies are also monitoring people who use their experimental interactive television systems in their living rooms.

GTE MainStreet, for example, offers games, stock quotes, educational materials and shopping to 4,000 cable customers in Massachusetts and California.

“We have the ability to track key stroke usage on a household-by-household basis,” Thomas Gladly, general manager of MainStreet, told an advertising conference in February.

Companies using click-stream data insist they will respect the privacy of consumers, even though there are no federal laws protecting this information.

“There is an unspoken anxiety that we’re going to invade your privacy,” said Lawrence Plumb, director of Bessel Atlantic Video Services Company, which tracks responses to advertisements on its interactive television service in northern Virginia. “Shame on us if we do that.”

Privacy issues

GTE said his company gives out “aggregate usage numbers” instead of individual household data. Other companies that provide only names and addresses, not personal or financial information.

Privacy experts say it is all right to collect individual information as long as the consumer consents.

America Online (AOL), the largest on-line computer service, got in hot water last fall when it offered a list of 1 million subscribers to direct-mail advertisers. The data included names, sex, home and business addresses, income, children and other information about AOL users, obtained from forms they had filled out.

After users and members of Congress objected, AOL changed its policy. It now allows its members to “opt out” — that clare that they don’t want their names sold to direct marketers. CompuServe and Prodigy have similar policies.

Many users, however, are unaware of this policy or don’t take advantage of it. “Only a very small percentage of our subscribers are opt out,” said Michelle Murray, a CompuServe spokeswoman.

Financial markets may

RATES

from Page 1F

health of financial markets will exceed hopes that a prema-
ture rate reduction could feed infla-
tion later if, as he has predicted, the economy bounces back by the end of this year.

And a rate cut today or Thurs-
day could prove embarrassing to the Federal Reserve if unemployment figures for June, scheduled for release Friday, show a re-
bound in the economy.

The Federal Reserve is sched-
uled to receive an advance copy of the June unemployment fig-
ures, but until late Thursday afternoon. By then, its policy-set-
ing Federal Open Market Com-
mittee will likely have adjourned.

Fed officials are fond of re-
ming listeners that their shifts in short-term interest rates affect spending and investment decis-
ions—and therefore economic growth—with a lag of six months to two years.

Yet a quarter of a percentage point reduction in short-term in-
terest rates this summer, the scenario most commonly cited now by econo-
ists—would make little difference for the economy, but could have a big and immediate effect on financial markets.

Top Fed officials, including Greenspan, have been feeling the pressure for a reduction in short-

term interest rates this summer. Alan S. Blinder, the vice chair-
man of the Federal Reserve, noted in an interview last month that soaring mortgage and bond prices, and the accompanying fall in long-term interest rates, have partly counteracted weak growth elsewhere in the economy. The scattered signal of economic health in the last two weeks seems to have reflected lower interest rates in financial markets. For ex-

ample, the Commerce Department announced June 29 that sales of new homes had soared, 19.9 per-
cent in May, while mortgage rates were steeply in lock-step with interest rates in the bond market.

The conflicting pressures on the central bank have opened fis-
sures within the committee, with Clinton Administration ap-
pointees like Blinder and Janet Yellen, another Federal Reserve Board govern-
ror, expressing more,com-
War of the Cancelbots!
by Eric Schlachter, Esq.
schlachtere@cooley.com

With the storage of USENET archives, our public activities become a matter of public records. For example, through DejaNews, anyone interested in my public postings can conveniently read all my posts and develop a "profile" of who I am based on what I say and where I say it. If you will, our online postings create a textual avatar.

Privacy wonks will immediately decry the implications of such information being readily available. I, on the other hand, am a little more concerned about what might happen if my profile were somehow distorted or manipulated. What if pieces of my profile were edited out, so that people looking to develop a profile of me got a skewed or altered viewpoint?

The reality is that the technology exists today to affect a person's digital profile--cancelbots. According to the news.admin.net-abuse FAQ, a cancelbot is a program that users can use to cancel the posting of articles to USENET newsgroups. The cancelbot works by forging the identity of the original poster of the article; therefore, the cancel message sent to recipients of USENET feeds will appear to have been issued from the initial poster.

As the FAQ points out, the name "cancelbot" (or, more accurately, the "bot" part of the word) is a misnomer, as the process of forging the cancellation messages is not automated. Rather, the process must be initiated by a person, and its operation is sufficiently complex as to be unattainable by neophytes. However, as discussed below, there is no reason why the process needs to be manual. With the advent of smart agents, the ability to release cancelbots will presumably be attainable to any interested parties.

Cancelbots first came to the attention of the public in a widely publicized incident in 1993. A microbiology professor by the name of Richard DePew grew tired of anonymous postings on sci.-hierarchy USENET newsgroups. In response, he wrote a program that automatically canceled any anonymous postings to these newsgroups. In its 12 hour lifespan, it canceled one anonymous posting before exhibiting erratic behavior. For his efforts, Richard DePew was "mail-bombed" and became the subject of his own newsgroup sarcastically named "alt.fan.dick-depew."

However, cancelbots are no longer disfavored by some, primarily due to "spammers." Spammers are people who seek to post their articles to a vast number of newsgroups, many of which have no relationship to the content of the article. Spamming has been long disfavored on the Internet, but in 1994, spamming reached new heights of awareness with the spamming by Arizona attorneys Laurence Canter and Martha Siegel, who posted messages regarding immigration law issues to 5,000 to 6,000 of the 9,000 newsgroups then in existence. A firestorm of controversy about "advertising on the Net" ensued.
In response, the cancelbots were born. In particular, one notorious cancelbot is the "CancelMoose™" who, according to the net-abuse FAQ, "stepped to the fore" in mid 1994 to cancel spams of his or her own accord. In one well-publicized event, in December 1994 Michael Wolff spammed 150 newsgroups to publicize his book "Net Chat." A few days later, the CancelMoose™ canceled all these postings, and the message was never received by USENET readers following this cancellation.

All messages posted by the CancelMoose™ are run through an anonymous remailer in Finland, and no one knows his or her true identity. According to the net-abuse FAQ, the CancelMoose™ "has behaved altogether admirably--fair, even-handed, and quick to respond to comments and criticism, all without self-aggrandizement or martyrdom." In other words, the silent, benevolent censor.

The net-abuse FAQ takes great pains to portray these censorship efforts as being triggered only by quantity, not content. In other words, cancelbots are unleashed only when spamming is taking place. There are no fixed numbers for when a message constitutes spamming, but spamming is not really the core issue at all.

Certainly, it is possible to use this technology as it was intended--in Mr. DePew's case, to avoid noxious postings being sent anonymously, and the CancelMoose™'s case, to prevent spamming. But this technology can easily be used for less admirable purposes.

Such a use was illustrated in the recent case involving the Church of Scientology (CoS). For those who have not been tracking the CoS's activities, the CoS has been involved in a large number of Internet related incidents during 1995. Most prominently, CoS has been crusading against online criticism of CoS and the release of CoS official documents. This crusade has taken the CoS into the courts (in continuing litigation against Dennis Erlich, a former CoS minister, Netcom, and the syslog of a Hollywood BBS) and to Finland, where it was able to get local police to seize the records of the anonymous remailer there.

Starting in late 1994, messages critical of the CoS intended to be posted in alt.religion.scientology started disappearing. (Those who track such things say that the cancellations continue to today.) CoS detractors labelled the cancellations the work of the "CancelBunny," and ardently believe that the CancelBunny is the work of the CoS. Whatever the case, because the CancelBunny is used specifically to squelch CoS critics, it denies critics of the CoS the right to speak their mind in the forum of their choice.

More recently, in Summer 1995 an article appeared in the "Strait Times" entitled "How to Keep Singaporeans Out of Dark Alleys of Internet?" This article discusses the dangers of information made available on the Internet. However, the author closes by advocating a "self-help" remedy--"a solitary crusader can clear the slate of smut....[Like the CancelMoose™,] any Singaporean Netizen, a citizen of the Internet, with technical savvy can follow suit. It would be in the public interest."
Apparently, to the author of that article, censoring based on content would be "in the public interest." Clearly, there are those who believe they have the right and obligation to use the cancelbot technology to enforce their private objectives.

As much as I fear the dangers of such thinking and its implication on civil liberties on a global scale, I also fear the application of such thinking on a personal level. Imagine that a person decided to use the cancelbot technology not to enforce their will on society at large, but rather to affect the digital persona of a specific individual.

Let's discuss how this could occur in practice. Imagine Tom really dislikes Harry. Tom decides to exact his toll on Harry by releasing a cancelbot that cancels every public posting Harry makes. Through his cancelbot, Tom has denied Harry the ability to express his viewpoints to the Internet community. As the Internet community becomes ever more ubiquitous, squelching a person's right to access the online community would destroy their digital persona—in effect, make them a nonexistent person in the community.

Further, it is not clear that such activities would be illegal under existing laws. The rules involving free speech protections in this country under the First Amendment apply only to government actors, not private individuals such as Tom. Statutory solutions, such as anti-harassment laws, may be stretched to fit the situation, but few of these laws have been updated to reflect the ways people can harass online. Laws may be updated to criminalize this behavior, but there are added complexities—if Tom uses an anonymous remailer, so that Tom cannot be easily located, or is located in a jurisdiction beyond the reach of the applicable laws, then Harry may lack any meaningful legal remedies.

I suspect the result will be that Harry will find a technological solution. One such approach might be to cancelbot the cancelbot, or to forge a message that cancels the cancellation. More abstractly, Harry will rely on his protective cancelbot to fend off the offensive cancelbot and find a way to get his message through. In other words, I see the war of the cancelbots, and like other technological battles being waged on the Net (hackers v. security, copyright holders v. pirates), there will be a constant spiral of escalating technologies. Who said the Cold War was over?

Ironically, given that cancelbots now exist and are very effective, it is a little surprising that we have not seen more abuse of their power. Perhaps this reflects a willingness to tolerate speech on an individual level, which has otherwise been repressed as technophobes seek legislative solutions intended to tailor the online content to conform to their viewpoints. Or perhaps this reflects the persistence of the Net culture, which admires its technology but condemns its abuse. In an age of questionable ethics and constant fear, perhaps the surprising restraint shown so far with respect to cancelbots provides us with some optimism that our collective efforts can develop community norms more powerful and admirable than could be achieved by laws and codes. And as for now, my digital persona still seems to be safe—except maybe from the Singaporeans...
About the author: Eric Schlachter is an attorney practicing in cyberspace law with the Silicon Valley law firm of Cooley Godward Castro Huddleson & Tatum. He has a law degree and an MBA in Entrepreneurial Finance from UCLA. He is an adjunct professor of Cyberspace Law at the University of San Francisco School of Law. He can be reached at schlachtere@cooley.com. The views expressed herein are the author’s own and do not necessarily reflect the opinions of his employer.
LEGALLY ONLINE by Lance Rose

ANONYMITY ONLINE: ITS VALUE, AND ITS SOCIAL COSTS

The online world presents a number of opportunities for people to go under cover. Digicash, an electronic money system invented by David Chaum of Belgium, allows people to buy things online without revealing their identities — just like using hard cash. In USENET, people vent their opinions in newsgroups without showing their faces, using anonymous remailer services to cover their tracks. In role-playing environments on BBSs and MUDs, people parade around in all kinds of identities, none of which may correspond in sex, psychology or temperament with their physical personas. Electronic voting and polling systems are being designed to determine our preferences without finding out who we are.

These examples illustrate that anonymity is an important feature of the online environment. But just what is “anonymity?” Is it the same as privacy? Not exactly. Being anonymous means you can act in socially significant ways without being identified, while having your privacy means removing yourself from social environments. That said, there is certainly a strong relation between the two; when you’re anonymous, it can be said that you’re keeping your identity private from others. Many of the social issues presented to us every day as “privacy” issues, such as the problems of large companies keeping databases on consumer lifestyles, and whether government should use Social Security numbers and other identifiers to keep track of us, are really “anonymity” issues. They are rooted in our desire to move through the world without a trace, when that is our preference.

What about “pseudonymity” — acting under a name or identity different from your own? This can also be seen as a form of anonymity, since people don’t know the “real” you when they take your pseudonymous identity on the Net at face value (a theme explored in Vernor Vinge’s excellent sci-fi story True Names). But at the same time, your pseudonymous persona can take on a life of its own. At that point, anonymity vanishes, because the new, pseudonymous entity is a real person in his or her own right as far as other people are concerned (a theme explored in Orson Scott Card’s excellent sci-fi story Ender’s Game).

To understand anonymity on the Net beyond merely defining it, we must move on to ask about its value to society. Does anonymity have a positive social value, or is it just some kid’s game, a way to hide from responsibility? This question was at the core of McIntyre v. Ohio Elections Commission, a case decided by the U.S. Supreme Court just as we went to press this month.

The case concerned the political efforts of Ohio resident Margaret McIntyre. She created leaflets opposing a proposed school tax levy on her home computer, and distributed them at meetings on the measure held at a local school. Some of the handbills identified her as the author, some did not. A school official at the meeting, who supported the tax proposal, told Ms. McIntyre that the anonymous handbills violated an Ohio election law requiring all printed materials directed at political matters to include information identifying their publisher. She disregarded this advice, and distributed her materials again at subsequent meetings. The tax levy in question ultimately passed after three votes, foiling Ms. McIntyre’s efforts. However, her opponent the school official was not content with winning the issue, and complained to the Ohio Election Commission about her anonymous handbills. They agreed with him and fined Ms. McIntyre $100 for failing to identify herself.

She challenged the fine in court as a violation of her First Amendment right to speak on political issues. The case went all the way up to the Supreme Court, which ultimately agreed with Ms. McIntyre (though she passed away before its decision), and invalidated the Ohio law. As U.S. citizens we have a First Amendment right to distribute our political speech anonymously. The Court referred to this as a “core” 1st Amendment value. The State of Ohio insisted that its identification law was necessary, because it helped prevent fraud, falsity and libel by dishonest political publishers. However, the Court felt this did not justify a blanket state requirement that publishers of all political handbills, whether or not they are marked by these evils, must be identified. In reaching this decision, the Court identified several valuable purposes served by anonymous political speech.

One is to promote the creation of valuable works of literature and art. Some of the most important creative contributions to our culture are also, at the time of their creation, some of the most scandalous and provocative stuff around. This ability to shake society is often part of the measure of great works. At the same time, the creators of some of these great works might not fare too well socially if identified to the public at large, especially if they’re the type to shy away from the light. Thus, as the Court states, “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public inter-
est in requiring disclosure as a condition of entry."

Another valuable purpose for anonymity is promoting and protecting political speech that would otherwise be suppressed due to fear of reprisals. The potential risk involved in just speaking your mind is almost limitless, as currently demonstrated by recent killings of popular Algerian Rai musicians by Islamic fundamentalists, and the ongoing death order against author Salman Rushdie, all simply for criticizing Islamic practices.

While such retaliations, in the end, may goad those who speak out to continue against such oppression despite the risk, the entire process points toward social instability and revolution. In contrast, here in the U.S., the Constitutional tolerance for speech enables those with criticisms about the ruling regime to air their views without the very fact of speaking pushing us to the edge of chaos (whether this renders the speech impotent or fosters its effective introduction as an agent of change into the mix of social thinking is another question).

Preventing government from looking behind the shield of anonymity furthers this goal. If the OBEAT and critical elements of our society get to have their say, we can avoid needless rebellion based on the mindless tactic of just trying to shut them up.

The other value for anonymity cited by the Supreme Court is that it promotes the consideration of ideas, without bias from knowing who the ideas came from: "Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not pre-judge her message simply because they do not like its proponent." As the Court pointed out, many of the views in the Federalist papers, from which much of the grounding philosophy of U.S. government derive, were anonymously published.

All these are only some of the ways in which the right to speak anonymously puts the "freedom" in freedom of speech. There are other valuable functions to anonymity which the Court left out, likely because they don't come up in political leafleting. Perhaps the major one is protection of whistleblowers. Plenty of distasteful enterprises merrily avoid detection based on the generous promise to all involved that anyone who squeals gets hit. All whistleblowers, other than martyrs, the foolish and the powerful, need total anonymity in order to reveal secret transgressions to the public or the authorities. With the rise of online communications making anonymity easier to achieve, whistleblowing is becoming more popular than ever. Indeed, online services have been set up expressly to serve as a place to serve up awful secrets without fear of retribution. While whistleblowing does not directly further the discussion of political ideas, its function is clearly of the utmost value in society, and its protection through a right of anonymity is hard to question.

Anonymity on the Net also enables people to explore parts of themselves in ways they could not do otherwise. One's job may be serious and burdened with responsibility, but online you can act like a free spirit. In family and business situations you may be inhibited against saying a single nasty word, but online you can carouse, if you want, with a saltier crew. This can be a very healthy process for some people, freeing them from needless rigidity and narrow-mindedness that can set in from the daily offline routine. Anonymity is the tool that can let people explore themselves this way, without worrying about the clash between different parts of their lives if someone they know in the physical world finds out about some other side they reveal online.

Many people take this further, using anonymity tools not to be totally anonymous, but to be someone else, usually of their own creation. If you go online today you will find boys pretending to be girls, girls pretending to be boys, teenagers pretending to be parents, invalids pretending to be action heroes, whites pretending to be black, blacks pretending to be white, and so on. Actually, if they're good at it, you won't find them.

Beyond the play aspect of this activity, it also has great social value. The heightened anonymity capabilities online permit people to explore the lives of others who are different from them in important ways. Many men and women who explore online dressed up as the other gender remark on how different the entire world of human relationships looks from the other perspective. Call me foolishly optimistic, but it seems inevitable that this kind of process can increase our empathy for each other, our ability to identify with others' points of view, and teach us how much more similar (though certainly not identical) we all are internally when the factor of individual perspective is partially pushed aside.

Finally, anonymity is becoming recognized as an essential feature of online commerce. Not all commerce needs to be anonymous, but neither must the buyer and seller in every transaction be traceable by the entire world. When I buy a stick of bubble gum at the local news stand, the seller may notice the transaction and my part in it momentarily, but all knowledge of the transaction will surely soon pass beyond memory. Anonymity is innate in such physical events, and we are comfortable with it.

But online, anonymity is optional. The question of its role in commerce is being newly visited, spurred by the efforts of demographics companies to pick up and tabulate every trace of our online wanderings. At this point, it appears there will be effective ways to retain traditional levels of anonymity at every level of commerce, from the stick of gum to the megabuck financing, though in many cases it may only be available for a price. Anonymity is probably a good thing in this case as in the others already described, though here it is not used in aid of free speech, but to enable efficient and productive commerce online.

Anonymity is not entirely a bed of roses. Its opponents argue that once you remove the possibility of reprisal for anonymous acts, it encourages people to act irresponsibly. The bad things that could happen include:

(1) the "doomsday scenario" — those who conceal their identities could lead traitorous and terrorist activities, and foment riots and unrest, with responsible authorities unable to respond adequately;

(2) more mundane crimes of all sorts can be furthered if the criminals can organize and execute crimes without fear of being identified;

(3) tax evasion on a grand scale — people and businesses can shift their income-related activities anonymously online, largely frustrating the tax collection efforts of land-based govern-
ments, and perhaps their continuing existence; and

(4) civil wrongs of all kinds could be committed with impunity — libel, fraud, copyright infringements, etc.

In addition to encouraging irresponsibility, far-reaching anonymity may also pose an obstacle to achieving a real online community. How cooperative and trusting can a community be if its participants all hide behind masks of anonymity keeping us from finding out who we all really are?

The benefits of anonymity and its potential for creating problems are both real enough, and they are in direct conflict. It’s not a mere misunderstanding. The problems do not disappear when you recast the issues in new terms, or enlighten each side about the concerns or needs of the other. Simply put, the feature of unaccountability which makes anonymity so attractive for many important social goals is also what creates the risk of irresponsible and dangerous activities. How do we resolve this conflict? How do we weigh the value of anonymity against the social costs created by those who would use the power of anonymity irresponsibly?

So far, three approaches to resolving the social issues of anonymity have been advanced. The first is a right of total, uncompromised anonymity. The thinking here is that anonymity is so valuable for society and for individuals that we all just have to live with it.

The second approach advocates a highly compromised right of anonymity. Everyone who goes online would have to register their identity somewhere. Those records would be about as hard, or easy, to review as credit reports are today. In effect, there would be no true anonymity at all. This approach emanates from those who are the most afraid of what anonymous people might do, and those who stand the most to gain from a low level of anonymity, such as government and commercial interests.

The third approach is anonymity that could be pierced only when the guardians of society, such as the FBI and other police groups, decide that specific anonymous actors pose a danger to society. This is an extension of the Clipper scheme, in which Clipper users must stow copies of their encryption keys with government agencies, for the express purpose of yielding them up to law enforcement agents upon properly delivered demand. In the version applicable to anonymity, information about each anonymous actor’s true identity would be recorded on some trusted server, again yielding up that information only to properly authorized government agents. The rationale for this approach is that many of the benefits of anonymity can be realized, while
government
retains the ability to act against those who use anonymity irresponsibly. Of course, it also requires trusting the government never to misuse its power to figure out who’s who.

These simple-minded solutions are clearly the first ones people think up, but they are all seriously defective. Total anonymity leaves irresponsible people free to wreak havoc. Highly compromised anonymity oppresses speech, self-realization, societal enlightenment and electronic commerce. Anonymity with a government back door forces us to trust the government completely, despite the serious lapses in government conduct regularly trumpeted by the media.

There might be another way: instead of cutting back on our ability to act anonymously, perhaps we can arrive at some system of spreading the social costs. This would allow the unrestrained use of anonymity for purposes that benefit society and its members, with a mechanism to cover losses caused by those who misuse the privilege. Is it possible to model such a system after state auto insurance schemes, where the state requires everyone with a car to carry insurance? Just as everyone who wants to drive a car has to pitch into a fund that pays for accidents, those who want to “drive” anonymously online would have to pay into a fund that covers injuries caused by misuse of anonymity.

An intriguing idea, but one with its own set of issues. Would everyone pay into such a fund, or just those who wish to operate anonymously? If the latter, would enough people be interested in paying for insurance to make the premiums affordable? How do we prevent recidivism among those who cause injury anonymously — cancel the old anonymous i.d., so they have to buy another one and pay another insurance premium (that doesn’t seem to provide a lot of discouragement)?

What about those who would anonymously injure themselves to collect on the insurance, such as by anonymously infringing their own copyrights? And perhaps the most difficult problem for an insurance-style solution: would — the fact that many of the injuries due to anonymous messages (including major disasters like the Oklahoma City bombing) are deliberate, instead of the accidental injuries and deaths covered by auto insurance, make the premiums insurmountably large?

These problems are not intractable, but they are not necessarily fully solvable, either. There may be a technological fix for some, and some adjustments in the laws applicable to online injuries may help as well. The important thing is that we need to start working through the insurance approach to solving the social riddle of anonymity, and any others that might be suggested. In the process, the true value of anonymity in society will be clarified and appreciated, and the chances for a more equitable balance between anonymous freedom and responsibility will be reached.
response password systems are far superior. Because the passwords are never transmitted over the Internet and never used again, sniffer attacks are rendered impotent. The U.S. Department of Defense uses a system called Lock, which is also commercially available as an integral adjunct to type-enforcement mechanisms. Such a system provides a high degree of confidence with respect to identification of participants in electronic conversations.

In mid-1994, Firewalls and Internet Security by Cheswick and Bellovin appeared on the scene and was quickly regarded as the definitive work on the subject of firewalls. The problem, however, is that the Cheswick/Bellovin book takes no note of type enforcement, assured pipelines, or the concept of defense in depth (willing to sacrifice a pawn to save the king). The entire solutions-oriented subject treatment is based on technology that has been largely superseded by the advanced principles of type enforcement.

However, the authors do an excellent job of describing 42 so-called bombs that must be considered when implementing any Internet routing device or firewall. This is an education in itself, and despite its deficiencies the book should be on everyone's shelf.

If you are considering connecting your company to the Internet, do not do so hastily. You can get on the Net safely, securely, and with a very high degree of confidence that your information assets remain private and intact. However, as with anything, there is a right and wrong way. Here are some tips:

- Consider your risks—honestly.
- Consider the benefits—conservatively and carefully.
- Make a plan—accurately and detailed to the last connector and RAM chip.
- Provide an adequate budget for purchase, installation, maintenance, upgrade, and administration. If you're going to skimp, wait until the next budget cycle.
- Administer correctly, regularly and follow corporate policy.
- React quickly when under attack—and if so inclined, strike back.

Wien Schwartau (p00506@psilink.com) is executive director of Inter-Pact Inc., an information security consulting firm in Seminole, Fla. He also is the author of Information Warfare: Chaos on the Electronic Superhighway.

---

CASHING IN

THE RUSH IS ON TO MAKE NET COMMERCE HAPPEN

By Lisa Morgan (203) 731-2502
info@mecklermedia.com; http://www.Internet-world.com. All rights reserved. Reprinted with permission.

The Internet is capable of becoming one of the most powerful business and financial tools of our time—if the process becomes simple and complete enough. Some businesses launched on the Net sell goods and services, but the buyer must send a check via regular mail to complete transactions. Although this is a viable method for some applications, a richer suite of payment mechanisms is needed for the broader range of business that will be conducted on the Internet.

Like the traditional off-line market, buyers and sellers want a variety of options such as credit cards, debit cards, and cash—or in this case, digital cash. To meet this demand, a host of new companies are vying to establish their technologies as the means for conducting secure Internet commerce.

Online commerce has existed in the form of EDI (electronic document interchange) since the mid-1980s. EDI applications are transaction-oriented, ranging from government RFPs (Requests for Proposals) to purchase orders. EDI is in use throughout several major industries to automate and simplify the otherwise paper-intensive process of doing business. While performed today via secure Value-Added Networks, it is questionable to what extent EDI applications will translate to the Internet, especially since many of the transactions involve large sums of money. A convergence is on the horizon nevertheless.

What's Available, What's Coming

CommerceNet, introduced in March 1994, is an industry consortium organized into working groups. Its members comprise an intriguing mix of Silicon Valley semiconductor manufacturers, software companies, financial institutions, information providers, and businesses of varying size. The consortium is a hothouse for electronic commerce and a great source of information, especially for businesses. As of October 1994, CommerceNet had more than 50 members and 15 subscribers (small to midsize companies).

Cisco Systems and Premenos Corp. recently announced a secure electronic commerce experiment that should be ready in early 1995. The system uses RSA Data Security Inc.'s public-key cryptography.

CyberCash Inc. is a well-funded start-up combining the talents of Dan Lynch and William Melton (see "Building Trust" in this issue). Lynch converted the ARPAnet—the predecessor to the Internet—to TCP/IP back in 1983 and has continually demonstrated his abilities as an Internet visionary.

Melton is the founder of Verifone, a company that made real-time credit-card verification a reality for retailers. Together they are working on a model for Internet commerce that will accept digital cash, credit cards, or debit cards. Expect to see
make its official debut in the spring of 1995.

DigiCash was founded by Dr. David Chaum. The company pioneered E-Cash, a software-only product that allows digital cash transfer over the Internet. E-Cash was developed for smart cards and electronic wallets—used in tollbridges, for example. DigiCash will supply the technology through other organizations, including Encyclopedia Britannica and NCSA (National Center for Supercomputing Applications), which will release the products under various cooperation and trial programs. The user software, which allows both paying and receiving payment, will be distributed free of charge. DigiCash will encrypt transactions and ensure anonymity.

First Virtual Holdings Inc. is attempting to become the first Internet merchant banking system. The company brings together the Hollywood business savvy of Lee Stein, First Virtual’s president and CEO, and three of the leading Internet gurus: Dr. Marshall T. Rose, Dr. Nathaniel S. Borenstein, and Einar Stefferud.

Stein, an attorney and accountant, provides financial advisory services to the music and entertainment industries. First Virtual principal Rose, one of the Internet wunderkinds, has written the book (actually several of them) on SNMP (Simple Network Management Protocol) and network management. Borenstein, the chief scientist, is the primary author of the MIME (Multipurpose Internet Mail Extensions) protocol that allows transfer of anything digital over the Internet, including multimedia documents. Stefferud, probably the world’s foremost expert on e-mail, has the role of chief visionary.

Introduced and online in October 1994, the First Virtual payment system allows any Internet user to initiate retail transactions via e-mail. The system aims to help maintain Internet culture by allowing buyers to evaluate information prior to committing to a purchase, which is a concept similar to shareware. No sensitive data is exchanged online in First Virtual’s system. Users set up accounts by telephone or fax, and credit-card payments are processed offline.

Registration fees are $2 for consumers and $10 for sellers. For each transaction, sellers pay a 29-cent fee plus two percent of the transaction price and a $1 processing fee each time a payment is made to their account. Initial First Virtual merchants include Internet Resources Group, Internet Multicasting Service, and an Internet newsgroup filtering service founded by David Farber, an Internet luminary. The Department of Commerce is also considering adopting the system to offset distribution costs of electronic documents.

The Internet Shopping Network was founded by its president, Randy Adams, who formerly was CEO and chairman of IAT Inc., a publicly held international education and training organization. The company, which was recently acquired by the Home Shopping Network, is an online microcomputer software and hardware superstore available to anyone with direct access to the Internet. Internet Shopping Network distributes more than 20,000 computer software and hardware products, plus InfoWorld, a computer news weekly. Membership is free, and prospective members need only pre-register with an approved Visa or Master Card.

Microsoft is also getting into the act. It recently announced a venture with Visa International that will enable Windows users to make secure credit-card purchases over the Internet using software co-developed by the two companies. The software will be based on RSA Data Security’s encryption technology and Visa’s VisaNet system will be used to authenticate payments. According to Chairman Bill Gates’ Fall Comdex ’94 speech, a “Wallet PC” that handles financial transactions and other consumer retail interactions may also be part of our future.

Netscape Communications Corp., which provides an enhanced commercial World-Wide Web browser, announced that it will support credit-card purchases via the Internet through credit-card processor First Data Corp. The Netscape system uses RSA’s encryption technology to scramble sensitive data. Merchants can purchase Netsite server software for $5,000, and buyers can access the system through free client software.

NetCash is another secure Internet project under way. Developed at the Information Sciences Institute (ISI) of the University of Southern California, it is a model for electronic currency that can be anonymously transferred over an unsecure network without the use of firewalls. NetCash allows service providers and users to select payment mechanisms with varying degrees of anonymity.
The percentage of businesses accepting debit cards will be higher than in the off-line marketplace.

Unlike most electronic cash systems in which only one financial institution generates and accepts its own digital cash, NetCash is designed to support the transfer of electronic cash between currency servers. At this time, NetCash has not yet been made commercially available.

Open Market is another secure Internet transactions venture. The system supports secure payment, real-time credit-card authorization, account statements, administrative interfaces for storefront management, and a customer feedback mechanism. The company offers "document fingerprinting," which automatically and uniquely numbers documents so that fraudulent distribution can be tracked.

Open Market's StoreBuilder kit ranges in price from $300 to $1,500 for setup and $50 to $300 in monthly fees, in addition to transaction fees and additional storage fees. Buyers can set up an account by sending credit-card info over the Net or by phone and fax. Open Market uses password and encryption schemes to secure its accounts.

Finally, Terisa Systems is a joint venture of EIT (Enterprise Integration Technologies) and RSA Data Security that is dedicated to producing a secure Mosaic product suite for Internet commercial transactions (see "Business Browser" in this issue).

Connecting Financial Systems

Electronic commerce players are teaming up with banks, credit-card, EDI, and software companies, and more to create an infrastructure that can support business over the Internet. EDS, Visa, and First USA—which have teamed up with First Virtual—intend to stake a claim in the online transaction business. In fact, participation from this type of company is necessary so that people can buy goods and services in real time.

To make Internet commerce viable on a mass scale, it is necessary to connect the world's financial systems. Given that security is imperative to these organizations, why are they willing to risk doing business on the Internet?

CyberCash and First Virtual are not directly connecting the Internet to the global financial networks. CyberCash will use an intermediate highly secure server that is connected to both networks. First Virtual's system maintains security without having to use the encryption or signature technologies that the other systems employ. The system separates business on the Internet, which is insecure, from the bank processing system through firewalls and off-line batch processing handled by EDS, one of the world's leaders in banking transactions.

No Numbers, No Crime

Credit cards are currently the most popular way to buy something on the Internet. This method is too dangerous to be practical, according to First Virtual's Rose and Borenstein.

"It's very easy to write a program that looks for a sequence of numbers beginning with a known credit-card prefix," Rose said. That is why First Virtual never requires a potential information merchant or consumer to send credit-card or checking-account numbers over the Internet. Instead, First Virtual customers enter these numbers using an automated phone system to set up a First Virtual account.

The Internet Shopping Network also keeps credit-card information off the Net. Members enter their credit-card numbers using phone or fax when they first establish an account. Open Market's system also includes this option.

CyberCash deals with the problem using encryption. Its customers will have a public key and a private key and must use both to complete a transaction. The company will also use authentication and digital signatures for added security.

Debit cards can be used for Internet-based financial transactions today because the technology is in wide use among banks and retail points of purchase. It is likely that the percentage of businesses accepting debit cards for Internet purchases will be higher than the existing number in the off-line marketplace because no special hardware is required.

At the October World-Wide Web conference in Geneva, DigiCash CEO Chaum demonstrated how anyone with a personal computer could transfer DigiCash's E-Cash to any other workstation via e-mail on
the Internet. The E-Cash system was shown integrated with Mosaic.

Digital cash is the binary equivalent to currency. It differs from credit and debit cards because it enables anonymous transactions.

"How much money are you willing to lose?" asked CyberCash's Lynch. "You don't, and I don't. walk around with $10,000 in your wallet. Usually people carry around what they are willing to lose. The same will be true for digital cash."

According to Chaum, DigiCash has a solution to the problem. "E-Cash is as secure as any government network because it employs the same underlying security mechanisms," he said. E-Cash ensures the high security required for electronic networks exclusively using "blind signature" technology, an innovation in public-key cryptography.

**Internet-Savvy Business**

CyberCash is targeting banks and businesses, the Internet Shopping Network and Open Market are targeting businesses and consumers, and First Virtual is targeting all these and the government. In any case, it appears that there will be a solution for just about everyone.

Over the past 18 months or so, organizations have been setting up WWW and Gopher servers to distribute product and company information. Businesses clever enough to have pointers strategically located to and from other points on the Internet have taken the first steps in doing real business on the Internet, but that's just the beginning.

For businesses, the Internet represents the cheapest new business opportunity in history because many of the high costs of doing business—shipping, warehousing, duplication, and distribution—are handled at a fraction of the cost using servers and the network.

That said, businesses will not drop existing products and channels of distribution just to go online. It is very conceivable, however, that many businesses will use the Internet as an alternative form of distribution because of its large reach and relatively low cost. Many more small entrepreneurial businesses also will likely emerge if the Internet proves to be a viable business alternative.

---

Lisa Morgan (4727130@mcm.com) is president of Corporate Communication Strategies, a Silicon Valley-based firm that provides business development and marketing services to high-technology companies.
E-Cash: Can't Live With It, Can't Live Without It

American Lawyer, February 1995

David G. Post

Download a plain text version of this article, with sidebar?

With some twenty or thirty million individual users, and twenty thousand businesses, already linked electronically to one another, and thousands more arriving on the scene each day, the Internet's potential as a marketplace—a place where buyers and sellers can come together to exchange goods or services for value—is vast. It is thus no surprise that businesses are rushing headlong onto the Internet (even if most of them have not quite figured out what they will do when they are there).

But the thousands of willing sellers (of everything from books, magazines, computer programs, and other information-based products to more tangible items) hawking their wares online face a problem: how will buyers pay for these goods and services? What is the currency that will serve as the medium of exchange in this new marketplace? At present, there is no secure way to effect payment of the public Internet, and so users are forced to go off the 'Net to make the purchase—mailing the seller a check or phoning in a credit card number.

Eight hundred years ago, give or take a few, the merchants of medieval Europe faced a similar problem when trying to unlock the commercial potential of the continent-wide marketplace. After the fall of Rome, with Europe divided up into dozens of competing sovereignties, long-distance commerce came to a virtual standstill for hundreds of years. Merchants and traders seeking to exploit this new territory faced any number of seemingly insurmountable obstacles—e.g., the difficulty of obtaining protection against armed and organized marauders, conflicting local laws and customs regarding commercial practices, and incompatible and convertible currencies.

To circumvent some of these problems, these medieval merchants invented, in effect, a form of private money: negotiable instruments (promissory notes, bills of exchange, and the like). The merchant-developed commercial law surrounding use of these instruments, incorporated into the lex mercatoria in the early middle ages, stands as one of the truly remarkable achievements of the western legal tradition and one of the critical turning-points in the history of the expansion of trade and commerce.

We may be on the verge of a similar sort of development today, but one that, in keeping with the general acceleration of all things technological, is likely to take far less time to conclude than the centuries it took for the commercial payment system to evolve. Although I am generally loathe to make predictions about future developments on the Internet (other than a forecast of continued rapid growth and activity), one prediction may stand as an exception to this general rule: I am virtually certain that we will soon find true electronic cash ("e-cash")—digital tokens accepted as the equivalent of legal tender [See sidebar]—circulating over the Internet's wires.

Don't take my word for it. Microsoft's Bill Gates, a man with a fairly good track record at predicting future technological developments (if only, perhaps, because he has the resources to will them into existence) calls the "electronic wallet"—a microchip storing e-cash, credit card information, and various other tidbits of information one might like to carry around in one's pocket—his "favorite idea," and everyone from Microsoft to financial services giants such as Citibank and Visa International—and dozens of smaller and (currently) less well-known operations—is hard at work developing its version of the currency of the future.

is not hard to see why. Existing paper money, to be sure, is inconvenient (physically cumbersome, difficult to transport and process, easy to steal) and it has been steadily losing "market share" to other payment systems (checks, credit cards, electronic funds transfer) that seem better suited to the needs of the modern world of electronic commerce.

431
But shorn of these disadvantages, cash is pretty wonderful stuff: portable, instantly recognizable, instantly accepted by everyone without any of the overhead associated with the other payment systems, and entirely anonymous. And any form of cash that can retain these features and be utilized in the world of electronic commerce is going to prove extremely attractive. It also will likely earn its developers significant amounts of money, digital or otherwise.

So what, you ask? So Microsoft (or others) finds some way to issue e-bills, earns billions of dollars in transactions fees, and helps transform the Internet into a kind of Home Shopping Network in overdrive -- why should the law or lawyers pay this any mind?

Because e-cash poses, appropriately enough, a binary choice for regulators and other law-enforcement types that will do much to determine the ultimate fate of lawful activity on the global network.

As a result of the very features that make it so attractive, cash has always occupied a somewhat unstable and uncomfortable place within the existing legal regime. Anonymous and virtually untraceable, cash transactions today occupy a place in a kind of legal netherworld, an underground domain where the law is an uncertain presence.

Because paper money in large quantities is indeed so cumbersome to use and manipulate, this underground economy is generally confined to relatively small-scale transactions. (Some large-scale drug operations and other organized crime are the obvious exceptions). So long as the transactions are mostly small, they can, perhaps, be tolerated by the state as an unfortunate, but largely insignificant, by-product of the modern commercial state. As transactions get larger, the state becomes more suspicious, and enlist the aid of the banks, through the currency reporting and anti-structuring laws, in reporting large disbursements of cash so that additional oversight can be ordered.

Anything that makes cash substantially easier to use in a substantially broader range of transactions holds the potential to expand this extra-legal netherworld to proportions posing ever more serious threats to the existing legal order. Under the most ambitious visions of e-cash, we would see a new form of a currency--units of money in the form of digital files instead of engraved notes that could be freely passed off from one computer to another with no record, yet incapable of being forged. A consumer could draw such e-cash electronically from his or her bank. The bank would have a record of that transaction, just as a withdrawal or check is recorded now. But after that, the encrypted e-cash file could be handed off without the knowledge of anyone but the parties to the transaction (see sidebar).

Consider the impact of this on taxation. Transaction-based taxes (e.g., sales and use taxes) account for a significant fraction of state and local government revenue, and Congress itself is considering implementing a transaction-based national sales or valued added tax. But if electronic money really is made to function like paper money does, payments we would never think of making in cash--to buy a new car, say, or the down payment on a house--could be made in this new form of currency because there would be no problem of bulk and no risk of robbery.

From the government's standpoint, if much larger and more significant transactions could be effected safely and securely by an electronic means that leaves no more of a paper trail than cash does today, that could eliminate records of many taxable transactions. The threat to the government's revenue flow should such schemes be implemented is a very real one (and officials at the US Treasury Department, at least, are starting to take cognizance of this development and to prepare their responses).

Perhaps the banks and the public will never have enough confidence that the most powerful, untraceable, forms of e-cash can be safe from forgery. But e-cash's proponents think the technology will prove trustworthy. If it does, the government may move to prevent any truly anonymous and untraceable e-cash system from developing. But that raises its own problems because, as we escape the Scylla of the Underground Economy, the Charybdis of Big Brother rears its ugly head. Just as powerful encryption schemes permit the design of radically untraceable e-cash systems, so, too, do powerful electronic record-keeping tools permit the design of equally traceable systems -- systems where all of your financial transactions are duly recorded in the Great Database, allowing those with access to know more about you than anyone could know today.
However the politics and business of e-cash play out, the technology is far enough along that the legal issues can't be avoided. The question e-cash poses is not, "Should the law take cognizance of this development?" but rather, "How can it not?" By pointing an arrow at the heart of the state's revenue-raising capabilities, e-cash cannot escape scrutiny and regulation; but it is going to take some serious thinking to design a regulatory scheme that does not fulfill our worst fears about the personal privacy implications of the new digital world.
SECTION 9

FOURTH AMENDMENT/ECPA
STEVE JACKSON GAMES INCORPORATED, et al., Plaintiffs, v. UNITED STATES SECRET SERVICE, UNITED STATES OF AMERICA, et al., Defendants

NO. A 91 CA 346 SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS, AUSTIN

816 F. Supp. 432; 1993 U.S. Dist. LEXIS 3378

March 12, 1993, Decided

JUDGES: Sparks

OPINIONBY: SAM SPARKS

OPINION: [*434] Opinion

I. Facts


The individual party plaintiffs are residents of the states of Texas and New Hampshire, and the corporate plaintiff is a Texas corporation with its principal place of business in Austin, Texas.

The Plaintiff Steve Jackson started Steve Jackson Games in 1980 and subsequently incorporated his business. Steve Jackson Games, Incorporated, publishes books, magazines, box games, and related products. n1 More than 50 percent of the corporation's revenues are derived from its publications. In addition, Steve Jackson Games, Incorporated, beginning in the mid-1980s and continuing through this litigation, operated from one of its computers an electronic bulletin board system called Illuminati. This bulletin board posts information to the inquiring public about Steve Jackson Games' products [***5] and activities; provides a medium for receiving and passing on information from the corporation's employees, writers, customers, and its game enthusiasts; and, finally, affords its users electronic mail whereby, with the use of selected passwords, its users can send and receive electronic mail (E-mail) in both public and private modes. In February of 1990, there were 365 users of the Illuminati bulletin board.

Footnotes

n1 While the content of these publications are not similar to those of daily newspapers, news magazines, or other publications usually thought of by this Court as disseminating information to the public, these products come within the literal language of the Privacy Protection Act.

End Footnotes

Steve Jackson was both the owner and employee of Steve Jackson Games, Incorporated, and authored many of its publications; he used both Illuminati's public and private programs for electronic mail and his use ranged from business records of the corporation, contracts with his writers, communication with his writers regarding articles [***6] which were intended to be published by the corporation, to private communications with his business associates and friends. Elizabeth McCoy's use of the Illuminati bulletin board involved her participation as a game player, her critiques as to the games and publications of the corporation, and her private communications with associates and friends. William Milliken's use of the Illuminati bulletin [*435] board was apparently limited to private communicates to associates and friends. Steffan O'Sullivan's use of the Illuminati bulletin board included writings for publication by Steve Jackson Games, Inc., his business dealings with the corporation, and public and private communications with associates and friends.

Importantly, prior to March 1, 1990, and at all other times, there has never been any basis for suspicion that any of the Plaintiffs have engaged in any criminal activity, violated any law, or attempted to communicate, publish, or store any illegally obtained information or otherwise provide access to any illegally obtained information or to solicit any information which was to be used illegally.

In October of 1988, Henry Kluepfel, Director of Network Security Technology (an affiliate [***7] Bell Company), was advised a sensitive, proprietary computer document of Bell South relating to Bell's
"911 program" had been made available to the public on a computer bulletin board in Illinois. Kluepfel reported this information to Bell South and requested instructions, but received no response. In April of 1989, Kluepfel confirmed the 911 Bell document was available on the Illinois computer bulletin board and learned the document was additionally available without any proprietary notice on at least another computer bulletin board and had been or was being published in a computer bulletin board newsletter in edited form. In July of 1989, Kluepfel was finally instructed by Bell South to report the "intrusion" of its computer network to the Secret Service and that the document taken was "sensitive" and "proprietary." Kluepfel had previously worked with the Secret Service and was known as an expert and reliable informant on computer "hacking." n2 Thereafter, Kluepfel met Assistant U.S. Attorney William Cook in Chicago and thereafter communicated with Cook and Secret Service Agent Tim Foley. Agent Foley was in charge of this particular investigation.

----------- Footnotes ------------

n2 A "hacker" is an individual who accesses another's computer system without authority.

----------- End Footnotes -----------

Around February 6, 1990, Kluepfel learned that the 911 document was available on a computer billboard entitled "Phoenix" which was operated by Loyd Blankenship in Austin, Texas. Kluepfel "downloaded" the document to put in readable form and then advised these facts to the Secret Service. Prior to February 26, 1990, Kluepfel learned that Blankenship not only operated the Phoenix bulletin board, but he was a user of the Illinois bulletin board wherein the 911 document was first disclosed, was an employee of Steve Jackson Games, Inc., and a user of the Steve Jackson Games, Inc.'s bulletin board "Illuminati." Kluepfel's investigation also determined that Blankenship was a "co-sysop" of the Illuminati bulletin board, which means that he had the ability to review anything on the Illuminati bulletin board and, importantly, maybe be able to delete anything on the system. Blankenship's bulletin board Phoenix had published "hacker" information and had solicited "hacker" information relating to passwords, ostensibly to be analyzed in some type of decryption scheme. By February 26, 1990, Kluepfel determined that the Phoenix bulletin board was no longer accessible as he could not "dial" or "log [**9] into" it. He reported this to Agent Foley. While Kluepfel advised Agent Foley that Blankenship was an employee of Steve Jackson Games, Inc., and was a user and co-sysop of Illuminati, Kluepfel never had any information whereby he was suspicious of any criminal activity by any of the Plaintiffs in this cause. Kluepfel was, and is, knowledgeable in the operation of computers, computer bulletin boards, the publishing of materials and document by computers, the communications through computer bulletin boards (both public and private communications), and could have "logged" into the Illuminati bulletin board at any time and reviewed all of the information on the bulletin board except for the private communications referred to by the Plaintiffs as electronic communications or electronic mail, but did not do so. Kluepfel had legitimate concerns, both about the 911 document stolen from Bell South and the possibility of a decryption system which could utilize passwords in rapid fashion and could result in intrusions of computer systems, including those of the Bell System.

In February of 1990, Agent Foley was also knowledgeable about computer bulletin boards and he too could have "logged" into Illuminati, become a user and reviewed all public communications on the bulletin board, but did not do so.

By February 28, 1990, when the search warrant affidavit was executed, Agent Foley had received information from reliable sources (Kluepfel, Williams, Spain, Kibbler, Coutorie, and Niedorf, and possibly others) n3 there had been an unlawful intrusion on the Bell South computer program, the 911 Bell South document was a sensitive and proprietary document, and that computer hackers were attempting to utilize a decryption procedure whereby unlawful intrusions could be made to computer programs including the Defense Department, and these hackers were soliciting passwords so that the decryption procedure could become operational. In addition, Agent Foley was advised Loyd Blankenship had operated his Phoenix bulletin board from his home, had published the 911 Bell South document in edited form, and had published and communicated that a decryption strategy was available and other "hackers" should submit selective passwords to finalize the decryption scheme for intrusions into computer systems by using a rapid deployment of passwords. Agent Foley was also advised that Blankenship was an employee of Steve Jackson Games and had access to the Illuminati bulletin board as a user and a co-sysop and he may well (and in fact did) have the ability to delete any documents or information in the Steve
Jackson Games computers and Illuminati bulletin board. The only information Agent Foley had regarding Steve Jackson Games, Inc. and Steve Jackson was that he thought this was a company that put out games, but he also reviewed a printout of Illuminati on February 25, 1990, which read, "Greetings, Mortal! You have entered the secret computer system of the Illuminati, the on-line home of the world's oldest and largest secret conspiracy. 512447449300/1200/2400BAUD fronted by Steve Jackson Games, Incorporated. Fnord." The evidence in this case strongly suggests Agent Foley, without any further investigation, misconstrued this information to believe the Illuminati bulletin board was similar in purpose to Blankenship's Phoenix bulletin board, which provided information to and was used by "hackers." Agent Foley believed, in good faith, at the time of the execution of his affidavit on February 28, 1990, there was probable cause to believe Blankenship had the 911 Bell South document [**12] and information relating to the decryption scheme stored in his computer at home or perhaps in computers, disks, or in the Illuminati bulletin board at his place of employment at Steve Jackson Games, Inc.; that these materials were involved in criminal activities; and that Blankenship had the ability to delete any information stored on any of these computers and/or disks.

n3 Kluepfel, Williams, Spain and Kibbler are employees of Bell South; Coutorie is a University of Texas Systems investigator assigned to investigate computer hacking; and Niedorf is a hacker involved in the Illinois bulletin board system.

Unfortunately, although he was an attorney and expressly represented this fact in his affidavit, Agent Foley was not aware of the Privacy Protection Act, 42 U.S.C. 2000aa et seq., and he conducted no investigation about Steve Jackson Games, Incorporated, although a reasonable investigation of only several hours would have revealed Steve Jackson Games, Inc. was, in [**13] fact, a legitimate publisher of information to the public and Mr. Jackson would have cooperated in the investigation. Agent Foley did not know the individual Plaintiffs but did know they were users of Illuminati as he had a list of all users prior to February 28, 1990. Agent Foley did know and understand the Illuminati bulletin board would have users and probably would have stored private electronic communications between users. Notwithstanding the failure of any investigation regarding Steve Jackson Games, Agent Foley and Assistant U.S. Attorney Cook intended to seize and review all of the information and documents in any computer accessible to Blankenship, regardless of what other incidental information would be seized. These intentions were expressly stated in their application for a search warrant and the warrant itself. n4

n4 The Court does fault Agent Foley and the Secret Service on the failure to make any investigation of Steve Jackson Games, Inc. prior to March 1, 1990, and to contact Steve Jackson in an attempt to enlist his cooperation and obtain information from him as there was never any basis to suspect Steve Jackson or Steve Jackson Games, Inc. of any criminal activity, and there could be no questions the seizure of computers, disks, and bulletin board and all information thereon, including all back-up materials would have an adverse effect (including completely stopping all activities) on the business of Steve Jackson Games, Inc. and the users of Illuminati bulletin board.

[*437] Foley's affidavit, executed on February 28, 1990, was sufficient under the law for the issuance of a search warrant by the United States Magistrate Judge. The Court does not find from a preponderance of the evidence that the admitted errors in Foley's affidavit were intentional and so material to make the affidavit and issuance of the warrant legally improper. See, Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The factual errors in the affidavit include the Bell 911 document was a computer program; the Bell 911 document was engineered at a cost of $79,449; the Bell 911 document had been "slightly" edited; articles in Phrack were described as "hacker tutorials;" the Bell 911 document published in Phrack contained a proprietary notice; Blankenship was a computer programmer for Steve Jackson Games, Inc.; Blankenship's alias "Mentor" was listed as an Illuminati bulletin board user; Coutorie, prior to February 28, 1990, provided Foley with information on Steve Jackson Games, Inc.; and that Kluepfel had "logged" into Illuminati. The affidavit and warrant preparation was simply sloppy and not carefully done. Therefore, the Court [**15] denies the Plaintiff's contentions relating to the alleged improprieties involved in the issuance of the search warrant.

On March 1, 1990, Agents Foley and Golden executed the search warrant. At the time of the
execution, each agent had available computer experts who had been flown to Austin to advise and review the stored information in the computers, the bulletin boards, and disks seized. These computer experts certainly had the ability to review the stored information and, importantly, to copy all information contained in the computers and disks within hours.

During the search of Steve Jackson Games and the seizure of the three computers, over 300 computer disks, and other materials, Agent Golden was orally advised by a Steve Jackson Games, Inc. Employee that Steve Jackson Games, Inc. was in the publishing business. Unfortunately, Agent Golden, like Foley, was unaware of the Privacy Protection Act and apparently attached no significance to this information. The evidence is undisputed that Assistant U.S. Attorney Cook would have stopped the search at the time this notification had he been contacted.

By March 2, 1990, Agent Foley knew Steve Jackson Games, Inc. was in the publishing business and the seizure included documents intended for publication to the public, including a book and other forms of information. He also knew or had the ability to learn the seizure of the Illuminati bulletin board included private and public electronic communications and E-mail. By March 2, 1990, Agent Foley knew that Steve Jackson Games, Incorporated, and its attorneys in Dallas and Austin, were requesting the immediate return of the properties and information seized, that transcripts of publications and the back-up materials had been seized, and that the seizure of the documents, including business records of Steve Jackson Games, Inc., and their back-up was certain to economically damage Steve Jackson Games, Inc. While Agent Foley had a legitimate concern there might be some type of program designed to delete the materials, documents, or stored information he was seeking, he admits there was no valid reason why all information seized could not have been duplicated and returned to Steve Jackson Games within a period of hours and no more than eight days from the seizure. In fact, it was months (late June 1990) before the majority of the seized materials was returned. Agent [**17] Foley simply was unaware of the law and erroneously believed he had substantial criminal information which obviously was not present, as to date, no arrests or criminal charges have ever been filed against anyone, including Blankenship.

In addition, Agent Foley must have known his seizure of computers, printers, disks and other materials and his refusal to provide copies represented a risk of substantial harm to Steve Jackson Games, Inc. under circumstances [*438] where he had no reason to believe the corporation or its owner was involved in criminal activity.

The Secret Service denies that its personnel or its delegates read the private electronic communications stored in the seized materials and specifically allege that this information was reviewed by use of key search words only. Additionally, the Secret Service denies the deletion of any information seized with two exceptions of "sensitive" or "illegal" information, the deletion of which was consented to by Steve Jackson. However, the preponderance of the evidence, including common sense, n5 establishes that the Secret Service personnel or its delegates did read all electronic communications seized and did delete certain information [**18] and communications in addition to the two documents admitted deleted. The deletions by the Secret Service, other than the two documents consented to by Steve Jackson, were done without consent and cannot be justified.

---Footnotes---

n5 The application and the search warrant itself was worded by Foley and Cook so that all information would be "read" by the Secret Service.

---End Footnotes---

By March 2, 1990, Agent Foley, Agent Golden, and the Secret Service, if aware of the Privacy Protection Act, would have known that they had, by a search warrant, seized work products of materials from a person or entity reasonably believed to have a purpose to disseminate to the public a "book" or "similar form of public communication."

The failure of the Secret Service after March 1, 1990, to promptly return the seized products of Steve Jackson Games, Incorporated cannot be justified and unquestionably caused economic damage to the corporation.

By March 1, 1990, Steve Jackson Games, Incorporated was apparently recovering from acute financial problems [**19] and suffering severe cash flow problems. The seizure of the work product and delays of publication, whether by three weeks or several months, directly impacted on Steve Jackson Games, Incorporated. Eight employees were terminated because they could not be paid as revenues from sales came in much later than expected. However, it is also clear from a preponderance of the evidence that after the calendar year 1990, the publicity surrounding this seizure and the nature of
the products sold by Steve Jackson Games, Incorporated had the effect of increasing, not decreasing, sales. In fact, Steve Jackson Games, Incorporated developed a specific game for sale based upon the March 1, 1990, seizure. The Court declines to find from a preponderance of the evidence there was any economic damage to Steve Jackson Games, Incorporated after the calendar year 1990 as a result of the seizure of March 1, 1990. n6

---Footnotes---

n6 The Court finds the testimony of Joanne Midwikis, an accountant who testified on behalf of Steve Jackson Games, Inc. and Steve Jackson, on damages suffered by Steve Jackson Games, Inc. and Steve Jackson was not credible.

---End Footnotes---

As a result of the seizure of March 1, 1990, and the retention of the equipment and documents seized, Steve Jackson Games, Incorporated sustained out-of-pocket expenses of $8,781.00. The personnel at this corporation had to regroup, rewrite, and duplicate substantial prior efforts to publish the book GURPS Cyberpunk and other documents stored in the computers and the Illuminati bulletin board, to explain to their clientele and users of the bulletin board the difficulties of their continuing business to maintain their clientele, to purchase or lease substitute equipment and supplies, to re-establish the bulletin board, and to get the business of Steve Jackson Games, Inc. back in order. The Court has reviewed the evidence regarding annual sales and net income of Steve Jackson Games, Incorporated for 1990 and the years before and after and finds from a preponderance of the evidence there was a 6 percent loss of sales in 1990 due to the seizure and related problems. The evidence was undisputed that there was a 42 percent profit on sales of publications of Steve Jackson Games, Incorporated. Thus, Steve Jackson Games, Incorporated sustained damages in loss of sales in 1990 of $100,617.00 [**21] for a loss of profit of $42,259.00 as a direct and proximate result of the seizure of March 1, 1990, and the retention of the documents seized. After 1990, the net sales of Steve Jackson Games, Incorporated continued to increase annually in a traditional proportion [*439] as the sales had been increasing from 1988. Thus, from a preponderance of the evidence, the loss of $42,259.00 is consistent with the net income figures of Steve Jackson Games, Incorporated in the years immediately following and preceding 1990.

Regarding damages to Steve Jackson, personally, his own testimony is that by 1990 he was becoming more active in the management of Steve Jackson Games, Incorporated, and spending less time in creative pursuits such as writing. Steve Jackson Games, Incorporated was in such financial condition that Chapter 11 proceedings in bankruptcy were contemplated. Thereafter, the testimony clearly established that Steve Jackson Games reasserted himself in management and was spending substantial time managing the corporation. The Court declines to find from a preponderance of the evidence that Steve Jackson personally sustained any compensatory damages as a result of the conduct of the United States Secret Service.

Elizabeth McCoy, Walter Milliken and Steffan O'Sullivan also allege compensatory damages. These plaintiffs all had stored electronic communications, or E-mail, on the Illuminati bulletin board at the time of seizure. All three of these Plaintiffs testified that they had public and private communications in storage at the time of the seizure. Steve Jackson, Elizabeth McCoy, Walter Milliken and Steffan O'Sullivan all testified that following June of 1990 some of their stored electronic communications, or E-mail, had been deleted. It is clear, as hereinafter set out, that the conduct of the United States Secret Service violated two of the three statutes which the causes of action of the Plaintiffs are based and, therefore, there are statutory damages involved, but the Court declines to find from a preponderance of the evidence that any of the individual Plaintiffs sustained any compensatory damages.

II.

a.

PRIVACY PROTECTION ACT

(First Amendment Privacy protection)

42 U.S.C. 2000aa et seq. The United States Secret Service, by Agent Foley and Assistant United States Attorney Cox, sought and obtained an order from a United States Magistrate Judge to search for and seize and thereafter read the information stored and contained in computer hardware (including, but not limited to, central processing units monitors, memory devices, modems, programming equipment, communication equipment, disks, and printers) and computer software (including, but not limited to) memory disks, floppy disks, storage media) and written material and
documents relating to the use of the computer system (including network access files), documentation relating to the attacking of computers and advertising the results of computer attacks (including telephone numbers and location information), and financial documents and licensing documentation relative to the computer programs and equipment at the business known as Steve Jackson Games which constitute evidence, instrumentalties, and fruits of federal crimes, including interstate transportation of stolen property (18 U.S.C. 2314) and interstate transportation of computer access information (18 U.S.C. 1030(a)(6))." See, Warrant Application and Order.

On March 1, 1990, the Secret Service seized [*24] the following property on the premises of Steve Jackson Games, Inc.: Compuadd keyboard; Packard-Bell monitor; DKT computer; cardboard box containing disks, miscellaneous papers and circuit boards; Splat Master gun with "Mentor" on barrel; Hewlett-Packard laser jet printer; BTC keyboard with cover; IBM personal computer 5150 (disassembled); Seagate Tech hard disk; 2400 modem 1649-1795 with power supply and disk; IBM keyboard; Amdek mode 310A; bulletin board back-up files (approximately 150); Empac International Corporation XT computer; "WWIV" users manual; red box of floppy disks; miscellaneous papers and notes from desk; floppy disk entitled "Phoenix setup." See, Warrant Return.

The evidence establishes the actual information seized, including both the primary source and back-up materials of the draft of GURPS Cyberpunk, a book intended for immediate publication (within days to weeks), drafts of magazine and magazine articles to [*440] be published, business records of Steve Jackson Games, Incorporated (including contracts and drafts of articles by writers of Steve Jackson Games, Incorporated), the Illuminati bulletin board and its contents (including public announcements, published [*25] newsletter articles submitted to the public for review, public comment on the articles submitted and electronic mail containing both private and public communications). Notwithstanding over 300 floppy disks being seized, the evidence introduced during trial was not clear as to what additional information was seized during the search warrant execution. However, the evidence is clear that on March 1, 1990, "work product materials," as defined in 42 U.S.C. 2000aa-7(b), was obtained as well as materials constituting "documentary materials" as defined in the same provision. n7

---End Footnotes---

The Privacy Protection Act, 42 U.S.C. 2000aa, dictates: "Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation . . . of a criminal offense to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, broadcast, or other similar form of public communication . . . ." See, 42 U.S.C. @ 2000aa(a).

Assuming Agent Foley was knowledgeable of the Privacy Protection Act (which he was not), neither he nor Assistant United States Attorney Cox had any information which would lead them to believe that Steve Jackson Games, Incorporated published books and materials and had a purpose to disseminate to the public its publications. Their testimony is simply they thought it a producer of games. As heretofore stated, the Court feels Agent Foley failed to make a reasonable investigation of Steve Jackson Games, Incorporated when it was apparent his intention was to take substantial properties belonging to the corporation, the removal of which could have a substantial [*27] effect on the continuation of business. Agent Foley, it appears, in his zeal to obtain evidence for the criminal investigation, simply concluded Steve Jackson Games, Incorporated was somehow involved in Blankenship's alleged activities because of the wording of the Illuminati bulletin board menu. In any event, the Court declines to find from a preponderance of the evidence that on March 1, 1990, Agent Foley or any other employee or agent of the United States had reason to believe that property seized would be the work product materials of a person believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication. n8

---Footnotes---

n7 The legislative history to the Privacy protection Act states:
...the Committee recognized a problem for the law enforcement officer, who seeking to comply with the statute, might be uncertain whether the materials he sought were work product or nonwork product and that they were intended for publication. Therefore, in the interests of allowing for some objective measure for judgment by the office, the Committee has provided that the work product must be possessed by someone "reasonably believed" to have a purpose to communicate to the public.

S. Rep. No. 874, 96th Cong., 2nd Sess., 10 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3957. As the Court has stated, Agent Foley with only a few hours of investigation would have "reasonably believed" Steve Jackson Games, Incorporated had "a purpose to communicate to the public." Therefore, under an objective standard, assuming a reasonable investigation, Agent Foley and the Secret Service violated the statute on March 1, 1990. However, Agent Foley was not aware of the Privacy Protection Act and was therefore not "seeking to comply" with its requirements. Consequently, the Court found on March 1, 1990 neither Agent Foley nor any other employee or agent of the United States "reasonably believed" the materials seized were work product or Steve Jackson Games, Incorporated had a "purpose to disseminate to the public."

- - - - - - - - End Footnotes - - - - - - - -[**28]

During the search on March 1, and on March 2, 1990, the Secret Service was specifically advised of facts that put its employees on notice of probable violations of the Privacy Protection Act. It is no excuse that Agents Foley and Golden were not knowledgeable of the law. On March 2, 1990, and thereafter, the conduct of the United States [*441] Secret Service was in violation of 42 U.S.C. 2000a et seq. It is clear the Secret Service continued the seizure of property of Steve Jackson Games, Incorporated including information and documents through late June of 1990. Immediate arrangements could and should have been made on March 2, 1990, whereby copies of all information seized could have been made. The government could and should have requested Steve Jackson as chief operating officer of the corporation to cooperate and provide the information available under the law. The Secret Service's refusal to return information and property requested by Mr. Jackson and his lawyers in Dallas and Austin constituted a violation of the statute. Regarding any information seized that would constitute "documentary materials" (whereby the defensive theory of 42 U.S.C. 2000aa [*29] (b)(3) might apply) there would have been no problem as the property was in the possession of the United States Secret Service and their experts and Steve Jackson were present to ensure no destruction, alteration or concealment of information contained therein. In any event, it is the seizure of the "work product materials" that leads to the liability of the United States Secret Service and the United States in this case. Pursuant to 42 U.S.C. 2000aa-6, the Court finds from a preponderance of the evidence that Steve Jackson Games, Incorporated is entitled to judgment against the United States Secret Service and the United States of America for its expenses of $8,781.00 and its economic damages of $42,259.00. The Court declines to find from a preponderance of the evidence other damages of Steve Jackson Games, Incorporated or liability of the United States Secret Service or the United States of America to any other Plaintiff under the provisions of the Privacy Protection Act.

b.

WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

18 U.S.C. 2510 et seq.

The Plaintiffs [*30] allege the United States Secret Service's conduct also violated 18 U.S.C. 2510, et seq., as it constituted intentional interceptions of "electronic communication." They allege the interception occurred at the time of seizure or, perhaps, at the time of review of the communication subsequent to the seizure. There is no question the individual Plaintiffs had private communications stored in Illuminati at the time of the seizure and the court has found from a preponderance of the evidence the Secret Service intended not only to seize and read these communications, but, in fact, did read the communications and thereafter deleted or destroyed some communications either intentionally or accidentally. The Defendants contend there is no violation of this particular statute under the facts of this case because there never was any unlawful "interception" within the meaning of the statute. Alternatively, the Defendants contend that the "good faith reliance" on the search warrant issued by the United States Magistrate Judge is a complete defense under Section 2520.

The Government relies on the 1976 Fifth Circuit case of United States v. Turk, 526 F.2d 654 (5th Cir. 1976), [*31] cert denied, 429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1976), and its interpretation of the statutory definition of "interception." In Turk,
police officers listened to the contents of a cassette tape without first obtaining a warrant. The court concluded this was not an "interception" under 18 U.S.C. § 2510 et seq.

Whether the seizure and replaying of the cassette tape by the officers was also an "interception" depends on the definition to be given "aural acquisition." Under one conceivable reading, and "aural acquisition" could be said to occur whenever someone physically hears the contents of a communication, and thus the use of the tape player by the officers to hear the previously recorded conversation might fall within the definition set out above. No explicit limitation of coverage to contemporaneous "acquisitions" appears in the Act.

We believe that a different interpretation -- one which would exclude from the definition of "intercept" the replaying of a previously recorded conversation -- has a **442** much firmer basis in the language of § 2510(4) and in logic, and corresponds more closely to the policies reflected in the legislative history. The words "acquisition . . . through the use of any . . . device" suggest that the central concern is with the activity engaged in a the time of the oral communication which causes such communication to be overheard by uninvited listeners. If a person secretly attaches a recorder in a room and thereby records a conversation between two others, an "acquisition" occurs at the time the recording is made. This acquisition itself might be said to be "aural" because the contents of the conversation are preserved in a form which permits the later aural disclosure of the contents. Alternatively, a court facing the issue might conclude that an "aural acquisition" is accomplished only when two steps are completed -- the initial acquisition by the device and the hearing of the communication by the person or persons responsible for the recording. Either of these definitions would require participation by the one charged with an "interception" in the contemporaneous acquisition of the communication through the use to the device. The argument that a new and different "aural acquisition" occurs each time a recording of an oral communication is replayed is unpersuasive. **33** That would mean that innumerable "interceptions," and thus violations of the Act, could follow from a single recording.

Id., at 657-658 (footnotes omitted). While the Fifth Circuit authority relates to the predecessor statute, Congress intended no change in the existing definition of "intercept" in amending the statute in 1986. See, S. Rep. No. 541, 99th Cong., 2nd Sess. 13 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3567 ("Section 101(a)(3) of the ELECTRONIC COMMUNICATIONS PRIVACY ACT amends the definition of the term "intercept" in current section 2510(4) of title 18 to cover electronic communications. The definition of "intercept" under current law is retained with respect to wire and oral communications except that the term "or other" is inserted after "aural." This amendment clarifies that it is illegal to intercept the non-voice portion of a wire communication."). The Court finds this argument persuasive when considering the Congressional enactment of the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. § 2701, et seq.

The Court declines to find liability **34** for any Plaintiff against the Defendants pursuant to the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2510, et seq., and specifically holds that the alleged "interceptions" under the facts of this case are not "interceptions" contemplated by the Wire and Electronic Communications Interception and Interception of Oral Communications Act. It simply has no applicability to the facts of this case.

c.

STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

18 U.S.C. § 2701 et seq.

Prior to February 28, 1990, Agent Foley, Assistant United States Attorney Cox, and the computer consultants working with them were cognizant of public computer bulletin boards and the use of electronic communications and E-mail through them. Each of the persons involved in this investigation, including Agent Foley, had the knowledge and opportunity to log into the Illuminati bulletin board, review its menu and user lists, obtain passwords, and thereafter review all information available to the public. In fact, Agent Foley erroneously thought Kluepfel had **35** done this when a printout of Illuminati documents dated February 25, 1990, was received. When Foley applied for the search warrant on February 28, 1990, he knew the Illuminati bulletin board provided services to the public whereby its users could store public and private electronic communications. While Foley admits no knowledge of the Privacy Protection Act and its provisions protecting publishers of information to the public, he
testified he was knowledgeable regarding the Wire and Electronic Communications Interception and Interception of Oral Communications Act. But, Foley never [**443] thought of the law's applicability under the facts of this case. Steve Jackson Games, Inc., through its Illuminati bulletin board services, was a "remote computing service" within the definition of Section 2711, and, therefore, the only procedure available to the Secret Service to obtain "disclosure" of the contents of electronic communications was to comply with this statute. See, 18 U.S.C. 2703. Agent Foley and the Secret Service, however, wanted more than "disclosure" of the contents of the communication. As the search warrant application evidences, the Secret [**36] Service wanted seizure of all information and the authority to review and read all electronic communications, both public and private. A court order for such disclosure is only to issue if "there is a reason to believe the contents of an . . . electronic communication. . . are relevant to a legitimate law enforcement inquiry." See, 18 U.S.C. @ 2703(d). Agent Foley did not advise the United States Magistrate Judge, by affidavit or otherwise, that the Illuminati bulletin board contained private electronic communications between users or how the disclosure of the content of these communications could relate to his investigation. Foley's only knowledge was that Blankenship had published part of the 911 document and decryption information in his Phoenix bulletin board, was employed at Steve Jackson Games, Inc., and could have the ability to store and delete these alleged unlawful documents in the computers or Illuminati bulletin board at Steve Jackson Games, Incorporated. At Agent Foley's specific request, the application and affidavit for the search warrant were sealed. The evidence establishes the Plaintiffs were not able to ascertain the [**37] reasons for the March 1, 1990 seizure until after the return of most of the property in June of 1990, and then only by the efforts of the offices of both United States Senators of the State of Texas. The procedures followed by the Secret Service in this case virtually eliminated the safeguards contained in the statute. For example, no plaintiff was on notice that the search or seizure order was made pursuant to this statute and that Steve Jackson Games, Incorporated could move to quash or modify the order or eliminate or reduce any undue burden on it by reason of the order. See, 18 U.S.C. @ 2703(d). The provisions of the statute regarding the preparation of back-up copies of the documents or information seized were never utilized or available. See, 18 U.S.C. @ 2704. Agent Foley stated his concern was to prevent the destruction of the documents' content and for the Secret Service to take the time necessary to carefully review all of the information seized. He feared Blankenship could possibly delete the incriminating documents or could have programmed destruction in some manner. Notwithstanding that any [**38] alteration or destruction by Blankenship, Steve Jackson, or anyone else would constitute a criminal offense under this statute, Foley and the Secret Service seized -- not just obtained disclosure of the content -- all of the electronic communications stored in the Illuminati bulletin board involving the plaintiffs in this case. This conduct exceeded the Government's authority under the statute.

The Government Defendants contend there is no liability for alleged violation of the statute as Foley and the Secret Service had a "good faith" reliance on the February 28, 1990, court order/search warrant. The Court declines to find this defense by a preponderance of the evidence in this case.

Steve Jackson Games, Incorporated, as the provider and each individual Plaintiffs as either subscribers or customers were "aggrieved" by the conduct of the Secret Service in the violation of this statute. While the Court declines to find from a preponderance of the credible evidence the compensatory damages sought by each Plaintiff, the Court will assess the statutory damages of $1,000.00 for each Plaintiff.

III. SUMMARY

This is a complex case. It is still not clear how sensitive and/or proprietary [**39] the 911 document was (and is) or how genuinely harmful the potential decryption scheme may have been or if either were discovered by the Secret Service in the information seized on March 1, 1990. The fact that no criminal charges have ever been filed and the investigation remains "on going" is, of course, not conclusive.

[**444] The complexity of this case results from the Secret Service's insufficient investigation and its lack of knowledge of the specific laws that could apply to their conduct on February 28, 1990 and thereafter. It appears obvious neither the government employees nor the Plaintiffs or their lawyers contemplated the statute upon which this case is brought back in February, March, April, May or June of 1990. But this does not provide assistance to the defense of the case. The Secret Service and its personnel are the entities that citizens, like each of the Plaintiffs, rely upon and look to protect their
rights and properties. The Secret Service conduct resulted in the seizure of property, products, business records, business documents, and electronic communications of a corporation and four individual citizens that the statutes were intended to protect.

It may well be, [*40] as the Government Defendants contend, these statutes relied upon by the Plaintiffs should not apply to the facts of this case, as these holdings may result in the government having great difficulties in obtaining information or computer documents representing illegal activities. But this Court cannot amend or rewrite the statutes involved. The Secret Service must go to the Congress for relief. Until that time, this Court recommends better education, investigation and strict compliance with the statutes as written.

The Plaintiffs are ordered to submit application for attorney’s fees and costs with appropriate supporting affidavits within ten (10) days of the date of this order. The Defendants will have ten days thereafter to file their responses.

SIGNED this the 12 day of March, 1993.

Sam Sparks United States District Judge
STEVE JACKSON GAMES, INCORPORATED, et al.,
Plaintiffs-Appellants,
v.
UNITED STATES SECRET SERVICE, et al., Defendants,
United States Secret Service and United States of America,
Defendants-Appellees.

No. 93-8661.
United States Court of Appeals,
Fifth Circuit.

Peter D. Kennedy, R. James George, Jr., George, Donaldson & Ford, Austin, TX, for appellants.

Sharon Steele, Washington, DC, for amicus curiae Electronic Frontier Foundation.

Scott McIntosh, Barbara Herwig, U.S. Dept. of Justice, Washington, DC, for appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINbotham, JONES and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

The narrow issue before us is whether the seizure of a computer, used to operate an electronic bulletin board system, and containing private electronic mail which had been sent to (stored on) the bulletin board, but not read (retrieved) by the intended recipients, constitutes an unlawful intercept under the Federal Wiretap Act, 18 U.S.C. § 2510, et seq., as amended by Title I of the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, Title I, 100 Stat. 1848 (1986). We hold that it is not, and therefore AFFIRM.

I.

The district court's findings of fact are not in dispute. See Steve Jackson Games, Inc. v. United States Secret Service, 816 F.Supp. 432 (W.D.Tex.1993). Appellant Steve Jackson Games, Incorporated (SJG), publishes books, magazines, role-playing games, and related products. Starting in the mid-1980s, SJG operated an electronic bulletin board system, called "Illuminati" (BBS), from one of its computers. SJG used the BBS to post public information about its business, games, publications, and the role-playing hobby; to facilitate play-testing of games being developed; and to communicate with its customers and free-lance writers by electronic mail (E-mail).

Central to the issue before us, the BBS also offered customers the ability to send and receive private E-mail. Private E-mail was stored on the BBS computer's hard disk drive temporarily, until the addressees "called" the BBS (using their computers and modems) and read their mail. After reading their E-mail, the recipients could choose to either store it on the BBS computer's hard drive or delete it. In February 1990, there were 365 BBS users. Among
other uses, appellants Steve Jackson, Elizabeth McCoy, William Milliken, and Steffan O'Sullivan used the BBS for communication by private E-mail.

In October 1988, Henry Kluepfel, Director of Network Security Technology (an affiliate Bell Company), began investigating the unauthorized duplication and distribution of a computerized text file, containing information about Bell's emergency call system. In July 1989, Kluepfel informed Secret Service Agent Foley and an Assistant United States Attorney in Chicago about the unauthorized distribution. In early February 1990, Kluepfel learned that the document was available on the "Phoenix Project" computer bulletin board, which was operated by Loyd Blankenship in Austin, Texas; that Blankenship was an SJG employee; and that, as a co-systems operator of the BBS, Blankenship had the ability to review and, perhaps, delete any data on the BBS.

On February 28, 1990, Agent Foley applied for a warrant to search SJG's premises and Blankenship's residence for evidence of violations of 18 U.S.C. ss 1030 (proscribes interstate transportation of computer access information) and 2314 (proscribes interstate transportation of stolen property). A search warrant for SJG was issued that same day, authorizing the seizure of, inter alia,

[computer hardware ... and computer software ... and ... documents relating to the use of the computer system ..., and financial documents and licensing documentation relative to the computer programs and equipment at ... [SJG] ... which constitute evidence ... of federal crimes.... This warrant is for the seizure of the above described computer and computer data and for the authorization to read information stored and contained on the above described computer and computer data.

The next day, March 1, the warrant was executed by the Secret Service, including Agents Foley and Golden. Among the items seized was the computer which operated the BBS. At the time of the seizure, 162 items of unread, private E-mail were stored on the BBS, including items addressed to the individual appellants. Despite the Secret Service's denial, the district court found that Secret Service personnel or delegates read and deleted the private E-mail stored on the BBS.

Appellants filed suit in May 1991 against, among others, the Secret Service and the United States, claiming, inter alia, violations of the Privacy Protection Act, 42 U.S.C. s 2000aa, et seq. [FN1]; the Federal Wiretap Act, as amended by Title I of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. ss 2510-2521 (proscribes, inter alia, the intentional interception of electronic communications); and Title II of the ECPA, 18 U.S.C. ss 2701-2711 (proscribes, inter alia, intentional access, without authorization, to stored electronic communications). [FN2]

The district court held that the Secret Service violated the Privacy Protection Act, and awarded actual damages of $51,040 to SJG; and that it violated Title II of the ECPA by seizing stored electronic communications without complying with the statutory provisions, and awarded the statutory damages of $1,000 to each of the individual appellants. And, it awarded appellants $195,000 in attorneys' fees and approximately $57,000 in costs. But, it held that the Secret Service did not "intercept" the E-mail in violation
of Title I of the ECPA, 18 U.S.C. s 2511(1)(a), because its acquisition of the contents of the electronic communications was not contemporaneous with the transmission of those communications.

II.

As stated, the sole issue is a very narrow one: whether the seizure of a computer on which is stored private E-mail that has been sent to an electronic bulletin board, but not yet read (retrieved) by the recipients, constitutes an "intercept" proscribed by 18 U.S.C. s 2511(1)(a). [FN3] Section 2511 was enacted in 1968 as part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often referred to as the Federal Wiretap Act. Prior to the 1986 amendment by Title I of the ECPA, it covered only wire and oral communications. Title I of the ECPA extended that coverage to electronic communications. [FN4] In relevant part, s 2511(1)(a) proscribes "intentionally intercept[ing] ... any wire, oral, or electronic communication", unless the intercept is authorized by court order or by other exceptions not relevant here. Section 2520 authorizes, inter alia, persons whose electronic communications are intercepted in violation of s 2511 to bring a civil action against the interceptor for actual damages, or for statutory damages of $10,000 per violation or $100 per day of the violation, whichever is greater. 18 U.S.C. s 2520. [FN5]

The Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. s 2510(4). The district court, relying on our court's interpretation of intercept in United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976), held that the Secret Service did not intercept the communications, because its acquisition of the contents of those communications was not contemporaneous with their transmission. In Turk, the government seized from a suspect's vehicle an audio tape of a prior conversation between the suspect and Turk. (Restated, when the conversation took place, it was not recorded contemporaneously by the government.) Our court held that replaying the previously recorded conversation was not an "intercept", because an intercept "require[s] participation by the one charged with an 'interception' in the contemporaneous acquisition of the communication through the use of the device". Id. at 658.

Appellants agree with Turk's holding, but contend that it is not applicable, because it "says nothing about government action that both acquires the communication prior to its delivery, and prevents that delivery." (Emphasis by appellants.) Along that line, appellants note correctly that Turk's interpretation of "intercept" predates the ECPA, and assert, in essence, that the information stored on the BBS could still be "intercepted" under the Act, even though it was not in transit. They maintain that to hold otherwise does violence to Congress' purpose in enacting the ECPA, to include providing protection for E-mail and bulletin boards. For the most part, appellants fail to even discuss the pertinent provisions of the Act, much less address their application. Instead, they point simply to Congress' intent in enacting the ECPA and appeal to logic (i.e., to seize something before it is received is to intercept it).
But, obviously, the language of the Act controls. In that regard, appellees counter that "Title II, not Title I, ... governs the seizure of stored electronic communications such as unread e-mail messages", and note that appellants have recovered damages under Title II. Understanding the Act requires understanding and applying its many technical terms as defined by the Act, as well as engaging in painstaking, methodical analysis. As appellees note, the issue is not whether E-mail can be "intercepted"; it can. Instead, at issue is what constitutes an "intercept".

Prior to the 1986 amendment by the ECPA, the Wiretap Act defined "intercept" as the "aural acquisition" of the contents of wire or oral communications through the use of a device. 18 U.S.C. s 2510(4) (1968). The ECPA amended this definition to include the "aural or other acquisition of the contents of ... wire, electronic, or oral communications...." 18 U.S.C. s 2510(4) (1986) (emphasis added for new terms). The significance of the addition of the words "or other" in the 1986 amendment to the definition of "intercept" becomes clear when the definitions of "aural" and "electronic communication" are examined; electronic communications (which include the non-voice portions of wire communications), as defined by the Act, cannot be acquired aurally.

Webster's Third New International Dictionary (1986) defines "aural" as "of or relating to the ear" or "of or relating to the sense of hearing". Id. at 144. And, the Act defines "aural transfer" as "a transfer containing the human voice at any point between and including the point of origin and the point of reception." 18 U.S.C. s 2510(18). This definition is extremely important for purposes of understanding the definition of a "wire communication", which is defined by the Act as

any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) ... and such term includes any electronic storage of such communication.

18 U.S.C. s 2510(1) (emphasis added). In contrast, as noted, an "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system ... but does not include ... any wire or oral communication...." 18 U.S.C. s 2510(12) (emphasis added).

Critical to the issue before us is the fact that, unlike the definition of "wire communication", the definition of "electronic communication" does not include electronic storage of such communications. See 18 U.S.C. s 2510(12). See note 4, supra.

[FN6] "Electronic storage" is defined as

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication....

18 U.S.C. s 2510(17) (emphasis added). The E-mail in issue was in
"electronic storage". Congress' use of the word "transfer" in the definition of "electronic communication", and its omission in that definition of the phrase "any electronic storage of such communication" (part of the definition of "wire communication") reflects that Congress did not intend for "intercept" to apply to "electronic communications" when those communications are in "electronic storage". [FN7]

We could stop here, because "[i]ndisputably, the goal of statutory construction is to ascertain legislative intent through the plain language of a statute--without looking to legislative history or other extraneous sources". Stone v. Caplan (Matter of Stone), 10 F.3d 285, 289 (5th Cir.1994). But, when interpreting a statute as complex as the Wiretap Act, which is famous (if not infamous) for its lack of clarity, see, e.g., Forsyth v. Barr, 19 F.3d 1527, 1542-43 (5th Cir.), cert. denied, --- U.S. ----, --- S.Ct. ----, --- L.Ed.2d ---- (1994), we consider it appropriate to note the legislative history for confirmation of our understanding of Congress' intent. See id. at 1544.

As the district court noted, the ECPA's legislative history makes it crystal clear that Congress did not intend to change the definition of "intercept" as it existed at the time of the amendment. See 816 F.Supp. at 442 (citing S.Rep. No. 99-541, 99th Cong., 2d Sess. 13 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3567). The Senate Report explains: Section 101(a)(3) of the [ECPA] amends the definition of the term "intercept" in current section 2510(4) of title 18 to cover electronic communications. The definition of "intercept" under current law is retained with respect to wire and oral communications except that the term "or other" is inserted after "aural." This amendment clarifies that it is illegal to intercept the nonvoice portion of a wire communication. For example, it is illegal to intercept the data or digitized portion of a voice communication. 1986 U.S.C.C.A.N. at 3567.

Our conclusion is reinforced further by consideration of the fact that Title II of the ECPA clearly applies to the conduct of the Secret Service in this case. Needless to say, when construing a statute, we do not confine our interpretation to the one portion at issue but, instead, consider the statute as a whole. See, e.g., United States v. McCord, --- F.3d ----, ----, 1994 WL 523211, at *6 (5th Cir.1994) (citing N. Singer, 2A Sutherland Statutory Construction, s 46.05, at 103 (5th ed. 1992)). Title II generally proscribes unauthorized access to stored wire or electronic communications. Section 2701(a) provides:

Except as provided in subsection (c) of this section whoever--

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished....

18 U.S.C. s 2701(a) (emphasis added).
As stated, the district court found that the Secret Service violated s 2701 when it intentionally accessed[d] without authorization a facility [the computer] through which an electronic communication service [the BBS] is provided ... and thereby obtain[ed] [and] prevent[ed] authorized access [by appellants] to [n] ... electronic communication while it is in electronic storage in such system. 18 U.S.C. s 2701(a). The Secret Service does not challenge this ruling.

We find no indication in either the Act or its legislative history that Congress intended for conduct that is clearly prohibited by Title II to furnish the basis for a civil remedy under Title I as well. Indeed, there are persuasive indications that it had no such intention.

First, the substantive and procedural requirements for authorization to intercept electronic communications are quite different from those for accessing stored electronic communications. For example, a governmental entity may gain access to the contents of electronic communications that have been in electronic storage for less than 180 days by obtaining a warrant. See 18 U.S.C. s 2703(a). But there are more stringent, complicated requirements for the interception of electronic communications; a court order is required. See 18 U.S.C. s 2518.

Second, other requirements applicable to the interception of electronic communications, such as those governing minimization, duration, and the types of crimes that may be investigated, are not imposed when the communications at issue are not in the process of being transmitted at the moment of seizure, but instead are in electronic storage. For example, a court order authorizing interception of electronic communications is required to include a directive that the order shall be executed "in such a way as to minimize the interception of communications not otherwise subject to interception". 18 U.S.C. s 2518(5). Title II of the ECPA does not contain this requirement for warrants authorizing access to stored electronic communications. The purpose of the minimization requirement is to implement "the constitutional obligation of avoiding, to the greatest possible extent, seizure of conversations which have no relationship to the crimes being investigated or the purpose for which electronic surveillance has been authorized". James G. Carr, The Law of Electronic Surveillance, s 5.7(a) at 5-28 (1994).

Obviously, when intercepting electronic communications, law enforcement officers cannot know in advance which, if any, of the intercepted communications will be relevant to the crime under investigation, and often will have to obtain access to the contents of the communications in order to make such a determination. Interception thus poses a significant risk that officers will obtain access to communications which have no relevance to the investigation they are conducting. That risk is present to a lesser degree, and can be controlled more easily, in the context of stored electronic communications, because, as the Secret Service advised the district court, technology exists by which relevant communications can be located without the necessity of reviewing the entire contents of all of the stored communications. For example, the Secret Service claimed (although the district court found otherwise) that it reviewed the private E-mail on the BBS by use of key word searches.
Next, as noted, court orders authorizing an intercept of electronic communications are subject to strict requirements as to duration. An intercept may not be authorized "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days". 18 U.S.C. s 2518(5). There is no such requirement for access to stored communications.

Finally, as also noted, the limitations as to the types of crimes that may be investigated through an intercept, see 18 U.S.C. s 2516, have no counterpart in Title II of the ECPA. See, e.g., 18 U.S.C. s 2703(d) (court may order a provider of electronic communication service or remote computing service to disclose to a governmental entity the contents of a stored electronic communication on a showing that the information sought is "relevant to a legitimate law enforcement inquiry").

In light of the substantial differences between the statutory procedures and requirements for obtaining authorization to intercept electronic communications, on the one hand, and to gain access to the contents of stored electronic communications, on the other, it is most unlikely that Congress intended to require law enforcement officers to satisfy the more stringent requirements for an intercept in order to gain access to the contents of stored electronic communications. [FN8]

At oral argument, appellants contended (for the first time) that Title II's reference in s 2701(c) to s 2518 (which sets forth the procedures for the authorized interception of wire, oral, or electronic communications) reflects that Congress intended considerable overlap between Titles I and II of the ECPA. [FN9] As stated, s 2701(a) prohibits unauthorized access to stored wire or electronic communications. Subsection (c) of s 2701 sets forth the exceptions to liability under subsection (a), which include conduct authorized:

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

18 U.S.C. s 2701(c) (emphasis added). [FN10]

Appellants overemphasize the significance of this reference to s 2518. As discussed in notes 6-7, supra, it is clear that Congress intended to treat wire communications differently from electronic communications. Access to stored electronic communications may be obtained pursuant to a search warrant, 18 U.S.C. s 2703; but, access to stored wire communications requires a court order pursuant to s 2518. Because s 2701 covers both stored wire and electronic communications, it was necessary in subsection (c) to refer to the different provisions authorizing access to each.

III.

For the foregoing reasons, the judgment is AFFIRMED.
FN1. Section 2000aa(a) provides that it is unlawful for a government officer or employee, in connection with the investigation ... of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.... Among the items seized was a draft of GURPS Cyberpunk, a book intended by SJG for immediate publication. It was one of a series of fantasy role-playing game books SJG published. "GURPS" is an acronym for SJG's "Generic Universal Roleplaying System". "Cyberpunk" refers to a science fiction literary genre which became popular in the 1980s, which is characterized by the fictional interaction of humans with technology and the fictional struggle for power between individuals, corporations, and government.

FN2. Kluepfel, the Assistant United States Attorney, and Agents Foley and Golden were also sued. In addition to the statutory claims, appellants also claimed violations of the First and Fourth Amendments to the United States Constitution. And, in September 1992, they added state law claims for conversion and invasion of privacy. Prior to trial, the claims against the individuals were dismissed, and appellants withdrew their constitutional and state law claims.

FN3. Appellants raised two other issues regarding damages, but later advised that they have been settled. And, prior to briefing, the Secret Service dismissed its cross-appeal.

FN4. An "electronic communication" is defined as: any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include-- (A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit; (B) any wire or oral communication; (C) any communication made through a tone-only paging device; or (D) any communication from a tracking device (as defined in section 3117 of this title).... 18 U.S.C. s 2510(12).

FN5. Title I of the ECPA increased the statutory damages for unlawful interception from $1,000 to $10,000. See Bess v. Bess, 929 F.2d 1332, 1334 (8th Cir.1991). On the other hand, as noted, Title II authorizes an award of "the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case ... less than the sum of $1000". 18 U.S.C. s 2707(c). As discussed, the individual appellants each received Title II statutory damages of $1,000.

FN6. Wire and electronic communications are subject to different treatment under the Wiretap Act. The Act's exclusionary rule, 18 U.S.C. s 2515, applies to the interception of wire communications, including such communications in electronic storage, see 18 U.S.C. s 2510(1), but not to the interception of electronic communications. See 18 U.S.C. s 2518(10)(a); United States v. Meriwether, 917 F.2d 955, 960 (6th Cir.1990); S.Rep. No. 541, 99th Cong., 2d Sess. 23 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3577. And, the types of crimes that may be investigated by means of surveillance directed at electronic communications, 18 U.S.C. s 2516(3) ("any federal felony"), are not
as limited as those that may be investigated by means of surveillance directed at wire or oral communications. See 18 U.S.C. s 2516(1) (specifically listed felonies).

FN7. Stored wire communications are subject to different treatment than stored electronic communications. Generally, a search warrant, rather than a court order, is required to obtain access to the contents of a stored electronic communication. See 18 U.S.C. s 2703(a). But, compliance with the more stringent requirements of s 2518, including obtaining a court order, is necessary to obtain access to a stored wire communication, because s 2703 expressly applies only to stored electronic communications, not to stored wire communications. See James G. Carr, The Law of Electronic Surveillance, s 4.10, at 4-126--4-127 (1994) (citing H.R.Rep. No. 99-647, 99th Cong., 2d Sess. 67-68 (1986)).

FN8. The ECPA legislative history's explanation of the prohibitions regarding disclosure also persuades us of the soundness of Turk's interpretation of "intercept" and our understanding of the distinctions Congress intended to draw between communications being transmitted and communications in electronic storage. In describing Title II's prohibitions against disclosure of the contents of stored communications, the Senate Report points out that s 2702(a) (part of Title II) "generally prohibits the provider of a wire or electronic communication service to the public from knowingly divulging the contents of any communication while in electronic storage by that service to any person other than the addressee or intended recipient." S.Rep. No. 99-541, 97th Cong. 2nd Sess. 37, 1986 U.S.C.C.A.N. 3555, 3591 (emphasis added). It then goes on to state that s 2511(3) of the Wiretap Act, as amended by Title I of the ECPA, "prohibits such a provider from divulging the contents of a communication while it is in transmission". Id. (emphasis added).

FN9. It goes without saying that we generally will not consider issues raised for the first time at oral argument. For this rare exception, the parties, as ordered, filed supplemental briefs on this point.

FN10. Section 2703 sets forth the requirements for governmental access to the contents of electronic (but not wire) communications. For electronic communications that have been in electronic storage for 180 days or less, the government can gain access to the contents pursuant to a federal or state warrant. 18 U.S.C. s 2703(a). For communications that are maintained by a remote computing service and that have been in storage for more than 180 days, the government can gain access by obtaining a warrant, by administrative or grand jury subpoena, or by obtaining a court order pursuant to s 2703(d). 18 U.S.C. s 2703(b). Section 2704 also deals only with electronic communications; it provides, inter alia, that a governmental entity may include in its subpoena or court order a requirement that the service provider create and maintain a duplicate of the contents of the electronic communications sought. 18 U.S.C. s 2704.
SECTION 10

COMPUTER CRIMES
COMPUTER FRAUD AND ABUSE STATUTE

1030. Fraud and related activity in connection with computers

(a) Whoever

(1) knowingly accesses a computer without authorization or exceeds authorized access, and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with the intent or reason to believe that such information so obtained is to be used to the injury of the United States, or to the advantage of any foreign nation;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(3) intentionally, without authorization to access any computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects the use of the Government's operation of such computer,

(4) knowingly and with intent to defraud, accesses a Federal interest computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer;

shall be punished as provided in subsection (c) of this section.

(5) intentionally accesses a Federal interest computer without authorization, and by means of one or more instances of such conduct alters, damages, or destroys information in any such Federal interest computer, or prevents authorized use of any such computer or information, and thereby

(A) causes loss to one or more others of a value aggregating $1,000 or more during any one year period; or

(B) modifies or impairs, or potentially modifies or impairs, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals; or

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is
(1) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and 

(2) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and 

(3) (A) a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(1) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and (B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and 

(d) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "federal interest computer" means a computer

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects the use of the financial institution's operation or the Government's operation of such computer; or

(B) which is one of two or more computers used in committing the offense, all of which are located in the same State;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;
(4) the term "financial institution" means

(A) an institution with deposits insured by the Federal Deposit Insurance Corporation;
(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;
(C) a credit union with accounts insured by the National Credit Union Administration;
(D) a member of the Federal home loan bank system and any home loan bank;
(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;
(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;
(G) the Securities Investor Protection Corporation;
(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and
(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act.

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter; and

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5.


Editorial Notes

Section 15 of the Securities Exchange Act of 1934, referred to in subsec. (e)(4)(F), is classified to section 780 of Title 15 Commerce and Trade.
Section 1(b) of the International Banking Act of 1978 referred to in subsec. (e)(4)(H), is classified to section 310i of Title 12, Banks and Banking.

457
Section 25 of the Federal Reserve Act, referred to in subsec. (e)(4)(I), is classified to subchapter I (section 601 et seq.) of chapter 6 of Title 12. Section 25(a) of the Federal Reserve Act, referred to in subsec. (e)(4)(I), is classified to subchapter II (section 611 et seq.) of chapter 6 of Title 12.

Separability of Provisions. If any provision of Pub.L. 101-73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101-73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101-73, set out as a note under section 1811 of Title 12, Banks and Banking.

Reports of Prosecutions. Section 2103 of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2192, provided: "The Attorney General shall report to the Congress annually, during the first three years following the date of the enactment of this joint resolution [Oct. 12, 1984], concerning prosecutions under the sections of title 18 of the United States Code added by this chapter."
OPINION

"It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying or misunderstanding undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it."


I. Introduction

This is a criminal prosecution under 18 U.S.C. § 875(c). Defendant Jake Baker (Baker) is charged in a superseding indictment with five counts of transmitting threats to injure or kidnap another, in electronic mail (e-mail) messages transmitted via the Internet. Now before the Court is Baker's motion to quash the superseding indictment. For the reasons that follow, the motion will be granted.

II. Background

The e-mail messages that form the basis of the charges in this case were exchanged in December, 1994 between Baker in Ann Arbor, Michigan, and defendant Arthur Gonda (Gonda), who sent and received e-mail through a computer in Ontario, Canada. Gonda's identity and whereabouts are unknown. The messages excerpted in the superseding indictment are drawn from a larger e-mail exchange between Gonda and Baker began on November 29, 1994, and ended on January 25, 1995. The specific language of the messages excerpted in the superseding indictment will be discussed in detail below. They all express a sexual interest in violence against women and girls.

Baker first appeared before a United States Magistrate Judge on a criminal complaint alleging violation of 18 U.S.C. § 875(c), on February 9, 1995. The complaint was based on an FBI agent's affidavit which cited language taken from a story Baker posted to an Internet newsgroup entitled "alt.sex.stories," and from e-mail messages he sent to Gonda. The story graphically described the torture, rape, and murder of a woman who was given the name of a classmate of Baker's at the University of Michigan. The "alt.sex.stories" newsgroup to which Baker's story was posted is an electronic bulletin board, the contents of which are publicly available via the Internet. Much of the attention this case garnered centered on Baker's use of a real student's name in the story. The e-mail messages exchanged between Gonda and Baker were private, and not available in any publicly accessible portion of the Internet.
Baker was arrested on the complaint and warrant on February 9, 1995, and detained overnight. The complaint and warrant is dated the same day. The following day, February 10, 1995, after holding a hearing a Magistrate Judge ordered Baker detained as a danger to the community. His detention was affirmed by a United States District Judge later that day. On March 8, 1995, this Court held a hearing on Baker's motion to be released on bond, and ordered a psychological evaluation of Baker be performed. The psychological evaluation was received on March 10, 1995. The evaluation concluded that Baker did not pose a threat, and the Court ordered him released that day.\[5\]

On February 14, 1995 the government charged Baker with violating 18 U.S.C. \(875(c)\) in a one count indictment based on unspecified communications transmitted in interstate and foreign commerce from December 2, 1994 through January 9, 1995. Presumably included in the communications was the story Baker posted. On March 15, 1995, the government charged Baker and Gonda in a superseding indictment with five counts of violating 18 U.S.C. \(875(c)\). The story on which the initial complaint was partially based is not mentioned in the superseding indictment, which refers only to e-mail messages exchanged between Gonda and Baker.\[6\] The government has filed a bill of particulars identifying who it perceives to be the objects of the allegedly threatening transmissions, as well as witness and exhibit lists.

Baker, who is named in all five of the superseding indictment's counts, has filed a motion seeking dismissal of all the counts of the superseding indictment. He contends that application of 18 U.S.C. \(875(c)\) to the e-mail transmissions pushes the boundaries of the statute beyond the limits of the First Amendment. The government responds that the motion must be denied because the First Amendment does not protect "true threats," and because whether a specific communication constitutes a true threat is a question for the jury.

III. The Law

Eighteen U.S.C. \(875(c)\) reads:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

The government must allege and prove three elements to support a conviction under \(875(c)\): "(1) a transmission in interstate [or foreign] commerce; (2) a communication containing a threat; and (3) the threat must be a threat to injure [or kidnap] the person of another." United States v. DeAndino, 958 F.2d 146, 148 (6th Cir.), cert. denied, 112 S. Ct. 2997 (1992). The Court of Appeals for the Sixth Circuit, like most others, has held that \(875(c)\) requires only general intent. Id. at 149. But see, United States v. Twine, 853 F.2d 676 (9th Cir. 1988) (finding a specific intent requirement in \(875(c)\)).\[7\] Because \(875(c)\) is a general intent crime, intent must be proved by "objectively looking at the defendant's behavior in the totality of the circumstances," rather than by "probing the defendant's subjective state of mind." DeAndino, 958 F.2d at 149. The Sixth Circuit has also held that "a specific individual as a target of the threat need not be identified." United States v. Cox, 957 F.2d 264, 266 (6th Cir. 1992). Even so, the threat must be aimed as some discrete, identifiable group. See id. (involving threat to "hurt people" at a specific bank); United States v. Lincoln, 589 F.2d 379 (8th Cir. 1979) (involving letters threatening to kill judges of the Eighth Circuit, under 18 U.S.C. \(876\)). The threat need not be communicated to the person or group identified as its target. See United States v. Schroeder, 902 F.2d 1469, 1470-71 (10th Cir.), cert. denied., 498 U.S. 867 (1990) (affirming \(875(c)\) conviction for a threat against people at a post office made to an Assistant United States Attorney); United States v. Kosma, 951 F.2d 549, 555 (3rd Cir. 1991) (listing cases in which threats against the President were made to third persons, under 18 U.S.C. \(871\)).

Prosecution under 18 U.S.C. \(875(c)\) involves punishment of pure speech,\[8\] it necessarily implicates and is limited by the First Amendment. Although the Supreme Court has not addressed the constitutionally permissible scope of \(875(c)\), it has considered a similar statute concerning threats against the President, 18 U.S.C. \(871(a)\).\[9\]
in *Watts v. United States*, 394 U.S. 705. In *Watts*, the Supreme Court recognized that:

a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

*Id.* at 707. Under *Watts*, to pass constitutional muster the government must initially prove "a true 'threat.'" *Id.* Factors mentioned in *Watts* as bearing on whether a specific statement can be taken as a true threat include the context of the statement, including whether the statement has a political dimension; whether the statement was conditional; and the reaction of the listeners. *Id.*[10] *Watts* also makes clear that the question of whether a statement constitutes a true threat in light of the First Amendment is distinct from the question of the defendant's intent: "whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat.'" *Id.*[11]

The distinction between the two questions of whether a statement is a "true threat" for the purposes of First Amendment limitation, and the intention of the statement's maker, is important but unfortunately often confused. The confusion results from too loose a use of the phrase "true threat."

The only extended discussion of the constitutional dimension of the "true threat" requirement with regard to *United States v. Kelnner*, 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976). In *Kelnner*, the Second Circuit drew on *Watts* to illuminate the constitutional limits of a prosecution under 875(c):

The purpose and effect of the *Watts* constitutionally-limited definition of the term "threat" is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished--only such threats, in short, as are of the same nature as those threats which are "properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues." *Watts*, 402 F.2d at 690.

***

So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied. This clarification of the scope of 18 U.S.C. 875(c) is, we trust, consistent with a rational approach to First Amendment construction which provides for governmental authority in instances of inchoate conduct, where a communication has become "so interlocked with violent conduct as to constitute for all practical purposes part of the [proscribed] action itself."

*Kelnner*, 534 F.2d at 1027 (quoting T. Emerson, The System of Freedom of Expression, 329 (1970)). *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

The government argues that the standard announced in *Kelnner* is "far more stringent" than the governing standard in the Sixth Circuit. For the Sixth Circuit "true threat" standard, the government refers the Court to *United States v. Lincoln*, 462 F.2d 1368, cert. denied, 409 U.S. 952 (1972). In citing *Lincoln* for the "true threat" standard, the government confuses the constitutional "true threat" requirement with the statutory intent requirement. In relevant part, *Lincoln* reads:

This Court therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances
wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of the President, and that the statement not be the result of mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.

\textit{ncoh. 462 F.2d at 1368 (quoting and adopting standard from Roy v. United States, 416 F.2d 874, 877-78 (9th Cir. 1969))} (emphasis added). \textit{Lincoln} addresses the statute's intent requirement, and adopts the Ninth Circuit's formulation of the intent required. \textit{It} does not speak to the constitutional "true threat" requirement imposed by the First Amendment and elucidated in \textit{Watts} and \textit{Kelner. United States v. Glover, 846 F.2d 339, 343-44 (6th Cir.), cert. denied, 488 U.S. 982 (1988)} and \textit{United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982)}, also cited by the government, quote the same language from \textit{Roy} and also address the statutory intent requirement rather than the constitutional limits of the statute. None of these cases indicate that a different constitutional standard for prosecution under \textit{\textcircled{a}} 875(c) applies in the Sixth Circuit than in the Second Circuit.\textit{[13]}

The confusion between the two requirements is understandable, because the phrase "true threat" has been used in the context of both requirements. Both the Ninth and Seventh Circuits have stated that the government must meet the \textit{Roy} general intent standard in order to make out a "true threat." \textit{Melugin v. Hames, 38 F.3d 1478, 1484 (9th Cir. 1994)} (under Alaska statute AS 11.56.510(a)(1)); \textit{United States v. Khorrari, 895 F.2d 1186, 1193 (7th Cir.), cert. denied, 498 U.S. 986 (1990)}.

That the phrase "true threat" has been used to describe both the statutory intent requirement and the constitutional "unconditional, unequivocal, immediate and specific" requirement does not imply that the two requirements are identical, or that any statement which meets the intent requirement may be prosecuted under \textit{\textcircled{a}} 875(c) without running afoul of the First Amendment. Typically, in the cases focusing on the intent requirement, there is no dispute that the statement satisfies the constitutional standard, and the defendant seeks dismissal or reversal of his conviction on the ground that he or she lacked the requisite intent. \textit{See, e.g., United States v. Lincoln, 462 F.2d at 1369 ("[a]pellant contends that the statute is violated only when a threat is uttered with a willful intent to carry it out "); United States v. Hoffman, 806 F.2d 703, 712 (7th Cir. 1986) (concluding that was reasonable for the jury to conclude that Hoffman intended the letter as a serious expression of his intent to harm the President.") (quoted in \textit{Khorrami, 895 F.2d 1186}).\textit{[14]}

\textit{Kelner's} standard for a prosecution under 18 U.S.C. \textit{\textcircled{a}} 875(c) is not only constitutionally required, but also is consistent with the statute's legislative history. The law which was eventually codified as 18 U.S.C. \textit{\textcircled{a}} 875(c) was first passed in 1932, Pub. L. No. 72-274 (1932), and criminalized use of the mail to transmit a threat to injure or kidnap any person (or to injure a person's property or reputation), or to accuse a person of a crime or demand ransom for a kidnapped person. \textit{Id.} The communication had to be sent "with intent to extort . . . money or any thing of value" to fall under the act. \textit{Id.} A motivating factor for passage of the 1932 act was the kidnapping of Charles Lindbergh's son, and the concomitant use of the mail to convey the kidnappers' threats and demands. H.R. Rep. No. 602, 72d Congress, 1st Sess. (1932).

The act was addressed to the constitutionally unproblematic case, like the Lindbergh case, identified in \textit{Kelner}: "where a communication has become 'so interlocked with violent conduct as to constitute for all practical purposes part of the [proscribed] action itself.'" \textit{Kelner, 534 F.2d at 1027.} The act was modified in 1934, Pub. L. No. 73-231 (1934), as increasingly sophisticated criminals had taken to using means other than the mail, such as the telephone and telegraph, to transmit their threats. S. Rep. No. 1456, 73d Congress, 2d Sess. (1934). As modified, it applied to threats transmitted "by any means whatsoever," but still required extortionate intent. Pub. L. No. 73-231 (1934). In 1939 the act, Pub. L. No. 76-76 (1939), was expanded to apply to threats to kidnap or injure that were not made with extortionate intent. \textit{Id.} The act's expansion was prompted by the recognition that many threats "of a very serious and socially harmful nature" were not covered by the existing law because "the sender of the threat did not intend to extort money or other thing of value for himself." H.R. Rep. No. 102, 76th Congress, 1st Sess. (1939). An example of such a threat mentioned in the in the Report was one directed to a governor, threatening to blow up the governor's home if certain defendants in a criminal case were not released. As modified, while an "extortionate" intent was no longer required, the act was still intended to address threats aimed at accomplishing some coercive
purpose, such as the release of the defendants in the given example. The modified statute still targets threats which, like the example, are unlikely to offend the constitutional standard articulated in *Kelner*.

Threats aimed at achieving some coercive end remain the typical subject of more contemporary cases. In *Cox*, for instance, the defendant's truck was repossessed while it contained items of his personal property. The defendant telephoned the bank that had had the truck repossessed and stated "I tell you what, you all better have my personal items to me by five o'clock today or it[']s going to be a lot of hurt people there." *Cox*, 957 F.2d at 265. The threat was designed to effect the return of the defendant's property, it targeted the people at the bank, and it was found not to be conditional (in part because his property could not have been returned by the five o'clock deadline). It falls within *Kelner*'s requirement of a threat that is "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." 534 F.2d at 1027.

Similarly, in *Schroeder*, the defendant had sued the government for denial of employment preference under a veterans benefit program. 902 F.2d at 1470. After losing his civil suits, the defendant called an Assistant United States Attorney and threatened to shoot people at a post office if he did not obtain satisfaction from the government; he stated that "the government either gives [him] money or people would get hurt." *Id.* *Schroeder* involves an explicitly extortionate threat aimed at people in post offices. Although the case appears to strain the constitutional standard, particularly with regard to the requirement of immediacy, the defendant did not raise a constitutional challenge on appeal.

While coercive or extortionate threats are paradigmatic subjects of a prosecution under 18 U.S.C. § 875(c), a threat which is neither coercive nor extortionate may still satisfy the constitutional test from *Kelner*; indeed, *Kelner* itself involved a non-coercive threat to assassinate the PLO leader Yasser Arafat. *Kelner*, 534 F.2d at 1025. See also, *DeAndino*, 958 F.2d at 146 (regarding threat that defendant was going to "blow [the victim]'s brains out," and the victim was "going to die.") Nevertheless, a coercive or extortionate threat is particularly likely to be a constitutionally prosecutable "true threat" because it is particularly likely to be intimately bound up with proscribed activity.

Another important factor in analyzing a threat under 18 U.S.C. § 875(c) is the recipient of the communication in question. As the Sixth Circuit stated in *Lincoln* (in the context of § 871(a)), the statutory general intent element requires that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily harm" or kidnap a person. 462 F.2d at 1368. Thus in *Cox*, the Sixth Circuit looked to the reaction of the recipient of the defendant's telephone call, as well as that of the person to whom the defendant asked to speak. 15 *Cox*, 957 F.2d at 266. In *Schroeder*, the appropriate focus in considering the defendant's statements is how they would be interpreted by the Assistant United States Attorney who heard them, and by those to whom we could foreseeably relay them. A statement which would not be interpreted by any foreseeable recipient as expressing a serious intention to injure or kidnap simply is not a threat under the statute. While it is not necessary that the statement prosecuted under 18 U.S.C. § 875(c) be communicated to the would-be target of the alleged threat, the statement must be evaluated in light of foreseeable recipients of the communication.

Evaluating a statement charged under 18 U.S.C. § 875(c) in light of its foreseeable recipients is consistent with the aims of the statute and the First Amendment. In the case of a coercive or extortionate threat, the maker of the statement obviously cannot achieve his or her end if the recipient of the statement does not take it as expressing a serious intention to carry out the threatened acts. If the coercive or extortionate threat is likely to be taken seriously by its recipient, then the threat is "so interlocked with violent conduct as to constitute for all practical purposes part of the [proscribed] action itself." *Kelner*, 534 F.2d at 1027. A communication containing an alleged non-coercive threat may be regulated consonant with the First Amendment, under the analysis in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 120 L.Ed.2d 305, 321 (1992), in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." If the alleged threat would not be interpreted by its foreseeable recipients as a serious expression of an intention to do the "threatened"
acts, it does not implicate fear of violence or the disruption that fear engenders, and does not suggest a real possibility that the "threatened" violence will occur. The statement thus would not be a "true threat" for the purposes of the First Amendment.

Whether or not a prosecution under § 875(c) encroaches on constitutionally protected speech is a question appropriately decided by the Court as a threshold matter. In the context of the Smith Act, 18 U.S.C. § 2381 et seq., which makes it a crime knowingly or willfully to advocate the overthrow or destruction of the United States government by force or violence, the Supreme Court has held that "[w]hen facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law" requiring a judicial determination. Dennis v. United States, 341 U.S. 494, 513 (1951) (construing Act as codified at 18 U.S.C. (1946 ed.) § 11, 54 Stat. 671). In the context of § 875(c), the Second Circuit has recognized that "[m]ost cases are within a broad expanse of varying fact patterns which may not be resolved as a matter of law, but should be left to a jury," but has said that where the factual proof of a "true threat" is "insufficient as a matter of law," the indictment is properly dismissed before reaching the jury. United States v. Carrier, 672 F.2d 300, 306 (2d Cir.); cert. denied, 457 U.S. 1139 (1982). Although the government argues that "whether a statement is a true threat is to be decided by the trier of fact," it recognizes that where "the language set forth . . . is so facially insufficient that it cannot possibly amount to a true threat," the Court may properly dismiss the indictment. Id.; accord Kosma, 951 F.2d at 555; United States v. Gilbert, 884 F.2d 454, 458 (9th Cir. 1989), cert. denied, 493 U.S. 1082 (1990); United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983), cert. denied, 467 U.S. 1228 (1984); Lincoln, 589 F.2d at 382. Whether the language set forth in the superseding indictment could possibly constitute a "true threat" must be determined in accord with Kelner's articulation of the constitutional requirement of a threat which on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

Kelner, 534 F.2d at 1027. Whether or not Baker actually intended to carry out the actions described in the communications is irrelevant to the constitutional inquiry.

IV. The Communications

The government characterizes the e-mail dialogue between Gonda and Baker in December, 1994 as reflecting "the evolution of their activity from shared fantasies to a firm plan of action." The government's characterization of the ongoing dialogue suggests that at least some of the counts in the superseding indictment should be dismissed; messages constituting "shared fantasies" fall short of the Kelner standard of an unequivocal, unconditional, immediate and specific threat conveying an imminent prospect of execution and therefore are not "true threats" unprotected by the First Amendment.

As the Court construes the law as discussed above, the constitutional standard enunciated in Kelner requires, at the very least, that a statement charged under § 875(c) contain some language construable as a serious expression of an intent imminently to carry out some injurious act. The language of the statement must be considered as it would be interpreted by the foreseeable recipients of the communication containing it. Statements expressing musings, considerations of what it would be like to kidnap or injure someone, or desires to kidnap or injure someone, however unsavory, are not constitutionally actionable under § 875(c) absent some expression of an intent to commit the injury or kidnapping. [16] In addition, while the statement need not identify a specific individual as its target, it must be sufficiently specific as to its potential target or targets to render the statement more than hypothetical.

Before addressing the specific language quoted in the indictment, several observations pertain to all of the government's charges. First, all of the language for which Baker is charged was contained in private e-mail messages he sent to Gonda. The messages were not available in any publicly accessible part of the Internet, and there is no allegation that they were ever distributed in any format, electronic or hardcopy, to anyone other than Gonda.
Nothing in these private messages suggests that they would be further distributed. It is only as a result of this prosecution and the ensuing publicity that the content of the messages has been publicly aired.

The focus of the inquiry here, therefore, is how a reasonable person would expect Gonda to interpret the e-mail messages. Gonda's identity is entirely unknown; "he" could be a ten year old girl, an eighty year old man, or a committee in a retirement community playing the role of Gonda gathered around a computer.[17] All that is known about Gonda is that he used a computer account based in Ontario, Canada, and that he apparently enjoyed exchanging with Baker what he referred to in an e-mail message dated January 3, 1995, as "REAL sex talk" concerning violence against women and girls. The language referred to by the government clearly does not constitute threats of a coercive or extortionate nature. It would be patently unreasonable after reading his messages to think that Baker's communications caused their only foreseeable recipient, Gonda, to fear violence, or caused him any disruption due to fear of violence. Of the grounds for prosecution of threats identified in R.A.V., the only one that could apply here is protection from the possibility that threatened violence will occur. ___ U.S. at ___, 120 L.Ed.2d at 321.

The government characterizes the communications between Gonda and Baker as evolving into "a firm plan of action." Section 875(c), though, does not address planning crimes, per se, but transmitting threats to injure or kidnap. At oral argument, the government agreed the exchange between Gonda and Baker could be characterized as an exchange between coconspirators. In order to prove the existence of a conspiracy, generally, the government must prove an agreement between two or more people to act together in committing an offense, and also an overt act in furtherance of the conspiracy. E.g., United States v. Reijsbeck, 841 F.2d 701, 704 (6th Cir. 1988); 18 U.S.C. § 371; Sixth Circuit Pattern Criminal Jury Instructions 3 01A, 3 04. The charges here could not support a conspiracy prosecution because no overt act is alleged. The only actions involved in this prosecution are speech--"the outward expression of what a person thinks in his mind." Vance v. Judas Priest, et al., 1990 WL 130920, *28 (Nev. Dist. Ct. 1990). In an e-mail exchange not quoted in the superseding indictment,[18] Baker and Gonda discuss sharing their thoughts, a classically protected activity. Baker had said to Gonda, in part: "I'd love to meet with you. There's no one else I can share my thoughts with." On November 29, 1994, Gonda responded in part: "I would really love to meet with you. I find that I am going insane trying to keep all these thoughts to myself... maybe we could even try to pick up some chicks and share our thoughts with them... what do you think?"

Even if Gonda and Baker were conspiring, it does not follow that they are guilty of transmitting a threat to injure or kidnap under 18 U.S.C. § 875(c). Section 875(c) is not simply a conspiracy statute minus the overt act requirement. In order to be constitutionally sanctionable, the statements Baker made must meet Kelner's "unequivocal, unconditional, immediate, and specific" standard. As Justice Brandeis wrote:

Fear of serious injury cannot alone justify suppression of free speech. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.

Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).[19]

A.

Count I charges Baker and Gonda with transmitting a threat to injure, and quotes from three e-mail messages. In the first message quoted, dated December 1, 1994, Baker responds to a message he had received from Gonda:

I highly agree with the type of woman you like to hurt. You seem to have the same tastes I have. When you come down, this'll be fun!

Also, I've been thinking. I want to do it to a really young girl first. 13 or 14.[20] There innocence makes them so much more fun --- and they'll be easier to control. What do you think? I haven't read your entire
mail yet. I've saved it to read later, in private. I'll try to write another short phantasy and send it. If not tomorrow, maybe by Monday. No promises.

On December 2, Gonda responded:

I would love to do a 13 or 14 year old. I think you are right...not only their innocence but their young bodies would really be fun to hurt. As far as being easier to control...you may be right, however you can control any bitch with rope and a gag...once they are tied up and struggling we could do anything we want to them...to any girl. The trick is to be very careful in planning. I will keep my eye out for young girls, and relish the fantasy...BTW[2] what about your neighbour at home, you may get a chance to see her...?...?

The same day, Baker responded:

True. But young girls still turn me on more. Likely to be nice and tight. Oh, they'd scream nicely too!

Yeah. I didn't see her last time I was home. She might have moved. But she'd be a great catch. She's real pretty, with nice long legs, and a great girly face ... I'd love to make her cry ...

The bill of particulars identifies the targets of these statements as:

13 and 14-year old girls who reside in Defendant Jake Baker's neighborhood in Ann Arbor, Michigan, and teen-age girls who reside in Defendant Jake Baker's neighborhood in Boardman, Ohio.

This Count falls short of the constitutional "true threat" requirement. As an initial matter, it does not refer to a sufficiently specific class of targets. The more limited class identified in the bill of particulars is not apparent from the content of the communications. Nothing in the exchange quoted in Count I implicitly or explicitly refers to 13 or 14 year old girls in Ann Arbor, nothing in the exchange identifies Boardman, Ohio (Baker's actual home) as the "home" referred to, and nothing in the exchange allows one to determine that the neighbor discussed is a teen-age girl. In reality, the only class of people to whom the messages can be taken to refer is 13 or 14 year old girls, anywhere. This class is too indeterminate to satisfy Kelner's requirement of specificity as to the person threatened, even under the liberal interpretation given the requirement by some courts. Cf. Schroeder, 902 F.2d at 1470 (targeting people at an unidentified post office).

As to the content of the messages, Baker's discussing his "tastes" in the first paragraph of his December 1 message does not involve any identifiable threatened action. In the second paragraph of the December 1 message, he expresses a desire "to do it to" a 13 or 14 year old girl. Even assuming that more context would clarify the phrase "to do it to," the second paragraph also fails to mention an intention to do anything. Rather, it seeks Gonda's reaction to Baker's desire, asking: "What do you think?" Discussion of desires, alone, is not tantamount to threatening to act on those desires. Absent such a threat to act, a statement is protected by the First Amendment.

As to Baker's message of December 2, the first paragraph again discusses a predilection toward "young girls," and what it would be like, presumably, "to do it to" "young girls." It does not mention any intention to act in accordance with the expressed predilection. The second paragraph responds to Gonda's question about a neighbor "at home." It says "she'd be a great catch," but expresses no intention to "catch" her, and indicates a desire to "make her cry," but, again, expresses no intention to take any action in accordance with that desire. It is not constitutionally permissible under Kelner to infer an intention to act on a desire from a simple expression of the desire. The intention (whether or not actually held) must itself be expressed in the statement. Count I fails to meet this standard, and must be dismissed.

B.
Counts II and III are based on the same statement made by Baker in an e-mail message dated December 9, 1994, and charge Baker with making a threat to kidnap and a threat to injure, respectively. The statement for which Baker is charged in the two counts reads:

I just picked up Blod Lust and have started to read it. I'll look for "Final Truth" tomorrow (payday). One of the things I've started doing is going back and re-reading earlier messages of yours. Each time I do they turn me on more and more. I can't wait to see you in person. I've been trying to think of secluded spots. but my knowledge of Ann Arbor is mostly limited to the campus. I don't want any blood in my room, though I have come upon an excellent method to abduct a bitch ---

As I said before, my room is right across from the girl's bathroom. Wait until late at night. grab her when she goes to unlock the door. Knock her unconscious. and put her into one of those portable lockers (forget the word for it). or even a duffle bag. Then hurry her out to the car and take her away .... What do you think?

The bill of particulars identifies the target of the statement as: "Female college students who lived in Defendant Jake Baker's dormitory at the University of Michigan in Ann Arbor, Michigan." Apart from concerns about equating Baker's online persona with his real person, the class of would-be targets here is identified with sufficient specificity.

Presumably, the government offers this statement as a threat to carry out the "method to abduct" it describes. Under Keener, discussion of a method of kidnapping or injuring a person is not punishable unless the statement includes an unequivocal and specific expression of intention immediately to carry out the actions discussed. Baker's e-mail message cannot reasonably be read as satisfying this standard. As in Count I, the language with which Baker is charged here lacks any expression of an intention to act, and concludes with a request for Gonda's reaction: "What do you think?" Discussing the commission of a crime is not tantamount to declaring an intention to commit the crime. To find an expression of unequivocal intention in this language would require the drawing of an inference not grounded in any specific language of the statement and would exceed the bounds of the First Amendment. Counts II and III must be dismissed.

C.

Count IV charges Baker and Gonda with transmitting a threat to injure. The Count is based on a message from Gonda to Baker, and Baker's response. Both e-mail messages are dated December 10, 1994. Gonda wrote:

Hi Jake. I have been out tonight and I can tell you that I am thinking more and more about 'doing' a girl. I can picture it so well...and I can think of no better use for their flesh. I HAVE to make a bitch suffer!

As far as the Teale-homolka killings, well I can think of no tastier crimes...BTW have you seen any pictures of the girls? You have to see these cunts! They must have been so much fun...please let me know any details that I cannot get here. I would love to see what you think about it....

As far as the asian bitch story, there is only one possible ending....

Baker responded:

Are tastes are so similar. it scares me :-) When I lay down at night. all I think of before I sleep is how I'd torture a bitch I get my hands on. I have some pretty vivid near dreams too. I wish I could remember them when I get up.

The bill of particulars identifies the target of these statements as:
Women who were the subject of Defendant Jake Baker's E-mail transmissions and Internet postings, including -- but not limited to -- Jane Doe, whose true name is known to Defendant Jake Baker and this Honorable Court.

his Count presents the weakest of all the government's charges against Baker. While the government identifies the class of targets here as women Baker discussed on the Internet, there is nothing in the language quoted here to so limit the class. In addition, since Baker's e-mail often refers simply to "a girl," a class composed of women Baker discussed in his e-mail and stories essentially is a class composed of any woman or girl about whom Baker has ever thought. Such a class is obviously not sufficiently specific.

With regard to the content of Baker's communication, Baker's statement here consists only of an expression of his thoughts before sleeping and of "near dreams" he cannot remember upon waking. To infer an intention to act upon the thoughts and dreams from this language would stray far beyond the bounds of the First Amendment, and would amount to punishing Baker for his thoughts and desires. Count IV must be dismissed.

D.

Count V charges Baker and Gonda with transmitting a threat to injure. It is based on an exchange between Gonda and Baker on December 11-12, 1994. On December 11, Gonda wrote to Baker:

It's always a pleasure hearing back from you...I had a great orgasm today thinking of how you and I would torture this very very petite and cute south american girl in one of my classes...BTW speaking of torture, I have got this great full length picture of the Mahaffy girl Paul Bernardo killed, she is wearing this short skirt!

he same day, Baker responded:

Just thinking about it anymore doesn't do the trick ... I need TO DO IT.

The next day, Gonda wrote:

My feelings exactly! We have to get together...I will give you more details as soon as I find out my situation...

Baker responded:

Alrighty then. If not next week. or in January. then definatly sometime in the Summer. Pickings are better then too. Although it's more crowded.

The bill of particulars identifies the target of these statements, as in Count IV, as:

Women who were the subject of Defendant Jake Baker's E-mail transmissions and Internet postings, including -- but not limited to -- Jane Doe, whose true name is known to Defendant Jake Baker and this Honorable Court.

This Count, too, fails to meet Kelner's constitutional "true threat" standard. The class of potential targets, as discussed with regard to Count IV, is far too vague. As to the content of the communications, Baker indicates his need TO DO IT. "Like his earlier statements, this language indicates a desire to do something. While use of the word "need" indicates a strong desire, it still falls short "unequivocal, unconditional and specific expression of intention immediately to inflict injury," Kelner, 534 F.2d at 1027; "needs" go unmet everyday. Baker next indicates,
at most, an intention to meet Gonda at some indefinite point in the future—in the next week, month, or several months later. This statement does not express an unequivocal intention immediately to do anything. Also, nothing in the language on which the Count is based indicates any intention to commit specific acts if Baker and Gonda ever were to meet. Like the preceding four Counts, Count V fails to state a charge under 18 U.S.C. § 875(c) that can survive a First Amendment challenge, and must be dismissed. This prosecution presents the rare case in which, in the government's words, "the language set forth...is so facially insufficient that it cannot possibly amount to a true threat."

V. Coda

This case in its initial stage generated a good deal of public interest. Now that the case will be concluded by an order rather than by a jury verdict, it is important to assure the public that such a conclusion is not by fiat. In United States v. Carrier, 672 F.2d 300, 306 (2d Cir.), cert. denied, 457 U.S. 1139 (1982), while the Second Circuit said "that whether words used are a true threat is generally best left to the triers of fact," it went on to say "[o]nly where the factual proof is insufficient as a matter of law should the indictment be dismissed." This is such a case. The communications which form the basis of the superseding indictment, the many preceding and subsequent communications, the names of the witnesses and the general nature of their testimony, and the exhibits are all in the record. All of this evidence, viewed in the light most favorable to the prosecution, leads to one inevitable conclusion: based on the applicable rules of law there is no case for a jury because the factual proof is insufficient as a matter of law. The government's enthusiastic beginning petered out to a salvage effort once it recognized that the communication which so much alarmed the University of Michigan officials was only a rather savage and tasteless piece of fiction. Why the government became involved in the matter is not really explained in the record.

Baker is being prosecuted under 18 U.S.C. § 875(c) for his use of words, implicating fundamental First Amendment concerns. Baker's words were transmitted by means of the Internet, a relatively new communications medium that is itself currently the subject of much media attention. The Internet makes it possible with unprecedented ease to achieve world-wide distribution of material, like Baker's story, posted to its public areas. When used in such a fashion, the Internet may be likened to a newspaper with unlimited distribution and no locatable printing press—and with no supervising editorial control. But Baker's e-mail messages, on which the superseding indictment is based, were not publicly published but privately sent to Gonda. While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment. Whatever Baker's faults, and he is to be faulted, he did not violate 18 U.S.C. § 875(c). The case would have been better handled as a disciplinary matter, as the University of Victoria proceeded in a similar situation. Despite whatever difficulties inhere in such a course What the Court said at the conclusion of oral argument bears repeating: "[T]he Court is very skeptical, and about the best thing the government's got going for it at this moment is the sincerity of purpose exhibited by [the Assistant United States Attorneys prosecuting the case]. I am not sure that sincerity of purpose is either synonymous with a good case under the law, or even the exercise of good judgment."

____________________

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: June 21, 1995

Detroit, Michigan

Baker Opinion / Stuart Beraha / sberaha@ic.net
[1] Computer networks are systems of interconnected computers that allow the exchange of information between the connected computers. The Internet is the world's largest computer network, often described as a "network of networks." The Internet is decentralized in that there is no central hub through which messages or information must be routed, and no central governing body. For a brief discussion of computer networks and their uses, see Edward T. O'Hara and Gavino Morin, Cyberspace and the Law: Your Rights and Duties in the On-Line World, 2-11 (1994). E-mail allows computer network users to send messages to each other which are received at an "electronic mailbox" identified by the recipient's unique user name and address. Id. at 5. A survey of Internet use conducted in October, 1994 counted 13.5 million consumer Internet users, and 27.5 million e-mail users. Peter H. Lewis, On the Net, New York Times, May 29, 1995, at 39. The survey tallied male users as outnumbering female users by a ratio of 2 to 1, and children aged seventeen and younger as constituting 2.3 percent of the users. Id.

[2] The American Civil Liberties Union Fund of Michigan has filed an amicus brief arguing in favor of dismissal.


[4] The messages were apparently stored on the hard drive of the computer in Baker's dormitory room; they may also have been stored on the University of Michigan computer Baker accessed through his account. Baker gave the authorities permission to search his stored e-mail messages.

[5] Baker's detention for 29 days is disturbing. The initial University of Michigan General Offense Report dated January 27, 1995, indicates that as early as January 20, 1995, a psychiatric evaluation was performed and concluded that Baker did not display any risk factors for potential violence. The University's investigation began on January 18, 1995. What evaluation, if any, was performed by the Washtenaw County Prosecutor, the logical prosecuting authority, is unknown. The FBI was initially contacted on January 26, 1995. A psychological evaluation was performed at the request of University officials on February 7, 1995, and concluded in a report dated February 9, 1995, that there was "no evidence that [Baker] is a danger to others or himself." Another psychiatric evaluation, also dated February 9, 1995, similarly concluded that Baker "presented no clear and present danger to [the student whose name he had used in the story] or anyone, at the time of the interview." Why Baker was arrested and taken into custody on February 9, 1995, is inexplicable. The government indicated in its supplemental brief that Baker's arrest was justified as preventing "Jake Baker and other like-minded individuals from acting on their violent impulses and desires." In light of the information available at the time of Baker's arrest, this justification seems farfetched.

[6] At oral argument on May 26, 1995, the government stated that it abandoned the story as a basis of prosecution because it did not constitute a threat.

[7] Baker recognizes that the Sixth Circuit considers [[section]] 875(c) a general intent crime, but asks the Court to "revisit the issue." Because Sixth Circuit precedent is clear on this point, the Court declines the invitation to revisit the point.


[9] 18 U.S.C. [[section]] 871(a) provides:

        Whoever knowingly and willfully deposits for conveyance in the mail or for delivery from any post office by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the
President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President, or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

[10] While Watts involved political speech, the Court must reject the government's implication that Watts establishes a separate standard for true threats in the context of political speech. The Watts opinion does not explicitly limit itself to political speech, and the Sixth Circuit has recognized that the political nature of the speech in Watts was only one factor considered by the Supreme Court. Cox, 957 F.2d at 266. (observing that the Supreme Court in Watts "considered the conditional nature of the threat, the fact that it was made during a political discussion, and the fact that the response of the audience was laughter.")

[11] The constitutional "true threat" question is also distinct from the sort of psycholinguistic threat analysis often performed by the FBI and other investigative agencies. See Murray S. Miron & John E. Douglas, Threat Analysis: The Psycholinguistic Approach, FBI Law Enforcement Bulletin, Sept. 1979, at 5; Parke Elliott Dietz, et al., Threatening and Otherwise Inappropriate Letters to Members of the United States Congress, Journal of Forensic Sciences, Vol. 36, No. 5, Sept. 1991, p. 1445; Parke Elliott Dietz, et al., Threatening and Otherwise Inappropriate Letters to Hollywood Celebrities, Journal of Forensic Sciences, Vol. 36, No. 1, Jan. 1991, p. 185. At oral argument, the government acknowledged that the FBI's threat analysis section had not analyzed the communications involved here, but indicated that the FBI agent who obtained the initial criminal complaint may have been in contact with the section.

[12] Lincoln and Roy specifically address the statute barring threats against the President, 18 U.S.C. [§section] 871(a). While cases under 18 U.S.C. [§section] 871(a) are helpful to analyzing a prosecution under 18 U.S.C. [§section] 875(c), there is a significant difference between the two statutes in that there is never any doubt under the former statute that the alleged threat has a sufficiently specific target.

[13] The Court's following Kehner's analysis assures that what is a crime in Michigan, Ohio, Kentucky, and Tennessee is also a crime in New York, Connecticut, and Vermont. Seemingly, the government would have it otherwise.

[14] In some cases it is unclear whether the defendant's argument goes to his or her intent or to the content of the statement. See Melugin v. Hames, 38 F.3d at 1484 (analyzing defendant's claim that his letter was not a "true threat" because it was "one of perhaps hundreds of 'crackpot communications' . . . receive[d] each year from frustrated and/or unschooled litigants."). If Melugin stands for the proposition that any statement which meets the Roy intention standard is constitutionally prosecutable, the Court declines to follow it. The Sixth Circuit has not so held, and in Twine, 853 F.2d at 680, the Ninth Circuit explicitly held that conviction under [§section] 875(c) required a showing of specific intent.

[15] Although the court in Cox looked to the actual reaction of the recipient of the phone call and the requested person, the statute only requires that a reasonable person would expect the recipient to interpret the statement as a serious expression of an intention to injure or kidnap.

[16] This test is not satisfied by finding that the desires expressed in a statement are so deviant that the person making the statement must be unstable, and therefore likely to act in accordance with his or her desires at any moment. Something in the statement itself must indicate some intention imminently to act. Otherwise, the statement may be unsettling or alarming, but is not a true threat for the purposes of the First Amendment.

[17] Role playing and adopting assumed identities is common in on-line communities. See, e.g., Dorion Sagan, Sex, Lies, and Cyberspace, Wired, Jan. 1995, at 78 (discussing the multiple, and differently gendered, identities assumed
by the author on the commercial service America Online--and subtitled "Online, no one knows you're a dog. Or a male. Or a 13-year-old girl."

[18] Baker and Gonda exchanged at least forty-one messages between November 29, 1994 and January 25, 1995. During the same time frame, Baker also corresponded by e-mail with other people who had read the stories he publicly posted.

[19] The Senate's recent passage of a telecommunications bill including Senator Exon's measure criminalizing the distribution of "filthy" material over computer networks suggests that the First Amendment's applicability to on-line communications has not been well considered. S. 652, 104th Congress, 1st Sess. (1995); see also, Edmund L. Andrews, Senate Supports Severe Penalties on Computer Smut, N.Y. Times, June 15, 1995, at Al.

[20] The typographic, spelling, and grammatical errors in this and the following quotations are reproduced from the originals.

[21] "BTW" is shorthand for "by the way."

[22] See note 3, supra.

[23] See note 4, supra.

[24] As is discussed above, the law now codified at 18 U.S.C. [[section]] 875 was revised in 1934, Pub. L. No. 72-274, as telephones and telegraphs began to be used to transmit threats.


Baker Footnotes  Stuart Beraha  sberaha@ic.net
This case presents the issue of whether new wine can be poured into an old bottle. The facts, as seen in the light most favorable to the government, are these. The defendant, David LaMacchia, is a twenty-one year old student at the Massachusetts Institute of Technology (MIT). LaMacchia, a computer hacker, used MIT’s computer network to gain entree to the Internet. Using pseudonyms and an encrypted address, LaMacchia set up an electronic bulletin board which he named Cynosure.

[fn 1] He encouraged his correspondents to upload popular software applications (Excel 5.0 and WordPerfect 6.0) and computer games (Sim City 2000). These he transferred to a second encrypted address (Cynosure II) where they could be downloaded by other users with access to the Cynosure password. Although LaMacchia was at pains to impress the need for circumspection on the part of his subscribers, the worldwide traffic generated by the offer of free software attracted the notice of university and federal authorities.

On April 7, 1994, a federal grand jury returned a one count indictment charging LaMacchia with
conspiring with "persons unknown" to violate 18 U.S.C. Sec. 1343, the wire fraud statute. According to the indictment, LaMacchia devised a scheme to defraud that had as its object the facilitation "on an international scale" of the "illega copying and distribution of copyrighted software" without payment of licensing fees and royalties to software manufacturers and vendors. The indictment alleges that LaMacchia's scheme caused losses of more than one million dollars to software copyright holders. The indictment does not allege that LaMacchia sought or derived any personal benefit from the scheme to defraud.

On September 30, 1994, the defendant brought a motion to dismiss, arguing that the government had improperly resorted to the wire fraud statute as a copyright enforcement tool in defiance of the Supreme Court's decision in Dowling v. United States, 473 U.S. 207 (1985). The government argues that Dowling is a narrower case than LaMacchia would have it, and holds only that copyright infringement does not satisfy the physical "taking" requirement of the National Stolen Property Act, 18 U.S.C. Sec. 2314.

THE DOWLING DECISION

Paul Edmond Dowling was convicted of conspiracy, interstate transportation of stolen property [ITSP], copyright violations and mail fraud in the Central District of California. Dowling and his co-conspirators sold bootleg Elvis Presley recordings by soliciting catalogue orders from post office boxes in Glendale, California. The infringing recordings were shipped in interstate commerce to Maryland and Florida. The eight ITSP counts on which Dowling was convicted involved thousands of phonograph albums. "[E]ach album contained performances of copyrighted musical compositions for the use of which no licenses had been obtained nor royalties paid ...." Dowling, supra at 212. Dowling appealed his convictions (except those involving copyright infringement) The Ninth Circuit Court of Appeals affirmed. "[T]he [Ninth Circuit] reasoned that the rights of copyright owners in their protected property were indistinguishable from ownership interests in other types of property and were equally deserving of protection under the [stolen property] statute." Id.

The Supreme Court granted certiorari only as to Dowling's convictions for interstate transportation of stolen property [fn 2]. The Court, in an opinion by Justice Blackmun, held that a copyrighted musical composition impressed on a bootleg phonograph record is not property that is "stolen, converted, or taken by fraud" within the meaning of the Stolen Property Act. Justice Blackmun emphasized that cases prosecuted under Sec. 2314 had traditionally involved "physical 
'goods, wares [or] merchandise.'" The statute "seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods" Id at 216. In Dowling's case there was no evidence "that Dowling wrongfully came by the phonorecords actually shipped or the physical materials from which they were made." Dowling, supra at 214.

Justice Blackmun felt compelled, however, to answer the government's argument that the
Unauthorized use of the underlying musical compositions was itself sufficient to render the offending phonorecords property "stolen, converted or taken by fraud."

"The Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. Id. at 216.

A copyright, as Justice Blackmun explained, is unlike an ordinary chattel because the holder does not acquire exclusive dominion over the thing owned. The limited nature of the property interest conferred by copyright stems from an overriding First Amendment concern for the free dissemination of ideas. "The primary objective of copyright is not to reward the labor of authors. but '[t]o promote the Progress of Science and useful Arts.' Art. I, Sec. 8, cl. 8." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349 (1991). Data general Corp. v. Grumman Systems Support, 36 F.3d 1147, 1187 (1st Cir. 1994) (same). Justice Blackmun offered the "fair use" doctrine (17 U.S.C. Sec. 107) and the statutory scheme of compulsory licensing of musical compositions (17 U.S.C. Sec. 115) as examples of ways in which the property rights of a copyright holder are circumscribed by the Copyright Act [fn 3]. Dowling, supra at 217.

It follows that interference with copyright does not easily equate with theft, conversion or fraud. The Copyright Act even employs a separate term of art to define one who misappropriates a copyright: "Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." There is no dispute in this case that Dowling's unauthorized inclusion on his bootleg albums of performances of copyrighted compositions constituted infringement of those copyrights. It is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms associated with physical removal employed by Sec. 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially like infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion or fraud. As a result, it fits but awkwardly with the language Congress chose - "stolen, converted or taken by fraud" - to describe the sorts of goods whose interstate shipment Sec. 2314 makes criminal.
Id at 217-218 (citations omitted).

The ITSP statute, Justice Blackmun observed, had its roots in efforts by Congress to supplement the efforts of state authorities frustrated by jurisdictional problems arising from the transportation of stolen property across state lines. Id. at 219-220.

No such need for supplemental federal action has ever existed, however, with respect to copyright infringement, for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area.... Given that power, it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the government ... In sum, the premise of Sec. 2314 -- the need to fill with federal action an enforcement chasm created by limited state jurisdiction -- simply does not apply to the conduct the Government seeks to reach here. Id at 220-221.

A review of the evolution of criminal penalties in the Copyright Act led Justice Blackmun to observe that:

"[T]he history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress' part before subjecting copyright infringement to serious criminal penalties.... In stark contrast, the Government's theory of this case presupposes a congressional decision to bring the felony provisions of Sec. 2314, which make available the comparatively light fine of not more than $10,000 but the relatively harsh term of imprisonment of up to 10 years, to bear on the distribution of a sufficient quantity of any infringing goods simply because of the presence here of a factor-interstate transportation-not otherwise though relevant to copyright law. The Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. Id. at 225-226.

Finally, noting that the government's expansive reading of the Stolen Property Act would have the unsettling effect of criminalizing a broad range of conduct involving copyright and other intellectual property that had been historically regulated by the civil laws, Justice Blackmun concluded that "the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties.

Here, the language of Sec. 2314 does not 'plainly and unmistakably' cover petitioner Dowling's conduct" Id at 228 (footnote omitted).

Dowling's ITSP convictions were reversed.
THE COPYRIGHT LAW

Article 1, Sec. 8, cl. 8 of the U.S. Constitution grants Congress the exclusive power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries." Thus "[t]he remedies for infringement 'are only those prescribed by Congress."

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (quoting Thompson v. Hubbard, 131 U.S. 123, 151 (1889)). Since 1897, when criminal copyright infringement was first introduced into U.S. copyright law, [fn 4] the concept differentiating criminal from civil copyright violations has been that the infringement must be pursued for purposes of commercial exploitation.

Until 1909, "[t]he crime of copyright infringement was . . . limited to unlawful performances and representation of copyrighted dramatic and musical compositions." Saunders, Criminal Copyright Infringement and the Copyright Felony Act, 71 Denv. U.L. Rev. 671, 673 (1994). The 1897 Act defined the mens rea of criminal copyright infringement as conduct that is "willfull" and undertaken "for profit," a definition that remained unaltered until the general revision of the Copyright Act in 1976.

In 1909, the Copyright Act was revised to extend misdemeanor criminal sanctions to infringement of all copyrighted material with the exception of sound recordings. Copyright Act of 1909, ch. 320, 33 stat 1075-1082. The 1909 amendments also made criminal the knowing and willful aiding and abetting of another's infringing activities.
Performers and producers of musical recordings were not protected under the 1909 Act, and composers were given the exclusive rights to license only the first recording of their musical works. After that, a compulsory licensing provision allowed anyone to record and distribute the work so long as a two cent per copy royalty was paid to the original composer. Id, Subsec. 1(e), 25(e).

The framework set out by the 1909 Act remained in effect until 1971, when the growth of the recording industry following the musical revolution of the 1960's brought the problem of unauthorized reproduction and sale of musical works to Congress' attention. See H.R. Rep. No. 487, 92d Cong. 1st Sess. 2 (1971). In response, Congress passed the Sound Recording Act of 1971, which addressed the perceived flaw in the 1909 Act by granting sound recordings full copyright protection, including criminal penalties for profit motivated infringement. In 1976, Congress revamped the Copyright Act by eliminating the crime of aiding and abetting copyright infringement.
It also eased the mens rea requirement for criminal copyright infringement by eliminating the burden of proving that an infringer acted "for profit," requiring instead only that the infringement be conducted "willfully and for purposes of commercial advantage or private financial gain." 17 U.S.C. Sec. 506(a). Criminal infringement under the 1976 Act was a misdemeanor except in the case of repeat offenders (who could be sentenced to a maximum of two years and a fine of $50,000).
After lobbying by the Motion Picture Association and the Recording Industry Association, Congress increased the penalties for criminal infringement in 1982. Act of May 24, 1982. Pub. L. No. 97-180, 97th Cong. 2d Sess., 96 Stat. 91. Certain types of first-time criminal infringement were punishable as felonies depending on the time period involved and the number of copies reproduced or distributed. [fn 5] See 18 U.S.C. Sec. 2319. The mens rea element, however, remained unchanged, requiring proof of "commercial advantage or private financial gain." 17 U.S.C. Sec. 506(a). Most criminal infringements remained misdemeanor offenses despite the new penalty structure.

In the decade following the 1982 revisions to the Copyright Act, the home computing and software industry underwent a period of explosive growth paralleling the expansion in the 1960's and 1970's of the recording and motion picture industries. In 1992, the Software Publishers Association reported in testimony to the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary that software manufacturers were losing $2.4 billion in revenues annually as a result of software piracy. "Rather than adopting a piecemeal approach to copyright legislation and simply adding computer programs to audiovisual works, and sound recordings to the list of works whose infringement can give rise to felony penalties under [18 U.S.C.] Sec. 2319," Congress passed the Copyright Felony Act. [fn 6] Saunders, supra, at 680. The Act amended Sec. 2319 by extending its felony provision to the criminal infringement of all copyrighted works including computer software. [fn 7] The mens rea for criminal infringement remained unchanged, requiring prosecutors to prove that the defendant infringed a copyright "willfully and for purpose of commercial advantage or private financial gain." 17 U.S.C. Sec. 506(a). [fn 8]

DISCUSSION

The wire fraud statute, 18 U.S.C. Sec. 1343 was enacted in 1952. In its entirety, the statute reads as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The wire fraud statute was enacted to cure a jurisdictional defect that Congress perceived was created by the growth of radio and television as commercial media. In its report to the House of Representatives, the Committee on the Judiciary explained:
The measure in amended form...creates a new, but relatively isolated area of criminal conduct consisting of the execution of a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises transmitted in writings, signs, pictures, or sounds via interstate wire or radio communications (which includes the medium of television)... The rapid growth of interstate communications facilities, particularly those of radio and television, has given rise to a variety of fraudulent activities on the part of unscrupulous persons which are not within the reach of existing mail fraud laws, but which are carried out in complete reliance upon the use of wire and radio facilities and without resort to the mails,... Even in those cases of radio fraud where the mails have played a role, it is sometimes difficult to prove the use of the mails to the satisfaction of the court, and so prosecutions often fail. Because of the greater facility in proving the use of radio, this bill if enacted might often rescue a prosecution which would otherwise be defeated on technicalities.


As the legislative history makes clear, the wire fraud statute was intended to complement the mail fraud statute by giving federal prosecutors jurisdiction over frauds involving the use of interstate (or foreign) wire transmissions. [fn 9] Thus what can be prosecuted as a scheme to defraud under the mail fraud statute (18 U.S.C. Sec. 1341) is equally susceptible to punishment under Sec. 1343 so long as the jurisdictional element is met. Carpenter v. United States. 484 U.S. 19, 25 n.6 (1987). McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc. 904 F.2d 786, 791 n.8 (1st Cir. 1990). The concomitancy of the two statutes underlies the government's argument that significance should be read into the fact that the limited grant of certiorari in Dowling left Dowling's convictions for mail fraud undisturbed.

A scheme to defraud is the defining concept of the mail and wire fraud statutes. Because of the conjunctive use of the word "or" in the statutory phrase "any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises." the federal courts (encouraged by prosecutors) have essentially bifurcated mail and wire fraud into two separate offenses; the first, the devising of a scheme to defraud, the second, the devising of a scheme to obtain money or property by false pretenses. While the latter crime comports with common law notions of fraud, "[t]he phrase, 'a scheme to defraud' came to prohibit a plan, that is, to forbid a state of mind, rather than physical conduct." Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 161 (1994).

The incarnation of mail fraud as an inchoate crime has its most celebrated expression in federal prosecutions of state and local public officials accused of depriving citizens of their intangible
right to honest public service in violation of their fiduciary duty to disclose conflicts of interest. [fn 10] See United States v. Mandel, 591 F.2d 1347, 1360-1362 (4th Cir. 1979). Because of the so-called "intangible rights doctrine," mail fraud and its sister offense, wire fraud, have become the federal prosecutor's weapon of choice. "Mail fraud . . . has been expanded to the point that a fiduciary, agent, or employee commits an offense when, through a material deception or a failure to disclose, a beneficiary, principal or employer suffers even an intangible, constructed detriment." Moohr, supra, 31 Harv. J. On Legis. at 163. Wire fraud offers an especially pleasing feature from the government's perspective that is particularly relevant to LaMacchia's case. Unlike the criminal copyright statute, 17 U.S.C. Sec. 506(a), the mail and wire fraud statutes do not require that a defendant be shown to have sought to personally profit from the scheme to defraud. See United States v. Silvano, 812 F.2d 754, 759-760 (1st Cir. 1987).

While it is true, as LaMacchia contends, that the denial of a writ of certiorari "imports no expression upon the merits of the case," United States v. Carver, 260 U.S. 482, 490 (1923), the more interesting issue is whether the Ninth Circuit's mail fraud analysis (the significant portions of which the Supreme Court left intact) is applicable to the facts of his case.

Dowling brought himself within the orbit of the mail fraud statute by mailing catalogues advertising his bootleg phonograph records. So, too, the government argues, LaMacchia subjected himself to the wire fraud statute by advertising infringing software via computer transmissions.

The government in Dowling (as here) did not argue any more than jurisdictional significance for Dowling's mailings, that is, the mailings themselves did not make any false or misleading representations. They did, however, serve as an obvious means of furthering Dowling's scheme to defraud. See Schmuck v. United States, 489 U.S. 705, 710-711 (1989).

The Ninth Circuit nonetheless focused on the fact that Dowling had "concealed his activities from the copyright holders with the intent to deprive them of their royalties." 739 F.2d at 1449. "It is settled in this Circuit that a scheme to defraud need not be an active misrepresentation. A nondisclosure or concealment may serve as a basis for the fraudulent scheme." Id. at 1448. See also United States v. Silvano, supra, 812 F.2d at 759 (same). The Ninth Circuit rejected Dowling's argument that non-disclosure can serve as the basis of a scheme to defraud only when a defendant has a fiduciary duty to make an affirmative disclosure. It also rejected the government's contention that "the presence of illegal conduct alone may constitute the basis of the 'fraud' element." 739 F.2d at 1449. "Rather, we conclude that a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged." Id. This duty, the Ninth Circuit noted, could be fiduciary in nature, or it could "derive from an independent explicit statutory duty created by legislative enactment." Id. In Dowling's case, the duty located by the Ninth Circuit was the duty implicit in the compulsory licensing scheme of the Copyright Act, 17 U.S.C. Sec. 115, which requires vendors to notify copyright owners of the intention to manufacture and distribute infringing records.
In conclusion, we stress that the narrowness of our holding permits nondisclosures to form the basis of a scheme to defraud only when there exists an independent duty (either fiduciary or derived from an explicit and independent statutory requirement) and such a duty has been breached. To hold otherwise that illegal conduct alone may constitute the basis of the fraud element of a mail fraud conviction would have the potential of bringing almost any illegal act within the province of the mail fraud statute.

739 F.2d at 1450.

The difficulties in applying the Ninth Circuit's Dowling analysis to support a wire fraud prosecution in LaMacchia's case are three. First, no fiduciary relationship existed between LaMacchia and the manufacturers whose software copyrights he allegedly infringed. Second, there is no independent statutory duty of disclosure like the one that snared Dowling because there is no software equivalent to the compulsory licensing scheme. [fn 11] Third, even were I to accept the argument made by the government in Dowling, that illegal conduct alone may suffice to satisfy the fraud element of [Sec. 1343], the holding would not cover LaMacchia's case for the simple reason that what LaMacchia is alleged to have done is not criminal conduct under Sec. 506(a) of the Copyright Act. [fn 12]

The government's second and more plausible argument relies on the unobjectionable proposition "that [the] enactment of particularized federal interest statutes does not oust a more general interstate commerce statute from application." Government's Memorandum at 11. The government cites a number of areas of specialized federal law where the mail and wire fraud statutes have been held to remain viable enforcement tools. This same argument, however, did not impress Justice Blackmun in Dowling, as none of the cases cited there (as here) "involved copyright law specifically or intellectual property in general." Dowling, supra at 218 n.8. [fn 13] The government also points to 18 U.S C. Sec. 2319(a), which provides that "[w]hoever violates section 506(a) . . . of title 17 shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law." The government emphasizes the last four words of the statute without apparently noticing the first four. LaMacchia is not alleged to have violated section 506(a). See also Dowling, supra at 225 n.18 ("In the absence of and such indication [that Congress intended to approve the use of Sec. 2314 in a copyright prosecution], we decline to read the general language appended to Sec. 2319(a) impliedly to validate extension of Sec. 2314 in a manner otherwise unsupported by its language and purpose"). Finally, the government cites Carpenter v. United States, 484 U.S 19 (1987), which holds that intangible as well as tangible property interests are protected by the mail and wire fraud statutes. "Absolutely nothing in Carpenter," the government argues, "distinguishes intangible right to copy, distribute and license computer software from other intangible property interests...." Government's Memorandum at 13. But see United States v. Riggs, 739 F. Supp. 414,
422-423 (N.D. Ill. 1990) ("As Dowling... recognized, the copyright holder owns only a bundle of intangible rights which can be infringed, but not stolen or converted. The owner of confidential, proprietary business information, in contrast, possesses something which has clearly been recognized as an item of property").

The issue thus is whether the "bundle of rights" conferred by copyright is unique and distinguishable from the indisputably broad range of property interests protected by the mail and wire fraud statutes. I find it difficult, if not impossible, to read Dowling as saying anything but that it is. [fn 14] "A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."

Dowling, supra at 216. If, as the government contends, Dowling stands for nothing more than the proposition that one cannot equate copyright infringement with a "physical taking" for purposes of the Stolen Property Act, [fn 15] it is difficult to explain why Justice Blackmun devoted the bulk of his opinion to the issue of "whether the history and purpose of Sec. 2314 evince a plain congressional intention to reach interstate shipments of goods infringing copyrights." Dowling supra at 218. [fn 16] Nor can one explain why the same analysis should not be applied to the mail and wire fraud statutes, which like the Stolen Property Act, were enacted to fill enforcement gaps in state and federal law. Why is it not true of mail and wire fraud, as it is of ITSP, that 

"[n]o such need for supplemental federal action has ever existed.... for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area [of copyright infringement]? Dowling supra at 220. Finally, why would not the government's position here produce the same pernicious result that Justice Blackmun warned of in Dowling, of permitting the government to subvert the carefully calculated penalties of the Copyright Act by selectively bringing some prosecutions under the more generous penalties of the mail and wire fraud statutes? [fn 17]

What the government is seeking to do is to punish conduct that reasonable people might agree deserves the sanctions of the criminal law. But as Justice Blackmun observed in Dowling, copyright is an area in which Congress has chosen to tread cautiously, relying "chiefly... on an array of civil remedies to provide copyright holders protection against infringement," while mandating "studiously graded penalties" in those instances where Congress has concluded that the deterrent effect of criminal sanctions are required. Dowling, supra at 221, 225. "This step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws." Id at 225. Indeed, the responsiveness of Congress to the impact of new technology on the law of copyright limned earlier in this opinion, confirms Justice Blackmun's conviction of "the wisdom of leaving it to the legislature to define crime and prescribe penalties"

Dowling, supra at 228.

"The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to
Congress when major technological innovations alter the market for copyrighted materials. Congress has the institutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."


While the government’s objective is a laudable one, particularly when the facts alleged in this case are considered, its interpretation of the wire fraud statute would serve to criminalize the conduct of not only persons like LaMacchia, but also the myriad of home computer users who succumb to the temptation to copy even a single software program for private use. It is not clear that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable. [fn 18]

In sum, I agree with Professor Nimmer that:

The Dowling decision establishes that Congress has finely calibrated the reach of criminal liability [in the Copyright Act], and therefore absent clear indication of Congressional intent, the criminal laws of the United States do not reach copyright-related conduct. Thus copyright prosecutions should be limited to Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.

3 Nimmer on Copyright, Sec. 15.05 at 15-20 (1993). See also 2 Goldstein, Copyright, Sec. 11.4.2.2 at 304 n. 67 (1989) ("[A]though the Court did not directly rule on whether the mail fraud statute encompassed the infringing conduct, its reasoning with respect to the Stolen Property Act, 18 U.S.C. Sec. 2314, suggests that it would have treated the mail fraud statute similarly.")

Accordingly, I rule that the decision of the Supreme Court in Dowling v. United States precludes LaMacchia’s prosecution for criminal copyright infringement under the wire fraud statute. [fn 19]

This is not, of course, to suggest that there is anything edifying about what LaMacchia is alleged to have done. If the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer.

One can envision ways that the copyright law could be modified to permit such prosecution. But, "'[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment.'" Dowling, supra at 214
ORDER

For the foregoing reasons, defendant LaMacchia’s motion to dismiss is ALLOWED.

SO ORDERED.

[signed, Richard G. Stearns]

United States District Judge

Footnotes

[1] The allusion is presumably to the North Star, a faithful astronomical reference point for mariners.

[2] The Court observed a split among the Circuits concerning the applicability of 18 U.S.C. Sec. 2314 to the interstate transportation of infringing articles.


[5] While the offense of criminal copyright infringement remained defined by 17 U.S.C. Sec. 506(a), the penalties were moved to a new freestanding statute, 18 U.S.C. Sec. 2319.


[7] The Report that accompanied the Senate version of the bill declared that "[t]he only defense

[8] As Senator Hatch, the Senate sponsor of the Act noted, "the copying must be undertaken to make money, and even incidental financial benefits that might accrue as a result of the copying should not contravene the law where the achievement of those benefits [was] not the motivation behind the copying." 138 Cong. Rec. S. 17958-17959 (October 8, 1992).

[9] The "interstate" limitation was inserted into the statute both out of jurisdictional concerns and to "avoid intrusion on the police power of the States." H.R. Rep. No. 388, supra, at 3. The police power of the States, of course, does not extend to the regulation of copyright, leading one to doubt, as defendant points out, that the statute was enacted to supplement state efforts to police copyright infringement.
 Defendant’s Memorandum at 18.

[10] The origins and contours of the intangible rights doctrine (and the short-lived effort of the Supreme Court to reground the mail fraud statute in traditional concepts of property, see McNally v. United States, 483 U.S. 350 (1987)) are capably portrayed in Moohr, supra, 31 Harv. J. on Legis at 158-170. The doctrine has been applied with similar effect to schemes rising in a commercial context. See United States v. George, 477 F.2d 508 (7th Cir. 1973) (commercial kickbacks, employee’s duty to disclose).

[11] In Cooper v. United States, 639 F Supp. 176, 180 (M.D. Fla. 1986), cited by the government, the petitioners did not raise the sufficiency of the allegation of a scheme to defraud, but rather the possibility that the jury might have perceived the interstate transportation of the pirated cassette tapes as the gravamen of the scheme, a theory indisputably precluded by the Supreme Court’s Dowling decision.

[12] I do not believe that the Ninth Circuit’s mail fraud analysis survives Dowling in any event, as I will explain. Dowling, I note, did not contest his conviction for criminal violations of Sec. 506(a) of the Copyright Act.

[13] The suggestion that the felony provisions of the wire fraud statute were enacted with the punishment of copyright infringement in mind in somewhat difficult to accept when one remembers that in 1952 the Copyright Act authorized only misdemeanor prosecutions, a circumstance that continued until 1982. Equally difficult to accept is the idea that Congress has in some fashion acquiesced by silence to the utilization of mail and wire fraud as copyright enforcement tools. One need only contrast the infrequent and, with exception of the Congressional reaction to McNally, technical amendments to the mail and wire fraud statutes with Congress’ exhaustive attention to developments affecting copyright law.

[14] The government strenuously disagrees with me on this point.
However, even the dissenters in Dowling (Justice Powell and White) saw the issue framed by the majority no differently than I do. As Justice Powell characterizes the opinion: "The Court holds today that 18 U.S.C. Sec. 2314 does not apply to this case because the rights of a copyright holder are 'different' from the rights of owners of other kinds of property." Dowling, supra at 22 (Powell, J., dissenting).


[16] The government's suggestion "that the legislative history of copyright protection serves only to provide additional reason to hesitate before extending Sec. 2314 to cover the interstate shipments in this case." and that Dowling simply held that "Congress has not spoken with the requisite clarity." seem to me equally applicable to the analysis of Sec. 1343. Government's Memorandum at 8 (quoting Dowling, supra at 221, 229).

[17] For example, a first offender who reproduces fewer than ten copies of a computer software program in a one hundred and eighty day period is subject to a maximum punishment of one year imprisonment 18 U.S.C. Sec. 2314(b)(3). The same prosecution under the wire fraud statute would entail a maximum prison sentence of five years. As defendant also notes, use of the wire fraud statute to punish criminal copyright infringement would override the shorter three year statute of limitations of the Copyright Act.

[18] In 1992, in hearings before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration, the Vice-President and General Counsel of the Computer & Communications Industry Association testified as follows: "There are millions of people with personal computers to make copies. That is exactly one of the reasons I think you want to be very careful. You do not want to be accidentally taking a large percentage of the American people, either small business or citizens, into the gray area of criminal law." Hearing on S. 893 (August 12, 1992) at p. 65.

[19] The issue presented in this case is one of infringement only. Infringement is a technical concept describing interference with the statutorily defined rights of a copyright holder. A scheme or artifice to defraud, the object of which was to fraudulently obtain possession of the copyright itself would, I believe, be clearly punishable under the mail and wire fraud statutes. See Dowling, supra at 217 ("[The infringer] does not assume physical control over the copyright, nor does he wholly deprive the owner of its use").
928 F.2d 504

UNITED STATES of America, Appellee,

v.

Robert Tappan MORRIS, Defendant-Appellant.

No. 774, Docket 90-1336.

United States Court of Appeals,
Second Circuit.

Thomas A. Guidoboni, Washington, D.C., for defendant-appellant.
(Frederick J. Scullin, Jr., U.S. Atty., Syracuse, N.Y., Mark D. Rasch,
U.S. Dept. of Justice, Washington, D.C., on the brief), for appellee.

Before NEWMAN and WINTER, Circuit Judges, and DALY, District
Judge. [*]

* The Honorable T.F. Gilroy Daly of the District Court for the
District of Connecticut, sitting by designation.

JON O. NEWMAN, Circuit Judge:

This appeal presents two narrow issues of statutory construction
concerning a provision Congress recently adopted to strengthen
protection against computer crimes. Section 2(d) of the Computer Fraud
who intentionally accesses without authorization a category of computers
known as "[f]ederal interest computers" and damages or prevents
authorized use of information in such computers, causing loss of $1,000
or more. The issues raised are (1) whether the Government must prove
not only that the defendant intended to access a federal interest
computer, but also that the defendant intended to prevent authorized use
of the computer's information and thereby cause loss; and (2) what
satisfies the statutory requirement of "access without authorization."

These questions are raised on an appeal by Robert Tappan Morris
from the May 16, 1990, judgment of the District Court for the Northern
District of New York (Howard G. Munson, Judge) convicting him, after a
into INTERNET, a national computer network, a computer program known as
a "worm" [FN1] that spread and multiplied, eventually causing computers
at various educational institutions and military sites to "crash" or
cease functioning.

FN1. In the colorful argot of computers, a "worm" is a
program that travels from one computer to another but does not
attach itself to the operating system of the computer it
"infects." It differs from a "virus," which is also a
migrating program, but one that attaches itself to the
operating system of any computer it enters and can infect any
other computer that uses files from the infected computer.

We conclude that section 1030(a)(5)(A) does not require the
Government to demonstrate that the defendant intentionally prevented
authorized use and thereby caused loss. We also find that there was
sufficient evidence for the jury to conclude that Morris acted "without
authorization" within the meaning of section 1030(a)(5)(A). We
therefore affirm.
FACTS

In the fall of 1988, Morris was a first-year graduate student in Cornell University's computer science Ph.D. program. Through undergraduate work at Harvard and in various jobs he had acquired significant computer experience and expertise. When Morris entered Cornell, he was given an account on the computer at the Computer Science Division. This account gave him explicit authorization to use computers at Cornell. Morris engaged in various discussions with fellow graduate students about the security of computer networks and his ability to penetrate it.

In October 1988, Morris began work on a computer program, later known as the INTERNET "worm" or "virus." The goal of this program was to demonstrate the inadequacies of current security measures on computer networks by exploiting the security defects that Morris had discovered. The tactic he selected was release of a worm into network computers. Morris designed the program to spread across a national network of computers after being inserted at one computer location connected to the network. Morris released the worm into INTERNET, which is a group of national networks that connect university, governmental, and military computers around the country. The network permits communication and transfer of information between computers on the network.

Morris sought to program the INTERNET worm to spread widely without drawing attention to itself. The worm was supposed to occupy little computer operation time, and thus not interfere with normal use of the computers. Morris programmed the worm to make it difficult to detect and read, so that other programmers would not be able to "kill" the worm easily.

Morris also wanted to ensure that the worm did not copy itself onto a computer that already had a copy. Multiple copies of the worm on a computer would make the worm easier to detect and would bog down the system and ultimately cause the computer to crash. Therefore, Morris designed the worm to "ask" each computer whether it already had a copy of the worm. If it responded "no," then the worm would copy onto the computer; if it responded "yes," the worm would not duplicate. However, Morris was concerned that other programmers could kill the worm by programming their own computers to falsely respond "yes" to the question. To circumvent this protection, Morris programmed the worm to duplicate itself every seventh time it received a "yes" response. As it turned out, Morris underestimated the number of times a computer would be asked the question, and his one-out-of-seven ratio resulted in far more copying than he had anticipated. The worm was also designed so that it would be killed when a computer was shut down, an event that typically occurs once every week or two. This would have prevented the worm from accumulating on one computer, had Morris correctly estimated the likely rate of reinfection.

Morris identified four ways in which the worm could break into computers on the network: (1) through a "hole" or "bug" (an error) in SEND MAIL, a computer program that transfers and receives electronic mail on a computer; (2) through a bug in the "finger demon" program, a program that permits a person to obtain limited information about the users of another computer; (3) through the "trusted hosts" feature, which permits a user with certain privileges on one computer to have equivalent privileges on another computer without using a password; and (4) through a program of password guessing, whereby various combinations of letters are tried out in rapid sequence in the hope that one will be an authorized user's password, which is entered to permit whatever level of activity that user is authorized to perform.

On November 2, 1988, Morris released the worm from a computer at the Massachusetts Institute of Technology. MIT was selected to disguise the fact that the worm came from Morris at Cornell. Morris soon discovered that the worm was replicating and reinfecting machines at a much faster rate than he had anticipated. Ultimately, many machines at
locations around the country either crashed or became "catatonic." When Morris realized what was happening, he contacted a friend at Harvard to discuss a solution. Eventually, they sent an anonymous message from Harvard over the network, instructing programmers how to kill the worm and prevent reinfection. However, because the network route was clogged, this message did not get through until it was too late. Computers were affected at numerous installations, including leading universities, military sites, and medical research facilities. The estimated cost of dealing with the worm at each installation ranged from $200 to more than $53,000.

Morris was found guilty, following a jury trial, of violating 18 U.S.C. § 1030(a)(5)(A). He was sentenced to three years of probation, 400 hours of community service, a fine of $10,050, and the costs of his supervision.

DISCUSSION

I. The intent requirement in section 1030(a)(5)(A)

Section 1030(a)(5)(A), covers anyone who (5) intentionally accesses a Federal interest computer without authorization, and by means of one or more instances of such conduct alters, damages, or destroys information in any such Federal interest computer, or prevents authorized use of any such computer or information, and thereby (A) causes loss to one or more others of a value aggregating $1,000 or more during any one year period; ... [emphasis added].

The District Court concluded that the intent requirement applied only to the accessing and not to the resulting damage. Judge Munson found recourse to legislative history unnecessary because he considered the statute clear and unambiguous. However, the Court observed that the legislative history supported its reading of section 1030(a)(5)(A).

Morris argues that the Government had to prove not only that he intended the unauthorized access of a federal interest computer, but also that he intended to prevent others from using it, and thus cause a loss. The adverb "intentionally," he contends, modifies both verb phrases of the section. The Government urges that since punctuation sets the "accesses" phrase off from the subsequent "damages" phrase, the provision unambiguously shows that "intentionally" modifies only "accesses." Absent textual ambiguity, the Government asserts that recourse to legislative history is not appropriate. See Burlington N.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461, 107 S.Ct. 1855, 1859, 95 L.Ed.2d 404 (1987); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); United States v. Holroyd, 732 F.2d 1122, 1125 (2d Cir. 1984).

With some statutes, punctuation has been relied upon to indicate that a phrase set off by commas is independent of the language that followed. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (interpreting the Bankruptcy Code). However, we have been advised that punctuation is not necessarily decisive in construing statutes, see Costanzo v. Tillinghast, 287 U.S. 341, 344, 53 S.Ct. 152, 153, 77 L.Ed. 350 (1932), and with many statutes, a mental state adverb adjacent to initial words has been applied to phrases or clauses appearing later in the statute without regard to the punctuation or structure of the statute. See Liparota v. United States, 471 U.S. 419, 426-29, 105 S.Ct. 2084, 2088-90, 85 L.Ed.2d 434 (1985) (interpreting food stamps provision); United States v. Noziger, 878 F.2d 442, 446-50 (D.C.Cir.) (interpreting government "revolving door" statute), cert. denied, --- U.S. ----, 110 S.Ct. 564, 107 L.Ed.2d 559 (1989); United States v. Johnson & Towers, Inc., 741 F.2d 662, 667-69 (3d Cir. 1984) (interpreting the conservation act), cert. denied, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 321 (1985). In the present case, we do not believe the comma after "authorization" renders the text so clear as to preclude review of the
legislative history.

The first federal statute dealing with computer crimes was passed in 1984, Pub.L. No. 98-473 (codified at 18 U.S.C. § 1030 (Supp. II 1984)). The specific provision under which Morris was convicted was added in 1986, Pub.L. No. 99-474, along with some other changes. The 1986 amendments made several changes relevant to our analysis.

First, the 1986 amendments changed the scienter requirement in section 1030(a)(2) from "knowingly" to "intentionally." See Pub.L. No. 99-474, section 2(a)(1). The subsection now covers anyone who (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.). According to the Senate Judiciary Committee, Congress changed the mental state requirement in section 1030(a)(2) for two reasons. Congress sought only to proscribe intentional acts of unauthorized access, not "mistaken, inadvertent, or careless" acts of unauthorized access. S.Rep. No. 99-432, 99th Cong., 2d Sess. 5 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 2479, 2483 [hereinafter Senate Report].

Also, Congress expressed concern that the "knowingly" standard "might be inappropriate for cases involving computer technology." Id. The concern was that a scienter requirement of "knowingly" might encompass the acts of an individual "who inadvertently 'stumbles' into someone else's computer file or computer data," especially where such individual was authorized to use a particular computer. Id. at 6, 1986 U.S.Code Cong. & Admin.News at 2483. The Senate Report concluded that "[t]he substitution of an 'intentional' standard is designed to focus Federal criminal prosecutions on those whose conduct evinces a clear intent to enter, without proper authorization, computer files or data belonging to another." Id., U.S.Code Cong. & Admin.News at 2484. Congress retained the "knowingly" standard in other subsections of section 1030. See 18 U.S.C. § 1030(a)(1), (a)(4).

This use of a mens rea standard to make sure that inadvertent accessing was not covered is also emphasized in the Senate Report's discussion of section 1030(a)(3) and section 1030(a)(5), under which Morris was convicted. Both subsections were designed to target "outsiders," individuals without authorization to access any federal interest computer. Senate Report at 10, U.S.Code Cong. & Admin.News at 2488. The rationale for the mens rea requirement suggests that it modifies only the "accesses" phrase, which was the focus of Congress's concern in strengthening the scienter requirement.

The other relevant change in the 1986 amendments was the introduction of subsection (a)(5) to replace its earlier version, subsection (a)(3) of the 1984 act, 18 U.S.C. § 1030(a)(3) (Supp. II 1984). The predecessor subsection covered anyone who knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of, such computer, if such computer is operated for or on behalf of the Government of United States and such conduct affects such operation. The 1986 version changed the mental state requirement from "knowingly" to "intentionally," and did not repeat it after the "accesses" phrase, as had the 1984 version. By contrast, other subsections of section 1030 have retained "dual intent" language, placing the scienter requirement at the beginning of both the "accesses" phrase and the "damages" phrase. See, e.g., 18 U.S.C. § 1030(a)(1).

Morris notes the careful attention that Congress gave to selecting the scienter requirement for current subsections (a)(2) and (a)(5). Then, relying primarily on comments in the Senate and House reports, Morris argues that the "intentionally" requirement of section
1030(a)(5)(A) describes both the conduct of accessing and damaging. As he notes, the Senate Report said that "[t]he new subsection 1030(a)(5) to be created by the bill is designed to penalize those who intentionally alter, damage, or destroy certain computerized data belonging to another." Senate Report at 10, U.S.Code Cong. & Admin.News at 2488. The House Judiciary Committee stated that "the bill proposes a new section (18 U.S.C. 1030(a)(5)) which can be characterized as a 'malicious damage' felony violation involving a Federal interest computer. We have included an 'intentional' standard for this felony and coverage is extended only to outside trespassers with a $1,000 threshold damage level." H.R.Rep. No. 99-612, 99th Cong. 2d Sess. at 7 (1986). A member of the Judiciary Committee also referred to the section 1030(a)(5) offense as a "malicious damage" felony during the floor debate. 132 Cong.Rec. H3275, 3276 (daily ed. June 3, 1986) (remarks of Rep. Hughes).

The Government's argument that the scienter requirement in section 1030(a)(5)(A) applies only to the "accesses" phrase is premised primarily upon the difference between subsection (a)(5)(A) and its predecessor in the 1984 statute. The decision to state the scienter requirement only once in subsection (a)(5)(A), along with the decision to change it from "knowingly" to "intentionally," are claimed to evince a clear intent upon the part of Congress to apply the scienter requirement only to the "accesses" phrase, though making that requirement more difficult to satisfy. This reading would carry out the Congressional objective of protecting the individual who "inadvertently 'stumble[s] into' someone else's computer file." Senate Report at 6, U.S. Code Cong. & Admin. News at 2483.

The Government also suggests that the fact that other subsections of section 1030 continue to repeat the scienter requirement before both phrases of a subsection is evidence that Congress selectively decided within the various subsections of section 1030 where the scienter requirement was and was not intended to apply. Morris responds with a plausible explanation as to why certain other provisions of section 1030 retain dual intent language. Those subsections use two different mens rea standards; therefore it is necessary to refer to the scienter requirement twice in the subsection. For example, section 1030(a)(1) covers anyone who (1) knowingly accesses a computer without authorization or exceeds authorized access, and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data ... with the intent or reason to believe that such information so obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.

Since Congress sought in subsection (a)(1) to have the "knowingly" standard govern the "accesses" phrase and the "with intent" standard govern the "results" phrase, it was necessary to state the scienter requirement at the beginning of both phrases. By contrast, Morris argues, where Congress stated the scienter requirement only once, at the beginning of the "accesses" phrase, it was intended to cover both the "accesses" phrase and the phrase that followed it.

There is a problem, however, with applying Morris's explanation to section 1030(a)(5)(A). As noted earlier, the predecessor of subsection (a)(5)(A) explicitly placed the same mental state requirement before both the "accesses" phrase and the "damages" phrase. In relevant part, that predecessor in the 1984 statute covered anyone who "knowingly accesses a computer without authorization, ... and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of, such computer...." 18 U.S.C. § 1030(a)(3) (Supp. II 1984) (emphasis added). This earlier provision demonstrates that Congress has on occasion chosen to repeat the same scienter standard in the "accesses" phrase and the subsequent phrase of
a subsection of the Computer Fraud Statute. More pertinently, it shows that the 1986 amendments adding subsection (a)(5)(A) placed the scienter requirement adjacent only to the "accesses" phrase in contrast to a predecessor provision that had placed the same standard before both that phrase and the subsequent phrase.

Despite some isolated language in the legislative history that arguably suggests a scienter component for the "damages" phrase of section 1030(a)(5)(A), the wording, structure, and purpose of the subsection, examined in comparison with its departure from the format of its predecessor provision persuade us that the "intentionally" standard applies only to the "accesses" phrase of section 1030(a)(5)(A), and not to its "damages" phrase.

II. The unauthorized access requirement in section 1030(a)(5)(A)

Section 1030(a)(5)(A) penalizes the conduct of an individual who "intentionally accesses a Federal interest computer without authorization." Morris contends that his conduct constituted, at most, "exceeding authorized access," rather than the "unauthorized access" that the subsection punishes. Morris argues that there was insufficient evidence to convict him of "unauthorized access," and that even if the evidence sufficed, he was entitled to have the jury instructed on his "theory of defense."

We assess the sufficiency of the evidence under the traditional standard. Morris was authorized to use computers at Cornell, Harvard, and Berkeley, all of which were on INTERNET. As a result, Morris was authorized to communicate with other computers on the network to send electronic mail (SEND MAIL), and to find out certain information about the users of other computers (finger demon). The question is whether Morris's transmission of his worm constituted exceeding authorized access or accessing without authorization.

The Senate Report stated that section 1030(a)(5)(A), like the new section 1030(a)(3), would "be aimed at 'outsiders,' i.e., those lacking authorization to access any Federal interest computer." Senate Report at 10, U.S.Code Cong. & Admin.News at 2488. But the Report also stated, in concluding its discussion on the scope of section 1030(a)(3), that it applies "where the offender is completely outside the Government, ... or where the offender's act of trespass is interdepartmental in nature." Id. at 8, U.S.Code Cong. & Admin.News at 2486 (emphasis added).

Morris relies on the first quoted portion to argue that his actions can be characterized only as exceeding authorized access, since he had authorized access to a federal interest computer. However, the second quoted portion reveals that Congress was not drawing a bright line between those who have some access to any federal interest computer and those who have none. Congress contemplated that individuals with access to some federal interest computers would be subject to liability under the computer fraud provisions for gaining unauthorized access to other federal interest computers. See, e.g., id. (stating that a Labor Department employee who uses Labor's computers to access without authorization an FBI computer can be criminally prosecuted).

The evidence permitted the jury to conclude that Morris's use of the SEND MAIL and finger demon features constituted access without authorization. While a case might arise where the use of SEND MAIL or finger demon falls within a nebulous area in which the line between accessing without authorization and exceeding authorized access may not be clear, Morris's conduct here falls well within the area of unauthorized access. Morris did not use either of those features in any way related to their intended function. He did not send or read mail nor discover information about other users; instead he found holes in both programs that permitted him a special and unauthorized access route into other computers.

Moreover, the jury verdict need not be upheld solely on Morris's use of SEND MAIL and finger demon. As the District Court noted, in
denying Morris' motion for acquittal, although the evidence may have shown that defendant's initial insertion of the worm simply exceeded his authorized access, the evidence also demonstrated that the worm was designed to spread to other computers at which he had no account and no authority, express or implied, to unleash the worm program. Moreover, there was also evidence that the worm was designed to gain access to computers at which he had no account by guessing their passwords. Accordingly, the evidence did support the jury's conclusion that defendant accessed without authority as opposed to merely exceeding the scope of his authority. In light of the reasonable conclusions that the jury could draw from Morris's use of SEND MAIL and finger demon, and from his use of the trusted hosts feature and password guessing, his challenge to the sufficiency of the evidence fails.

Morris endeavors to bolster his sufficiency argument by contending that his conduct was not punishable under subsection (a)(5) but was punishable under subsection (a)(3). That concession belies the validity of his claim that he only exceeded authorization rather than made unauthorized access. Neither subsection (a)(3) nor (a)(5) punishes conduct that exceeds authorization. Both punish a person who "accesses" "without authorization" certain computers. Subsection (a)(3) covers the computers of a department or agency of the United States; subsection (a)(5) more broadly covers any federal interest computers, defined to include, among other computers, those used exclusively by the United States, 18 U.S.C. § 1030(e)(2)(A), and adds the element of causing damage or loss of use of a value of $1,000 or more. If Morris violated subsection (a)(3), as he concedes, then his conduct in inserting the worm into the INTERNET must have constituted "unauthorized access" under subsection (a)(5) to the computers of the federal departments the worm reached, for example, those of NASA and military bases.

To extricate himself from the consequence of conceding that he made "unauthorized access" within the meaning of subsection (a)(3), Morris subtly shifts his argument and contends that he is not within the reach of subsection (a)(5) at all. He argues that subsection (a)(5) covers only those who, unlike himself, lack access to any federal interest computer. It is true that a primary concern of Congress in drafting subsection (a)(5) was to reach those unauthorized to access any federal interest computer. The Senate Report stated, "[T]his subsection [(a)(5)] will be aimed at 'outsiders,' i.e., those lacking authorization to access any Federal interest computer." Senate Report at 10, U.S. Code Cong. & Admin. News at 2488. But the fact that the subsection is "aimed" at such "outsiders" does not mean that its coverage is limited to them. Congress understandably thought that the group most likely to damage federal interest computers would be those who lack authorization to use any of them. But it surely did not mean to insulate from liability the person authorized to use computers at the State Department who causes damage to computers at the Defense Department. Congress created the misdemeanor offense of subsection (a)(3) to punish intentional trespasses into computers for which one lacks authorized access; it added the felony offense of subsection (a)(5) to punish such a trespasser who also causes damage or loss in excess of $1,000, not only to computers of the United States but to any computer within the definition of federal interest computers. With both provisions, Congress was punishing those, like Morris, who, with access to some computers that enable them to communicate on a network linking other computers, gain access to other computers to which they lack authorization and either trespass, in violation of subsection (a)(3), or cause damage or loss of $1,000 or more, in violation of subsection (a)(5).

Morris also contends that the District Court should have instructed the jury on his theory that he was only exceeding authorized access. The District Court decided that it was unnecessary to provide the jury with a definition of "authorization." We agree. Since the word is of common usage, without any technical or ambiguous meaning, the Court was
not obliged to instruct the jury on its meaning. See, e.g., United States v. Chenault, 844 F.2d 1124, 1131 (5th Cir. 1988) ("A trial court need not define specific statutory terms unless they are outside the common understanding of a juror or are so technical or specific as to require a definition.").

An instruction on "exceeding authorized access" would have risked misleading the jury into thinking that Morris could not be convicted if some of his conduct could be viewed as falling within this description. Yet, even if that phrase might have applied to some of his conduct, he could nonetheless be found liable for doing what the statute prohibited, gaining access where he was unauthorized and causing loss.

Additionally, the District Court properly refused to charge the jury with Morris's proposed jury instruction on access without authorization. That instruction stated, "To establish the element of lack of authorization, the government must prove beyond a reasonable doubt that Mr. Morris was an 'outsider,' that is, that he was not authorized to access any Federal interest computer in any manner." As the analysis of the legislative history reveals, Congress did not intend an individual's authorized access to one federal interest computer to protect him from prosecution, no matter what other federal interest computers he accesses.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is affirmed.
THE UNITED STATES OF AMERICA, Plaintiff, v. ROBERT J. RIGGS, also known as Robert Johnson, also known as Prophet, and CRAIG NEIDORF, also known as Knight Lightning, Defendants

No. 90 CR 0070

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

743 F. Supp. 556; 1990 U.S. Dist. LEXIS 9304

July 23, 1990

JUDGES: [**1] Nicholas J. Bua, United States District Judge.

OPINION: [**557] MEMORANDUM ORDER

NICHOLAS J. BUA, UNITED STATES DISTRICT JUDGE

On June 5, 1990, this court entered a memorandum opinion denying defendant Craig Neidorf's motion to dismiss the original indictment in this case. See United States v. Riggs, 739 F. Supp. 414 (N.D.Ill. 1990). Two days later, the Special April 1990 Grand Jury returned an 11-count superseding indictment against Neidorf and his co-defendant, Robert Riggs. Neidorf now moves to dismiss each count in the superseding indictment except Count I, which names only Riggs as a defendant. In support of his motion, Neidorf adopts the arguments in the amicus curiae briefs of Electronic Frontier Foundation ("EFF"). n1 For the reasons stated herein, EFF's arguments are rejected; Neidorf's [*558] motion to dismiss the superseding indictment is accordingly denied.

n1 Neidorf also reasserts the arguments he made in challenging the original indictment. Nothing in the superseding indictment, however, gives the court reason to revisit the issues already resolved by the court's June 5 order. Accordingly, to the extent that Neidorf applies his previous arguments to the superseding indictment, those arguments are summarily rejected.

FACTS

The facts set forth in the superseding indictment are essentially the same as those in the original indictment, so only a brief overview of them is necessary here. The government charges that Neidorf and Riggs devised and implemented a scheme to defraud involving the use of computers. The original indictment charged that the focus of the fraud scheme was narrow; the government claimed that the goal of the scheme was to use computers to steal the E911 text file owned by Bell South Telephone Company ("Bell South"). n2 The superseding indictment, however, now charges that misappropriation of Bell South's E911 text file was only one of the goals of the fraud scheme in which Neidorf and Riggs participated. The objective of the scheme is now more generally described as follows:

To fraudulently obtain and steal private property in the form of computerized files by gaining unauthorized access to other individuals' and corporations' computers, copying the sensitive computerized files in those computers, and then publishing the information from the computerized files in a hacker publication for dissemination to other computer hackers.

Thus, government now claims that Riggs [**3] and Neidorf entered into a scheme to steal and disseminate not only Bell South's E911 file, but other valuable computer-stored information as well.

n2 The E911 computer text file contains confidential, valuable, proprietary information describing the computerized control and maintenance of the emergency 911 services in the nine-state region in which Bell South operates.

According to the superseding indictment, Riggs and Neidorf committed several acts in furtherance of their broad scheme to distribute information stolen from computer systems. Each of these acts forms the basis for separate charges in Counts Two, Three, Four and Seven of the superseding indictment. Count Two charges that Neidorf violated the federal wire fraud statute, 18 U.S.C. @ 1343, by using his computer to announce the beginning of the "Phoenix Project." According to the government, that project involved a plan to solidify the hacker community by publishing hacking tutorials and disseminating other items of interest to hackers, such as information [**4] on how to prevent law enforcement authorities from discovering hacking activity. Neidorf's plan was to use a computer hacker newsletter entitled "PHRACK," which he published regularly, to
distribute information to the hacking community. Counts Three and Four charge that Neidorf and Riggs further violated @ 1343 by sending communications to each other via electronic mail concerning the implementation of their scheme. In addition, Count Seven charges that Neidorf violated @ 1343 by publishing an issue of PHRACK which contained a series of tutorials about breaking into computer systems.

The superseding indictment also charges Neidorf and Riggs with committing acts in furtherance of their more specific goal to fraudulently obtain Bell South's E911 text file. These acts form the basis of the remaining counts in the superseding indictment -- Counts One, Five, Six, Eight, Nine, Ten, and Eleven. Count One charges that Riggs violated @ 1343 by gaining unauthorized access to Bell South's computer system in Atlanta, Georgia, downloading a copy of Bell South's E911 text file to his home computer in Decatur, Georgia, and then transferring the E911 file to a computer bulletin board service in Lockport, Illinois, where he stored it for Neidorf's review. Count Five charges that Neidorf and Riggs violated @ 1343 when Neidorf, using a computer located at the University of Missouri in Columbia, Missouri, retrieved the E911 file from the Lockport computer bulletin board. Count Six charges that Neidorf's receipt of the E911 file from Riggs through the Lockport computer bulletin board constitutes a violation of the federal statute prohibiting the interstate transportation of stolen property, 18 U.S.C. @ 2314.

[559] After receiving the E911 file, Neidorf allegedly edited the file to conceal the fact that it had been fraudulently obtained by Riggs. Counts Eight and Nine charge that Riggs and Neidorf violated @ 1343 and @ 2314 when Neidorf transferred the edited version of the E911 file back to Riggs through the Lockport bulletin board. A short time later, Neidorf used his computer to publish the edited version of the E911 text file in an issue of PHRACK. Count Ten charges that Neidorf violated @ 1343 by publishing the E911 text file in PHRACK, and Count Eleven charges that the publication of the E911 file in PHRACK constituted a violation of @ 2314 by both Neidorf and Riggs.

DISCUSSION

Neidorf's [6] arguments, as presented by amicus EFF, attack the superseding indictment in two waves. One set of arguments challenges the counts against Neidorf based on the transfer of the stolen E911 file -- Counts Five, Six, Eight, Nine, Ten and Eleven. The other set of arguments challenges the counts dealing with the remaining charges -- Counts Two, Three, Four, and Seven. The court will address each set of Neidorf's arguments separately.

I. Counts Five, Six, Eight, Nine, Ten and Eleven

A. First Amendment

Neidorf's main challenge to Counts Five, Six, Eight, Nine, Ten and Eleven of the superseding indictment is grounded in the First Amendment. He argues that criminalizing his publication of the E911 text file in PHRACK -- as the government attempts to do in Counts Ten and Eleven -- constitutes an unconstitutional abridgement of his First Amendment rights. He further contends that since Counts Five, Six, Eight and Nine are based on the transfer of information which was incidental to the publication of the E911 file in PHRACK, finding him criminally liable under those counts would also abridge his First Amendment freedoms.

In support of his argument, Neidorf relies principally on three [7] cases: Smith v. Daily Mail Publishing Co., 433 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978); and Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1222 (7th Cir. 1984), aff'd, 469 U.S. 1200, 84 L. Ed. 2d 309, 105 S. Ct. 1155 (1985). Neidorf maintains that under this precedent, a statute which criminalizes the publication of information can be sustained against a First Amendment attack only if it serves "the highest form of governmental interest." The Smith, Landmark, and Worrell decisions, however, are clearly distinguishable from the instant case. Each of those cases involved a statute expressly aimed at placing a prior restraint on speech. In addition, each of those cases involved the criminal prosecution of an individual for publishing information which had been lawfully obtained. In the instant case, in contrast, the superseding indictment does not charge Neidorf under a statute creating an express prior restraint on speech and, more importantly, the superseding indictment does not allege that Neidorf lawfully obtained Bell South's E911 file. In fact, the superseding indictment specifically charges that Riggs and Neidorf entered into [8] a scheme to steal and disseminate confidential, computer-stored information, including Bell South's E911 text file. Thus, according to the superseding indictment, even though Neidorf did not actually steal the E911 file, he was completely aware...
that it was stolen when he received it from Riggs. n3 As such, Neidorf clearly stands on different footing than the defendants in Smith, Landmark, and Worrell.

n3 The First Amendment argument in EFF’s amicus brief is based largely on its assertion that Neidorf “did not participate in or know of the theft [of the E911 file] in advance.” While Neidorf is certainly free to try to prove the truth of that assertion at trial, that statement is directly contradictory to the charges in the superseding indictment.

Moreover, the law is clear that where an individual violates an otherwise valid criminal statute, the First Amendment does not act as a shield to preclude [*560] the prosecution of that individual simply because his criminal conduct involves speech. For example, in United [*99] States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), defendant Rowlee formed a society whose activities dealt almost exclusively with promoting the evasion of taxes and frustrating the work of the Internal Revenue Service. Rowlee conducted seminars in which he counseled individuals to violate federal tax laws; he also advertised his anti-tax theories and services in the newspapers. The Second Circuit rejected Rowlee’s argument that his First Amendment rights were abridged by his conviction for mail fraud and for violations of 18 U.S.C. @ 371 (conspiracy to defraud the United States) and 26 U.S.C. @ 7206(2) (aiding and abetting tax fraud). With respect to the @ 371 charge, the court held:

"Speech is not protected by the First Amendment when it is the very vehicle of the crime itself["]. . . . [Rowlee was] convicted of the act of conspiracy, an act forbidden by section 371. [His] conduct was not protected by the First Amendment merely because, in part, it may have involved the use of language.

Id. at 1278 (quoting United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970)). In addressing the mail fraud charge, the court found that the First Amendment was simply not implicated. [*10] The court stated, "The defendants either violated the mail fraud statute or they did not. If they did not, reference to the First Amendment [in the jury instructions] only introduced an unnecessary complication into the case." Id. at 1280.

Similarly, in United States v. Morison, 844 F.2d 1057 (4th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 247 (1988), where a military intelligence employee was charged with violating the Espionage Act by sending an unauthorized transmission of national security material to a member of the press, the court held that First Amendment was not implicated. The court noted that the government based the charges on allegations that the defendant knowingly and willfully stole and distributed the secret documents. The court then stated, "We do not think that the First Amendment offers asylum under those circumstances, if proven, merely because the transmittal was to a representative of the press." Id. at 1068. Other courts have rejected First Amendment arguments similar to those in Rowlee and Morison. See, e.g., United States v. Lincoln, 589 F.2d 379, 382 (8th Cir. 1979) (rejecting defendant’s First Amendment attack against his conviction [*11] for mailing a threatening letter in violation of 18 U.S.C. @ 876); United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D.Okl. 1974) (rejecting defendant’s argument that federal statutes proscribing copyright infringement violate the First Amendment).

Neidorf argues that the E911 text file he published "is plainly of interest to any member of the public concerned with the operation of the system through which he can reach 'police, fire, and/or ambulance services.'" Even if that were true, however, under Branzburg v. Hayes, 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), Neidorf’s violation of criminal law is not excused simply because he provided the public with interesting information. In Branzburg, a reporter had written a newspaper article concerning certain criminal activities of individuals whom he had promised not to identify. When a grand jury subpoenaed the reporter to gather information concerning the criminal activity described in his article, the reporter argued that the First Amendment protected him from divulging the information. The Supreme Court rejected the reporter’s argument. The Court held:

It would be frivolous to assert -- and no one does in these cases -- that the First Amendment, [*12] in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.

Id. 408 U.S. at 691.
In short, the court finds no support for Neidorf's argument that the criminal activity [*561] with which he is charged in this case is protected by the First Amendment. Interpreting the First Amendment as shielding Neidorf from criminal liability would open a gaping hole in criminal law; individuals could violate criminal laws with impunity simply by engaging in criminal activities which involve speech-related activity. The First Amendment does not countenance that kind of end run around criminal law.

B. Vagueness

Under Palmer v. City of Euclid, 402 U.S. 544, 29 L. Ed. 2d 98, 91 S. Ct. 1563 (1971), a criminal charge must be dismissed where a criminal statute, as applied to the defendant's conduct, "fail[s] to give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.'" Id. at 545 (quoting United States v. Harris, 347 U.S. 612, 617, [**13] 98 L. Ed. 989, 74 S. Ct. 808 (1954)).

Neidorf argues that Counts Five, Six, Eight, Nine, Ten and Eleven should be dismissed pursuant to Palmer because sections 1343 and 2314 are unconstitutionally vague as applied to his alleged conduct.

The court finds no merit in Neidorf's contention. Two elements must be proven to sustain a conviction under the wire fraud statute: (1) a scheme to defraud; and (2) use of wire communications in furtherance of the scheme. Lombardo v. United States, 865 F.2d 155, 157 (7th Cir.), cert. denied, 491 U.S. 905, 109 S. Ct. 3186, 105 L. Ed. 2d 695 (1989). It is not in any way unclear or ambiguous that Neidorf's alleged conduct satisfies each of these elements. According to the superseding indictment, Neidorf entered into a scheme to defraud Bell South and other corporations and individuals out of valuable, computer-stored information, and through the use of a computer he allegedly caused wire communications to be sent in furtherance of that scheme. If these allegations are true, then Neidorf schemed, and he used wire communications to further his scheme. Thus, there are no vagueness problems with respect to @ 1343; that statute clearly applies to Neidorf's alleged conduct.

---Footnotes---

n4 The court notes that as with its First Amendment argument, EFF's vagueness argument is based largely on the notion that Neidorf was an innocent recipient of the stolen E911 file. As the court has already pointed out, that notion is contradicted by the express allegations in the superseding indictment. Those allegations charge that when Neidorf received the E911 file, he was completely aware of the fact that it had been stolen.

---Footnotes---

With respect to @ 2314, Neidorf's vagueness argument is a by-product of his previous argument against the original indictment that he did not cause "goods, wares, or merchandise" to be transferred within the meaning of the statute. The court rejected that argument, finding that the confidential, computer-stored information which Neidorf allegedly transferred comes within the @ 2314 definition of "goods, wares, or merchandise." Neidorf now argues that @ 2314 is unconstitutionally vague as applied to him because he could not have known that the information he transferred came within the definition of "goods, wares, or merchandise."

However, as this court detailed in the earlier opinion in this case, several courts have already held that the definition of "goods, wares, or merchandise" in @ 2314 encompasses proprietary business information which is stored on a tangible medium, such as paper. See United States v. Riggs, 739 F. Supp. 414, 420 (N.D.Ill. 1990) (collecting cases). The only difference between those cases and this case is that here the information was stored on computer. Moreover, it is clear that in this case Neidorf knew the information he transferred [***15] was valuable property; in fact, that is the precise reason he wanted to obtain the information and share it with other computer hackers. Therefore, the court finds that @ 2314, as applied to this case, is not unconstitutionally vague. Neidorf had fair notice that his alleged conduct could constitute a violation of that statute.

II. Counts Two, Three, Four and Seven

A. Scheme to Defraud

Neidorf argues that Counts Two, Three, Four and Seven -- all of which [*562] charge wire fraud -- should be dismissed on the grounds that the superseding indictment "fails to allege a scheme to defraud of which these counts could be a part." This argument is easily rejected. As noted above, the superseding indictment expressly alleges that Neidorf and Riggs entered into a scheme to defraud individuals and corporations out of proprietary information stored on computers. This plan involved two major steps: (1) stealing the information by gaining unauthorized access to computers; and (2) disseminating the information to others. Any use of
the wires in furtherance of the alleged scheme is chargeable under the wire fraud statute. To satisfy the "in furtherance" requirement, a wire communication must simply [*16] be "incident to an essential part of the scheme." Schmuck v. United States, 489 U.S. 705, 109 S. Ct. 1443, 1447, 103 L. Ed. 2d 734 (1989) (quoting Badders v. United States, 240 U.S. 391, 394, 60 L. Ed. 706, 36 S. Ct. 367 (1916)).

n5 Schmuck involved the mail fraud statute, but the Seventh Circuit has consistently held that cases construing the mail fraud statute are applicable to the wire fraud statute. See United States v. Gimbel, 830 F.2d 621, 627 (7th Cir. 1987).

Each wire communication alleged in Counts Two, Three, Four and Seven clearly satisfies that requirement. Counts Three and Four charge that Neidorf and Riggs exchanged electronic mail discussing the implementation of the scheme. Counts Two and Seven involve wire transfers of separate issues of PHACK. In one of those issues (Count Two), Neidorf announced the beginning of the "Phoenix Project;" in the other (Count Seven), he published tutorials on computer hacking. Each of these communications was certainly incident to an essential part of the scheme, since the aim of the communications was ostensibly [*17] to encourage others to illicitly obtain confidential, computer-stored information. Therefore, based on the scheme alleged in the superseding indictment, the acts in Counts Two, Three, Four, and Seven are properly chargeable under the wire fraud statute.

B. First Amendment

Relying again on the First Amendment, Neidorf raises a separate challenge to Counts Two and Seven, which he claims charge him with mere advocacy of illegal conduct. He argues that under Brandenburg v. Ohio, 395 U.S. 444, 25 L. Ed. 2d 430, 89 S. Ct. 1827 (1969), his mere advocacy of illegal activity is no basis for criminal liability because: (1) the alleged advocacy was not directed at producing imminent lawless action; and (2) the alleged advocacy was not likely to produce or incite such action.

Neidorf's argument must be rejected for the same reasons the court rejected Neidorf's previous First Amendment argument. If Neidorf participated in the scheme to defraud as alleged in the superseding indictment, then he is criminally responsible for his conduct in furtherance of the scheme, and the First Amendment does not shield him from that responsibility merely because his criminal conduct involved speech. See, e.g., Rowlee, 899 F.2d at 1278-81; Morison, 844 F.2d 1057. Cases like this one, where a wire fraud violation is based on the theft and unlawful dissemination of proprietary business information, simply do not implicate the type of First Amendment concerns which arise in cases like Brandenburg, which involved prosecution under a criminal syndicalism statute. Moreover, as the court noted in Rowlee, the Brandenburg test cannot be reasonably applied to violations of the mail fraud or wire fraud statutes, which usually "involve long-term, slowly-developing wrongs, not 'imminent lawless action.'" Rowlee, 899 F.2d at 1280. Therefore, Neidorf's request to dismiss Counts Two, Three, Four and Seven on First Amendment grounds must be denied.

CONCLUSION

For the foregoing reasons, Neidorf's motion to dismiss the superseding indictment is denied.

IT IS SO ORDERED.
"As you travel down the info highway, don't forget to stop and download the roses."
SAMPLE TEST QUESTIONS

1. You get a phone call from your client Joe Bob, president of Internet on the Range, an Internet access provider in Cheyenne, Wyoming. He asks:

"We carry over 6,000 Usenet newsgroups on our system. Really, we try to carry almost all of them. It takes up a lot of storage space, but I think our users appreciate having access to all the Usenet groups.

"Well, 2 days ago, a maelstrom broke out on our system. Seems that a story was posted, from some random yutz in Australia, I think, of all places, on alt.sex.stories that described bestiality with a buffalo. You know, folks up here don’t stand for that kind of talk. So some of my users read this story and started complaining on our internal message boards that Internet on the Range should stop carrying the alt.sex.stories newsgroup. Now, it seems like I’m going to lose a whole bunch of my users if I don’t stop carrying the alt.sex.stories newsgroup. On the other hand, I really hate the idea of censoring the newsgroup—I mean, anyone can go to the website that archives alt.sex.stories and get the text of all the messages anyway—so what good is pulling the plug? What should I do?"

What do you tell Joe Bob? (80 minutes)

2. You get a call from Jack Chance. He says:

"I read your bio online and I think you are just the person to help me. See, I want to start up an Internet-related business called High Stakes. It will be an online gambling casino like no other—bigger, better, more exciting, more fun! We’re all going to make millions. I need a lawyer to represent me, and I know you have the skills. I’m hoping you’ll agree to take me on.

"Now, I know Internet gambling raises some difficult legal issues. Here’s my solution. I’m going to form a California corporation called Internet Casinos, Inc. that will be based in the Silicon Valley. Makes it easier to raise the capital. We’ll form a Grand Caymans subsidiary, which will just be a shell corporation. To avoid any criminal liability, we’ll base the server in Grand Caymans, and for the most part it will run autonomously—maybe we’ll contract out the server maintenance as needed, and I’ll fly out there occasionally to make sure everything is OK. We’ll make millions! Will you take me on?"

Your firm requires you to get the signature of a partner in order to bring in new business. The most likely candidate is Sharp Shapiro. You tell Sharp that you would like to talk to him about a new business prospect, and before you can say any more, Sharp says:

"Here’s the deal with new business. We need to decide if there is a real business there. Our firm is measured on the number of IPOs we do, so we need businesses that are going to succeed, that are on an IPO track. So tell me—what are the business prospects for this new client? Do you like their idea? Will their business succeed?"
What do you tell Sharp? (40 minutes)

3. Freddie Freeloader is a friend from undergrad. Knowing your habits, he calls you on a Sunday afternoon at the office. He says:

"Hey broster, what’s shakin'? I’ve just launched my new personal home page. It’s called "Death to Mickey!" at www.waltsucks.com. It’s a total anti-Disney thing. I’ve got it all. I’ve got a comic strip called "Mickey’s Sexcapades"--in the first issue, Roger Rabbit plays a sex therapist who counsels Mickey about Mickey’s transsexual urges. I’ve also got a place where people can play songs like "It’s a Small World" backwards, and I’ve inserted some satanic chants so that people will think that Disney released songs with these satanic messages. Oh, it’s great! You know, I’ve hated the whole Disney thing ever since I saw "Bambi"--I mean, they kill the mom! Now, I’m getting my chance to make a social statement!"

You reply:

"As you know, Freddie, you’re not my client, so I can’t really give you specific legal advice. But I can’t help but point out a couple of legal issues. First, there is . . . "

Complete the thoughts. (60 minutes)

4. Your client, Marla Macrobiotic, runs MetaNet, a website dedicated to various issues holistic and spiritual. One of her online databases is Stomach Meditation, a page which lists vegan restaurants in many cities throughout the US. She calls to say:

"I’m so mad. I was browsing the web when I came across a new site called Go to Florida! at www.sunshine.com. It’s a site designed to convince people to come to Florida. Apparently, they are really pushing to bring vegetarian people to Florida, because one of their headings was "Good Places for Vegetarians to Eat." Well, I looked at the database, and I swear, it is a total rip off of my site! They must have just electronically copied my site, because everything is the same--the data is the same, they organized it alphabetically by city just like I did, even the HTML coding is the same! I want to sue them so that they won’t be able to afford even alfalfa sprouts! Just send me the check when the court rules in my...."

You interrupt Marla by saying:

"First, I need to know some information. Second, there are some legal principles that suggest we should probably think twice about pursuing a lawsuit....."

What information do you need? And why would you want to reconsider a suit? (40 minutes)
September 21, 1995

Re: ****, Inc. Proposed Web Site Notice of Terms and Conditions

Dear:

This letter is in response to your request for our review and comment on ****, Inc.'s "disclaimer" to be posted on the company's Web site. The following discussion examines the four separate types of notices at issue here, and the attachment offers proposed language for each. We do not mean to overstate, by our detailed analysis, the legal risks associated with offering a Web site. However, we felt it was necessary to address fully all of the issues involved, given the rather undeveloped state of the law in this area.

Copyright Notice

A copyright notice should be placed on all original works of authorship that **** has created and over which it wishes to maintain control. The standard notice, "© ****, Inc. 1995," will inform users that **** reserves all of its exclusive rights under U.S. copyright law. These rights can be divided into three general categories: (1) the right to make and distribute copies of the work; (2) the right to modify the work so as to create a "derivative work;" and (3) the right to publicly perform or display the work. The laws outside of the U.S. may differ, but most industrialized countries confer similar rights under their copyright laws.

The copyright notice presently on ****'s Web site reserves all of these rights to **** and requires the company's express permission to copy any copyrighted information on the site. However, if ****'s purpose in constructing the site was to disseminate as widely as possible ****'s company and product information, it may be more advantageous to give Internet users express permission to copy information on the site, subject to certain restrictions. Please see the attachment for an example of language that **** might use to accomplish this result.

Trademark Notice

****'s Web site trademark notice should, above all, identify for the reader the marks in which **** claims trademark rights. To avoid claims of infringement or improper use of others' trademarks, it also should note that other marks appearing on the site are the property of their respective owners. The present trademark notice, which identifies all marks used and their owners, is unnecessary. More important is to ensure that others companies' marks appearing on ****'s site are used properly. For example, a trademark should be used only as an adjective, never as a noun (e.g. "Our software is compatible with your Compaq computer." Not "Our software is compatible with your Compaq."). It is also a good idea to capitalize trademarks in order to set them apart from the rest of the text.
Warranty Disclaimer

Under California state law (Cal. Commercial Code §§ 2314-15), certain implied warranties are created in some circumstances by a sale of goods. While it is unclear whether these warranties apply to information published on the Internet and what effect, if any, disclaimers of these warranties might have on a Web site owner’s liability, it is prudent to include such a disclaimer in the event that implied warranties are found to apply to Internet publishing. In fact, many commercial entities on the Web have incorporated warranty disclaimers into their sites.

Notwithstanding their popularity on the World Wide Web, however, it is likely that many warranty disclaimers that now appear on the Web may be unenforceable against a potential claimant. For any disclaimer of warranty to be enforceable, it must be conspicuously placed (so that a reasonable person should see it) and contain terms that are not unconscionable. A contract is "unconscionable" where, as a result of unequal bargaining positions of the parties, the terms of the contract unreasonably favor one of the parties. Like the "fine print" that commonly appears at the bottom of standardized contract forms, most Internet disclaimers do not even require the user to read the agreement, let alone demonstrate his or her consent to its terms. The disclaimer is instead placed in an obscure hypertext link that no one accesses. Further, many disclaimers presently on the Web are so complex and contain terms so onerous that no court may enforce them.

Of course, there is no guarantee that even a properly drafted and placed warranty disclaimer would be upheld by a court. While this does not mean that warranty disclaimers should not be used, it is important to remember that including a disclaimer cannot insulate a Web site owner from all claims against it.

Limitation of Liability

****’s notice also should include language that seeks to limit the company’s liability for certain types of damages arising out of the use or performance of the information. Sample language for this provision is included on the attached Terms and Conditions notice.

It is important to remember that even if the disclaimer and limitation of liability were found to be enforceable, such language cannot insulate **** from every type of claim. For example, it will not protect against claims for libel, product disparagement, false advertising, fraud, and other claims based on false statements. Therefore, it is important to ensure that all information **** places on the Internet is accurate, not misleading, and is reasonably based on fact.

To reduce the risk of liability to Internet users, **** should position the Terms and Conditions notice where users will not miss it, so as to maximize its enforceability but without unnecessarily impeding or frustrating users of ****’s Web site. To aid you in weighing the business risks and advantages involved in placement of the disclaimer, I have outlined several options below, listed in order of "best chance for enforceability/most imposition" to "lowest chance of enforceability/least imposition."
Place the disclaimer on a "front" screen (like a boot screen) so that it will act as a gate through which users must pass in order to access ****'s home page. This will ensure that users at least see the disclaimer, if not read it. To further ensure that users read and agree to the terms of the disclaimer, **** could require the user to input something like "I agree" and his or her initials before access is granted to ****'s site. While this would give **** the greatest likelihood of enforceability against a potential claimant, at present, such arrangements are not commonly used on the Web. Moreover, given users' contempt for all impediments to browsing, this option might dissuade users from accessing the site.

Place the full text of the disclaimer on the home page in a font large enough to be easily readable.

Place in a conspicuous location on the home page a notice such as: "Use of this Service is subject to the terms and conditions as set forth in ****, Inc.'s Terms and Conditions of Use -- PLEASE READ," with a hypertext link to the Terms and Conditions page. The notice should be positioned so that the user sees it as soon as the home page is opened, without having to scroll down. As stated above, disclaimers placed in hypertext links are not foolproof because there is no guarantee that anyone will read them.

Regardless of which option you choose, the hypertext link as it presently appears identifies itself only as a copyright notice. This is not sufficient to notify users that there is a disclaimer **** wants them to read. **** would not be able to rely on any disclaimer or limitation of liability that is linked only to the copyright notice because the user reasonably could take the position that he or she was unaware of it -- that it is the digital equivalent of "fine print."

Finally, the sample language in the Terms and Conditions notice covers only ****'s present use of its site, namely as a tool to disseminate electronically information about the company and its products. If in the future **** decides to offer online software products, bug fixes, patches, or message boards that allow users to communicate with each other, it may be necessary to add language to the disclaimer.

After you have had a chance to review the proposed language but before you actually adopt any of it, please give me a call so that we may together determine what is the most appropriate Terms and Conditions language for ****. I look forward to speaking with you soon.

Very truly yours,

COOLEY GODWARD CASTRO
HUDDLESON & TATUM
TERMS AND CONDITIONS OF USE

Use of ****, Inc.'s World Wide Web site (hereinafter "Service") is subject to the terms and conditions below. PLEASE READ THIS AGREEMENT CAREFULLY BEFORE ACCESSING THE SERVICE. BY ACCESSING THE SERVICE, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS BELOW. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS AND CONDITIONS, YOU MAY NOT ACCESS OR USE THIS SERVICE.

Copyright. © ****, Inc. 1995. Permission is granted to make and redistribute without charge copies of any information provided on this Service, subject to the following conditions: (1) Such information may be used for non-commercial, educational, or personal purposes only; and (2) Any copy of such information or any portion thereof must be unaltered and must include ****, Inc.'s copyright notice. All other rights reserved.

Disclaimer of Warranties. THIS SERVICE IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF TITLE OR NONINFRINGEMENT OR THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ****, INC. ASSUMES NO RESPONSIBILITY FOR ERRORS OR OMISSIONS IN THIS SERVICE OR OTHER DOCUMENTS THAT ARE REFERENCED BY OR LINKED TO THIS SERVICE.

Limitation of Liability. IN NO EVENT SHALL ****, INC. BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING WITHOUT LIMITATION, THOSE RESULTING FROM LOSS OF USE, DATA, OR PROFITS, WHETHER OR NOT ****, INC. HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGE, OR ON ANY THEORY OF LIABILITY, ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THIS INFORMATION.

Trademarks. ****, the **** logo, and _______ are trademarks of ****, Inc. All other trademarks are the property of their respective owners.

Miscellaneous. This Service may include typographical errors or other inaccuracies. Changes are periodically added to the information herein. ****, Inc. may make at any time improvements and/or changes in the product(s) and/or program(s) described in this Service.
Cyberspace Law Review Bibliography
By Eric Schlachter, Esq.
Cooley Godward Castro Huddleston & Tatum, Palo Alto, CA
schlachtere@cooley.com

I have indicated noteworthy pieces with an asterisk [*].


Jerry Berman and Daniel J. Weitzner, Abundance & User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619 (1995)

Anne W. Branscomb, Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspace, 104 YALE L.J. 1639 (1995)


Thomas D. Brooks, Note, Catering Jelly Fish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards, 21 RUTGERS COMPUTER TECHNOLOGY L.J. 461 (1995)


M. Ethan Katsh, *Cybertime, Cyberspace and Cyberlaw*, 1995 J. ONLINE ART. 1


Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. ART. 2


[*] Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 *HARVARD J.L. & TECH.* 65 (1992)


Henry H. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 *VILL. L. REV.* 349 (1993)


Domain Name Legal Bibliography

by Eric Schlachter, Esq.
Cooley Godward Castro Huddleson & Tatum, Palo Alto, CA
schlachterc@cooley.com

'Address Poacher' Loses Internet Ruling, SAN JOSE MERCURY NEWS, October 6, 1994 at 1E (describing Princeton Review's arbitration loss to Kaplan over kaplan.com).

BBB has Internet Trademark Gripe, SAN JOSE MERCURY NEWS, May 12, 1995, at 1C (describing the Better Business Bureau's legal complaint against a man who registered "bbb.com" and "bbb.org" to extract money from the Bureau).


James Evans, In Cyberspace, a Company by Any Other Name Might Be Missing Out, SAN FRANCISCO DAILY JOURNAL, Wednesday, July 28, 1995 at 1.


Simon C. Garfinkel, On the Net, Name Wars Accelerate, SAN JOSE MERCURY NEWS, August 28, 1995 at IF.

Chris Gulker, Firm Must Alter Name on Internet, SAN FRANCISCO EXAMINER, October 6, 1994, at E1.


Internet Address Collector Voluntarily Gives Up His Claims to Names, SAN JOSE MERCURY NEWS, September 9, 1994 at 1D (describing how Jim Cashel voluntarily gave up 18 domain names, including "hertz" and "trump").

Anthony Lazarus, Trademark Laws Clash with First Come, First-Served Domain Registration, DIGITAL MEDIA, June 8, 1994 at 37.


David Plotnikoff, *An Internet Traveler Sends a McMessage*, SAN JOSE MERCURY NEWS, October 8, 1994 at 6C (updating McDonald’s response to Quittner’s registration of mcdonalds.com).


Joshua Quittner, *Billions Registered*, WIRED, October 1994 at 50 (also available at www.wired.com).


Stewart Ugelow, *Address for Success: Internet Name Game*, WASHINGTON POST, August 11, 1994, at Al.

*Video Jockey Butts Heads With MTV over Internet*, THE PLAIN DEALER, May 25, 1994 at 6C.

Mark Voorhees, *Trademark Suit Strikes at Belly of the Internet Beast*, INFORMATION LAW ALERT, February 24, 1995 (describing KnowledgeNet’s suit against D.L. Boone & Co. and several entities connected with InterNIC for giving out knowledgenet.com to Boone).
Cyberspace Legal Topics
by Eric Schlachter, Esq.
Cooley Godward Castro Huddleson & Tatum, Palo Alto, CA
schlachtere@cooley.com

- Sysop liability for deciding to carry Usenet feeds and linking to other Websites.
- Online accounts and the possibility for recognizing property interests. Applying a real property lease analysis to cyberspace.
- New methods of online regulation: what ever happened to the cries for FCC regulation? And how desirable is congressional regulation?
- An analysis of what constitutes "negligence" in sysop maintenance of their space.
- Should the definition of "reasonable person" be adjusted for the cyberspace community?
- Implications of an advertiser-driven Internet rather than a user/subscription driven Internet.
- New legal regimes for virtual reality: do the same laws apply in MOOs and MUDs? Example: cyber- rapes.
- Analysis of MTV v. Curry and the implications for "cybermarks."
- Does Web browsing constitute copyright infringement?
- Analysis of electronic shrinkwraps. Are online disclaimers enforceable? What procedural steps can be used to enhance enforceability?
- Jurisdiction and choice of law in cyberspace.
- Should true anonymity be allowed in online contexts? Who will bear the responsibilities of anonymous actions?
- Statutory analysis: letting the courts decide what rules apply in cyberspace (Stern v. Delphi, It's in the Cards).
- Analysis of sales taxes on information services.
- Application of foreign states' sale tax laws to online transactions.
- Dataveillance. The use of online data profiles in marketing research.
- Compilation copyrights for collective online activities.
- When does online behavior become "harassing"?
- Legality of online gambling.
- Right of attribution. Discuss White Paper, moral rights, value creation.
- Whether "ease of access" to illicit materials should affect liability for dissemination. Countering the arguments that the fact that the Internet makes materials more easily available (i.e., porn, bomb recipes, etc.) should result in such materials being illegal.
- How co-existing trademarks in physical space will get reconciled on the Net.
- Application of harassment laws on the Net.
- Setting community standards in cyberspace. Is cyberspace its own community? Are there multiple online-only communities in cyberspace?
- Online service liability for caching popular web pages. Is this copyright infringement? Liability for data that persists after the underlying page has changed.
- Developing rules for digital signatures.
- Implications of cancelbots. Liability for their release.
- Protecting the look 'n' feel of websites.
- Analysis of legal issues regarding programs that extract information from a user's hard drive and communicate back to a central server (Windows 95, Netscape Navigator).
WEB HOSTING AGREEMENT

THIS WEB HOSTING AGREEMENT (the "Agreement") is made as of __________, 199_, by and between _______________ a __________ corporation ("Provider"), and ________________, a _______________ ("Customer"), for the purpose of providing Customer with the resources enumerated on Exhibit A to make Customer’s content available on the World Wide Web. The electronic publicly viewable computer screen depictions of Customer’s materials on Provider’s server is referred to herein as the "Website."

1. DELIVERY OF CONTENT. Except as otherwise explicitly provided herein, Customer will deliver, and will be solely responsible for providing, to Provider all of Customer’s text, pictures, sound, video and other data ("Content") that Customer intends to publish and distribute on the Website. Unless otherwise specified in Exhibit A, the Content will be in the format(s) specified by Provider. Customer will bear all costs associated with the telecommunications and computer hardware, software and services necessary to generate the Content and deliver it to Provider.

2. WEBSITE DEVELOPMENT AND MAINTENANCE.

2.1 Provider Services. Provider will provide to Customer the services enumerated in Exhibit A for the fees set forth therein.

2.2 Work Product. As specified in Exhibit A, and for the fees set forth therein, Provider may provide design and other consulting services at Customer’s request. Provider hereby grants to Customer a non-exclusive, nontransferable, royalty-free, worldwide license to reproduce, distribute, publicly perform and publicly display all such materials created by Provider at Customer’s request, whether solely or in collaboration with Customer (the "Work Product").

2.3 Content Control. Customer will be solely responsible for creating, managing, editing, reviewing, deleting and otherwise controlling the Content and all user-generated content. Customer acknowledges that, by only providing Customer with the ability to publish and distribute its own Content and the content of third parties, Provider is acting as a passive conduit for the distribution and publishing of such content. As a conduit, Provider will give Customer complete discretion over the content published and distributed by Customer. Provider has no obligation to Customer, and undertakes no responsibility, to review the Content or user-generated content to determine whether any such content may incur liability to third parties. Notwithstanding anything to the contrary herein, if Provider believes in its sole discretion that any content on the Website may create liability for Provider, Customer agrees that Provider may take any actions with respect to the Website that Provider believes are prudent or necessary to minimize or eliminate Provider’s potential liability.
3. **FEES.** The initial fee shall be payable upon execution. The monthly fee shall be payable monthly in advance on the first day of each month. All other fees payable to Provider shall be invoiced monthly. Payment terms for invoiced amounts shall be net 30. In the event there is an unpaid balance 30 days after invoicing, Customer shall also pay interest at the rate of the lesser of 1.5% per month or the then-highest interest rate allowed to be imposed by applicable law, plus Provider’s cost of collection. All fees owed by Customer to Provider are exclusive of, and Customer shall pay, all sales, use, excise and other taxes which may be levied upon either party in connection with this Agreement or on activities occurring on the Website, except for taxes based on Provider’s net income.

4. **TERM AND TERMINATION.** The initial term of this Agreement shall be as specified in Exhibit A and this Agreement shall automatically renew on a month-to-month basis unless and until terminated with 30 days’ prior written notice by one party to the other. This Agreement will terminate automatically in the event that Provider decides, in its sole discretion, to stop operating its Web-accessible service. Either party may terminate this Agreement upon the material breach of the other party, if such breach remains uncured for 30 days following written notice to the breaching party; except that Provider may, by providing written notice, terminate this Agreement immediately if the monthly fees are not paid when due. Upon the expiration or termination of this Agreement, all licenses hereunder shall terminate, Provider’s obligations hereunder shall terminate and Provider will promptly download the Content to floppy disk and return the Content to Customer upon payment of all outstanding obligations owed by Customer to Provider. Sections 6, 8, 9 and 10 shall survive termination of this Agreement.

5. **CONTENT.**

5.1 **Customer Covenants.** Customer covenants that Customer will not publish or distribute on the Website any Content that: (a) infringes on any third party’s copyright, patent, trademark, trade secret or other proprietary rights; (b) violates any law, statute, ordinance or regulation, including without limitation the laws and regulations governing export control; (c) is defamatory or trade libelous; (d) is pornographic or obscene; or (e) contains viruses, trojan horses, worms, time bombs, cancelbots or other similar harmful or deleterious programming routines. Customer agrees to use commercially reasonable practices (including without limitation periodic inspections of the Website) to ensure that user-generated content published or distributed on the Website does not create liability for Provider.

5.2 **License.** For the term of this Agreement, Customer hereby grants to Provider a non-exclusive, royalty-free, worldwide license to reproduce, distribute, publicly perform and publicly display the Content and Work Product on or in conjunction with the Website. Provider may make a reasonable number of archival copies of the Content. Title to and ownership of all intellectual property rights of the Content shall remain with Customer or its third party licensors.

6. **DISCLAIMER OF WARRANTIES.** Provider provides the Website, the Work Product and all services performed hereunder "AS IS" and without any warranty of any kind. Provider does not guarantee continuous or uninterrupted service to the Website. In the event of interruption
of Website service, Provider's sole obligation shall be to restore service as soon as reasonably possible.

7. **TRADEMARKS.** Neither party may use the other party's trademarks, service marks, trade names, logos, or other commercial or product designations (collectively, "Marks") for any purpose whatsoever without the prior written consent of the other party. Notwithstanding the foregoing, Customer grants to Provider a non-exclusive, nontransferable, royalty-free, worldwide license to use Customer's Marks (a) on the Website for the purposes of marketing, promotion, and content directories or indexes, and (b) in electronic or printed advertising, publicity, press releases, newsletters and mailings about the Website or Provider.

8. **INDENMITY.** Customer agrees to defend, indemnify and hold harmless Provider and its directors, officers, agents and employees for any and all losses, costs, liabilities or expenses (including without limitation reasonable attorneys' and expert witnesses' fees) incurred or arising from (a) any breach of the covenants in Section 5.1, (b) any user-generated content, or (c) any claims arising from the sale or license of goods or services on the Website. Provider's indemnity rights shall not be limited or offset by any contributory negligence by Provider. Provider may participate in the defense at its expense.

9. **LIMITATIONS ON LIABILITY.** IN NO EVENT SHALL PROVIDER BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING BUT NOT LIMITED TO SUCH DAMAGES ARISING FROM BREACH OF CONTRACT OR WARRANTY OR FROM NEGLIGENCE OR STRICT LIABILITY), OR FOR INTERRUPTED COMMUNICATIONS, LOST DATA OR LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF PROVIDER HAS BEEN ADVISED OF (OR KNOWS OR SHOULD KNOW OF) THE POSSIBILITY OF SUCH DAMAGES. UNDER NO CIRCUMSTANCES SHALL PROVIDER BE LIABLE TO CUSTOMER OR ANY THIRD PARTIES FOR AN AMOUNT GREATER THAN THE AMOUNTS RECEIVED FROM CUSTOMER HEREUNDER.

10. **GENERAL PROVISIONS.**

10.1 **Governing Law.** This Agreement will be governed and construed in accordance with the laws of the State of California without giving effect to principles of conflict of laws. Customer agrees to submit to jurisdiction in California and further agrees that any cause of action arising under this Agreement may be brought in a court in __________ County, California.

10.2 **Severability; Waiver.** If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision which most closely approximates the intent and economic effect of the invalid provision. The waiver by either party of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.
10.3 Headings. Headings used in this Agreement are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section, or in any way affect this Agreement.

10.4 Successors and Assigns. This Agreement may not be assigned by Customer without Provider’s prior written consent. The parties’ rights and obligations will bind and inure to the benefit of their respective successors, heirs, executors and administrators and permitted assigns. Provider may subcontract all or a portion of its responsibilities hereunder.

10.5 Attorneys’ Fees. If any legal action is brought to construe or enforce any provision of this Agreement, the prevailing party shall be entitled to receive its reasonable attorneys’ fees and court costs in addition to any other relief it may receive.

10.6 Force Majeure. If the performance of this Agreement, or any obligation hereunder, except the making of payments hereunder, is prevented, restricted or interfered with by any act or condition whatsoever beyond the reasonable control of the affected party, the party so affected, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such prevention, restriction or interference.

10.7 Independent Contractors. The parties to this Agreement are independent contractors, and no agency, partnership, joint venture or employee-employer relationship is intended or created by this Agreement.

10.8 Notice. Any notices required or permitted hereunder shall be given to the appropriate party at the address specified below or at such other address as the party shall specify in writing. Such notice shall be deemed given: upon personal delivery; if sent by telephone facsimile, upon confirmation of receipt; if sent by electronic mail, upon confirmation of delivery; or if sent by certified or registered mail, postage prepaid, five (5) days after the date of mailing.

10.9 Entire Agreement. This Agreement, including the Exhibit attached hereto, sets forth the entire understanding and agreement of the parties and supersedes any and all oral or written agreements or understandings between the parties as to the subject matter of this Agreement. It may be changed only by a writing signed by both parties.

10.10 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be taken together and deemed to be one instrument.
IN WITNESS WHEREOF, each of the parties hereto have executed this Agreement as of the date first written above.

Provider:

By: ________________________
Title: ________________________
Street Address: ________________________
Mail Address: ________________________
Fax: ________________________
E-Mail: ________________________

Customer:

By: ________________________
Title: ________________________
Street Address: ________________________
Mail Address: ________________________
Fax: ________________________
E-Mail: ________________________
EXHIBIT A

Services and Fees

Format

The Content shall be provided in ________________.

Services

For the monthly fee, Provider shall provide the following:

* All computer hardware and software and telecommunications equipment as Provider deems necessary in its reasonable discretion. Provider may adjust Customer’s monthly fee if Provider deems Customer’s demands on the computer hardware or telecommunications equipment to be unreasonable. If Customer requests the use of software other than the software supported by Provider in its sole discretion, upon written confirmation from Customer, Provider will acquire such software and invoice Customer all amounts actually incurred.
* All Internet access equipment and services required for the Website.
* Register a domain name of Customer’s choosing with InterNIC; however, Customer will reimburse Provider for all fees and charges actually incurred by Provider for such service.
* Unprocessed server logs indicating the number of hits, requests, etc.
* For the monthly fee, Provider will provide ___ hours of support services per month, including without limitation the following services which Provider may choose to provide: conversion of Content to HTML, site design, graphic image scanning, Content reloads and updates, Customer technical phone support, Website-specific maintenance and end user support. Thereafter, for any additional hours, Provider will invoice Customer for such services at the rate of $___ per hour.
* For the monthly fee, Provider will provide ___ "pages" of Content. For the purposes of this Agreement, one "page" shall be the information contained on one 13" computer monitor screen as formatted in HTML. One page may contain up to ___ graphics (in JPEG or GIF format) and up to ___ MPEG files. Additional graphics per page will be charged at ____ and additional MPEG files per page will be charged at ____. Customer will be responsible for establishing and maintaining all hypertext links.

Fees

* Initial Fee: ________________
* Monthly fee: ________________
* Other charges:

Term

____ months from the date set forth in the first paragraph.
WEB HOSTING AGREEMENT

THIS WEB HOSTING AGREEMENT (the "Agreement") is made as of ________, 199_, by and between ______________ a __________ corporation ("Provider"), and ______________, a ________________ ("Customer"), for the purpose of providing Customer with the resources enumerated on Exhibit A to make Customer's content available on the World Wide Web. The electronic publicly viewable computer screen depictions of Customer's materials on Provider's server is referred to herein as the "Website."

1. DELIVERY AND DISTRIBUTION OF CONTENT. Customer will deliver to Provider all Customer text, pictures, sound, video and other data ("Content") that Customer intends to distribute on the Website. The Content will be in the format(s) specified in Exhibit A. Provider shall make such Content and the Work Product (as defined herein) publicly available to users (or, if Customer specifies that some or all of the Content shall have limited access, to only those users or categories of users specified by Customer) 24 hours a day, 7 days a week. Provider shall upload all Content, including updates, within 24 hours of delivery to Provider. At its option, Customer may electronically transmit or upload the Content directly to the Website.

2. WEBSITE DEVELOPMENT AND MAINTENANCE.

2.1 Provider Services. Provider will provide to Customer the services enumerated in Exhibit A for the fees set forth therein.

2.2 Work Product. As specified in Exhibit A, and for the fees set forth therein, Provider will provide design and other consulting services upon Customer's written request. Provider hereby irrevocably assigns to Customer all right, title and interest in and to all work product and documentation produced pursuant to Customer's requests for services hereunder (the "Work Product") and all applicable intellectual property rights thereto, including without limitation copyrights, trademarks, trade secrets, patents, moral rights, contract and licensing rights. If Provider has any rights that cannot be assigned to Customer, Provider waives the enforcement of such rights, and if Provider has any rights that cannot be assigned or waived, Provider hereby grants to Customer an exclusive, irrevocable, perpetual, worldwide, fully paid license, with right to sublicense, to such rights.

2.3 Content Control. Customer will be solely responsible for creating, managing, editing, reviewing, deleting and otherwise controlling the Content and all user-generated content. Customer acknowledges that, by only providing Customer with the ability to distribute its own Content and the content of third parties, Provider is acting as a passive conduit for the distribution and publishing of such content. As a conduit, Provider will give Customer complete discretion over the content distributed by Customer. Provider has no obligation to Customer, and undertakes no responsibility, to review the Content or user-generated content to determine whether any such content may incur liability to third parties.
3. **FEES.** Provider shall invoice all fees monthly. Payment terms are net 30. Provider shall pay all sales, use, excise and other taxes which may be levied upon either party in connection with this Agreement, except for taxes based on Customer's net income.

4. **TERM AND TERMINATION.** The initial term of this Agreement shall be as specified in Exhibit A and this Agreement shall automatically renew on a month-to-month basis unless and until terminated with 30 days' prior written notice by one party to the other. Either party may terminate this Agreement upon the material breach of the other party, if such breach remains uncured for 10 days following written notice to the breaching party. Upon the expiration or termination of this Agreement, Provider shall download all materials on the Website to a medium of Customer's choosing and deliver such materials to Customer by 5 p.m. the next business day. In addition, at no cost to Customer, Provider shall: (i) keep the Website publicly accessible for a period of 7 days following the date of termination of this Agreement; (ii) immediately upon the date that the Website is no longer publicly accessible, and for a period of 12 months thereafter, maintain the Website's URL and, at such URL, provide one Web page (including a hypertext link) that Customer may use to direct its users to its new website or some other URL of Customer's choosing; and (iii) cooperate with Customer in assigning a new Internet Protocol address to the Website's URL as Customer may request. Sections 2.2, 6, 9 and 10 shall survive termination of this Agreement.

5. **CONTENT.**

5.1 **Customer Covenants.** Customer covenants that Customer will not distribute on the Website any Content that: (a) infringes on the U.S. copyright or patent rights of any third party; (b) violates any law or regulation, including without limitation the laws and regulations governing export control; (c) is defamatory or trade libelous; (d) is pornographic or obscene; or (e) contains viruses, trojan horses, worms, time bombs or cancelbots.

5.2 **License.** For the term of this Agreement, Customer hereby grants to Provider a non-exclusive, nontransferable, royalty-free, worldwide license to reproduce, distribute, publicly perform and publicly display the Content and Work Product only on or in conjunction with the Website. Provider may make copies of the Content only as necessary for archival purposes. Title to and ownership of all intellectual property rights of the Content shall remain with Customer or its third party licensors, and Customer grants no rights other than explicitly granted herein.

6. **DISCLAIMER OF WARRANTIES.** EXCEPT AS SET FORTH HEREIN, EACH PARTY EXPRESSLY DISCLAIMS ALL REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

7. **TRADEMARKS.** Subject to the terms and conditions of this Agreement, each party hereby grants to the other party a limited, non-exclusive, nontransferable, royalty-free, worldwide license to use such party's trademarks, service marks, trade names, logos or other commercial or product designations (collectively, "Marks") for the purposes of creating content directories
or indexes and for marketing and promoting the Website. The holder of the Marks may terminate the other party’s right to use the Marks, in whole or in part, if the usage of the Marks does not adhere to the holder of the Mark’s then-current standards for the Marks.

8. INDEMNITIES.

8.1 Customer Indemnity. Customer agrees to defend and hold harmless Provider against any third party claim, action, suit or proceeding alleging any breach of the covenants contained in Section 5.1. Subject to Section 8.3, Customer shall indemnify Provider for all losses, damages and all reasonable expenses and costs incurred by Provider as a result of a final judgment entered against Provider in any such claim, action, suit or proceeding.

8.2 Provider Indemnity. Provider agrees to defend and hold harmless Customer against any third party claim, action, suit or proceeding: (a) alleging that Provider has infringed any U.S. copyright or U.S. patent right, or (b) resulting from Provider’s acts, omissions or misrepresentations under this Agreement. Subject to Section 8.3, Provider shall indemnify Customer for all losses, damages and all reasonable expenses and costs incurred by Customer as a result of a final judgment entered against Customer in any such claim, action, suit or proceeding.

8.3 Mechanics of Indemnities. The indemnifying party’s obligations are conditioned upon the indemnified party: (a) giving the indemnifying party prompt written notice of any claim, action suit or proceeding for which the indemnified party is seeking indemnity; (b) granting control of the defense and settlement to the indemnifying party; and (c) reasonably cooperating with the indemnifying party at the indemnifying party’s expense.

9. LIMITATIONS ON LIABILITY. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING BUT NOT LIMITED TO SUCH DAMAGES ARISING FROM BREACH OF CONTRACT OR WARRANTY OR FROM NEGLIGENCE OR STRICT LIABILITY), OR FOR INTERRUPTED COMMUNICATIONS, LOST DATA OR LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF (OR KNOWS OR SHOULD KNOW OF) THE POSSIBILITY OF SUCH DAMAGES.

10. GENERAL PROVISIONS.

10.1 Governing Law. This Agreement will be governed and construed in accordance with the laws of the State of California without giving effect to principles of conflict of laws. Both parties agree to submit to jurisdiction in California and further agree that any cause of action arising under this Agreement may be brought in a court in __________ County, California.

10.2 Further Assurances. Provider agrees to cooperate with Customer, both during and after the term of this Agreement, in the procurement and maintenance of Customer’s rights.
to intellectual property created hereunder and to execute, when requested, any other documents deemed necessary by Customer to carry out the purpose of this Agreement.

10.3 Severability; Waiver. If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision which most closely approximates the intent and economic effect of the invalid provision. The waiver by either party of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.

10.4 Headings. Headings used in this Agreement are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section, or in any way affect this Agreement.

10.5 Successors and Assigns. Neither party may assign this Agreement without the other party’s written consent except to a party that acquires a majority of the equity securities or voting interests or all or substantially all of the assets of the assigning party. The parties’ rights and obligations will bind and inure to the benefit of their respective successors, heirs, executors and administrators and permitted assigns. Provider may not subcontract its responsibilities hereunder without Customer’s prior written consent, which will not be unreasonably withheld.

10.6 Attorneys’ Fees. If any legal action is brought to construe or enforce any provision of this Agreement, the prevailing party shall be entitled to receive its reasonable attorneys’ fees and court costs in addition to any other relief it may receive.

10.7 Force Majeure. If the performance of this Agreement, or any obligation hereunder is prevented, restricted or interfered with by any act or condition whatsoever beyond the reasonable control of the affected party, the party so affected, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such prevention, restriction or interference. Notwithstanding the foregoing, in the event of interruption of Website service, Provider shall use its best efforts to restore service as soon as possible.

10.8 Independent Contractors. The parties to this Agreement are independent contractors, and no agency, partnership, joint venture or employee-employer relationship is intended or created by this Agreement.

10.9 Notice. Any notices required or permitted hereunder shall be given to the appropriate party at the address specified below or at such other address as the party shall specify in writing. Such notice shall be deemed given: upon personal delivery; if sent by telephone facsimile, upon confirmation of receipt; if sent by electronic mail, upon confirmation of delivery; or if sent by certified or registered mail, postage prepaid, five (5) days after the date of mailing.
10.10 Entire Agreement. This Agreement, including the Exhibit attached hereto, sets forth the entire understanding and agreement of the parties and supersedes any and all oral or written agreements or understandings between the parties as to the subject matter of this Agreement. It may be changed only by a writing signed by both parties.

10.11 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be taken together and deemed to be one instrument.

In witness whereof, each of the parties hereto have executed this Agreement as of the date first written above.

Provider:

By: ________________________
Title: ______________________
Street Address: ______________
____________________________
Mail Address: ________________
____________________________
Fax: ________________________
E-Mail: _____________________

Customer:

By: ________________________
Title: ______________________
Street Address: ______________
____________________________
Mail Address: ________________
____________________________
Fax: ________________________
E-Mail: _____________________
EXHIBIT A

Services and Fees

Format

The Content shall be provided in _________________.

Services

For the monthly fee, Provider shall provide the following:

* All computer hardware and software and telecommunications equipment necessary to support the Website.
* All Internet access equipment and services required for the Website.
* Register a domain name of Customer's choosing with Internic. Provider acknowledges and agrees that Customer shall own the domain name and all intellectual property rights appurtenant thereto.
* Unprocessed server logs indicating the number of hits, requests, etc.
* For the monthly fee, Provider will provide ____ hours of support services per month, including without limitation the following services which Provider may choose to provide: conversion of Content to HTML, site design and layout, graphic image scanning, Content reloads and updates, Customer technical phone support, Website-specific maintenance and end user support. Thereafter, Provider will invoice Customer for such services at the rate of $____ per hour.
* For the monthly fee, Provider will provide ____ "pages" of Content. For the purposes of this Agreement, one "page" shall be the information contained on one 13" computer monitor screen as formatted in HTML. One page may contain up to ____ graphics (in JPEG or GIF format) and up to ____ MPEG files. Additional graphics per page will be charged at ____ and additional MPEG files per page will be charged at ____.

Fees

* Initial Fee: ________________

* Monthly fee: ________________

* Other charges:

Term

_____ months from the date set forth in the first paragraph.
INTERNET AUTHORIZATION FORM

[Redacted has] installed software and hardware with which users on the network may access the Internet. The purpose of this capability is to enable [redacted] employees to have access to outside sources of information. These include databases and other professionals. The tools to access these resources are provided by [redacted] and include electronic mail, inc, file transfer and World Wide Web client software. The following is [redacted]'s policy regarding proper use of the Internet and the responsibilities and obligations of [redacted] users regarding access to the Internet.

A. These accounts are meant to be used only during the tenure of your employment at [redacted] for legitimate business purposes and not for personal correspondence, personal entertainment, or other non-[redacted] related activity.

B. Communications over the Internet are not private and therefore, [redacted] reserves the right to read, copy, use, intercept, review, audit, access, and disclose all messages sent over the Internet to determine whether, among other reasons, there have been any breaches of security, violations of company policy, or wrongdoing on the part of employees.

C. Employees should understand that they have no expectation of privacy with respect to Internet communications and should therefore, refrain from communications that are personal or confidential in nature. Moreover, employees should remember that the Internet is not a secret communications link and that third parties, so called “hackers,” and government agencies may be retrieving Internet communications without prior notice to or consent of the Internet user. Further, [redacted] reserves the right to disclose to applicable government agencies the content of Internet communications without prior notice to an employee who may have sent or received such a communication.

D. As deployed at [redacted], the Internet is a means of business communication. Erasing a message does not necessarily erase all copies of the message. Archived copies may be stored for substantial periods of time and are subject to the provisions of this policy regarding content, review, access, and disclosure. For these reasons, you should not write or send anything that you would not write in a hard copy memorandum or letter.

E. [redacted] prohibits any employee from using the Internet for any illegal activity whatsoever, including, but are not limited to, any type of unlawful commerce, such as the distribution of proprietary research data or the unauthorized transfer of licensed or unlicensed software.

Need policy re. using firm name/representing firm online. Reminder about potential for defamation/libel.
F. The Internet system shall not be used for any form of harassment or any communications which could be annoying, offensive, or derogatory. Internet is a company resource and is provided strictly as a business communications tool. No employee is permitted to use the Internet to deliver a message that is harassing or offensive on the basis of race, color, religious belief, sex, sexual orientation, national origin, ancestry, age, marital status, disability, mental condition, or veteran status. Furthermore, employees are prohibited from reading messages delivered to someone else or otherwise violating privacy rights of others without proper authorization from management.

G. From time to time, [Company Name] may install software that is intended to block access to portions of the Internet or adopt additional policies to restrict access to portions of the Internet. Employees shall not tamper with any blocking software and shall adhere to any restricted access policies adopted by [Company Name].

H. You may not authorize anyone to use [Company Name]'s Internet account or your password and you must take all reasonable precautions, including not sharing your password, to prevent use of [Company Name]'s accounts by unauthorized persons.

I. Anyone who receives an Internet message for which they are not the intended recipient must immediately inform the sender that the message was sent improperly and must delete the message from their in-box.

J. Employees who violate any of the terms contained herein, or any of the Internet usage policies established by [Company Name] from time to time, will be subject to discipline, up to and including termination.

As a condition to receiving access to the Internet, you must first receive training from the network specialist and read and review this authorization form and sign below to indicate your agreement to be bound to the terms of this Internet agreement.

Understood and Agreed:

Signed: ___________________________ Date: __________
The Unofficial Smiley Dictionary

<table>
<thead>
<tr>
<th>Emoticon</th>
<th>Meaning</th>
<th>Emoticon</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>:-)</td>
<td>Your basic smiley. This smilie is used to inflect a sarcastic or joking statement since we can’t hear voice inflection over Unix.</td>
<td>:-)</td>
<td>Talking head Smiley</td>
</tr>
<tr>
<td>;(</td>
<td>Winky smiley. User just made a flirtatious and/or sarcastic remark. More of a “don’t hit me for what I just said” smiley.</td>
<td>;(</td>
<td>Bumped out Smiley</td>
</tr>
<tr>
<td>:=(</td>
<td>Frowning smiley. User did not like that last statement or is upset or depressed about something.</td>
<td>:=(</td>
<td>User’s beard has permanent wave <em>or</em> was drawn by Picasso</td>
</tr>
<tr>
<td>:-I</td>
<td>Indifferent smiley. Better than a Frowning smiley but not quite as good as a happy smiley</td>
<td>:-I</td>
<td>“have an ordinary day” Smiley</td>
</tr>
<tr>
<td>:-&gt;</td>
<td>User just made a really biting sarcastic remark. Worse than a :-).</td>
<td>:-&gt;</td>
<td>Disappointed Smiley</td>
</tr>
<tr>
<td>&gt;;:-&gt;</td>
<td>User just made a really devilish remark.</td>
<td>&gt;;:-&gt;</td>
<td>Real sad Smiley</td>
</tr>
<tr>
<td>&gt;;-&gt;</td>
<td>Winky and devil combined. A very lewd remark was just made.</td>
<td>&gt;;-&gt;</td>
<td>Hmm</td>
</tr>
<tr>
<td>:-8(</td>
<td>Condescending stare</td>
<td>:-8(</td>
<td>User’s lips are sealed.</td>
</tr>
<tr>
<td>:-#</td>
<td>User’s lips are sealed.</td>
<td>:-#</td>
<td>Smoker</td>
</tr>
<tr>
<td>:-P</td>
<td>User is smoking a pipe</td>
<td>:-P</td>
<td>User wears glasses</td>
</tr>
<tr>
<td>:-=)</td>
<td>Older user with mustache</td>
<td>:-=)</td>
<td>User attends an Ivy League school</td>
</tr>
<tr>
<td>:-F</td>
<td>User is sticking their tongue out (at you!)</td>
<td>:-F</td>
<td>User has two noses</td>
</tr>
<tr>
<td>:-Q</td>
<td>User tends to drool</td>
<td>:-Q</td>
<td>User has a big nose</td>
</tr>
<tr>
<td>:-R</td>
<td>User is cross</td>
<td>:-R</td>
<td>User has acne</td>
</tr>
<tr>
<td>:-S</td>
<td>User is well dressed</td>
<td>:-S</td>
<td>User’s face needs a nosejob, no explanation necessary</td>
</tr>
<tr>
<td>:-T</td>
<td>User talks too much</td>
<td>:-T</td>
<td>User with funny-looking right nose</td>
</tr>
<tr>
<td>:-V</td>
<td>Popeye smiling face, for people who look like popeye</td>
<td>:-V</td>
<td>User with funny-looking left nose</td>
</tr>
<tr>
<td>:-W</td>
<td>User has one eye</td>
<td>:-W</td>
<td>Popeye gets his lights punched out</td>
</tr>
<tr>
<td>:-X</td>
<td>User has a cold</td>
<td>:-X</td>
<td>User only has a left eye, which is closed</td>
</tr>
<tr>
<td>:-Y</td>
<td>User is surprised</td>
<td>:-Y</td>
<td>User is left-handed</td>
</tr>
<tr>
<td>:-Z</td>
<td>User has a mustache</td>
<td>:-Z</td>
<td>User needing a haircut</td>
</tr>
<tr>
<td>@</td>
<td>No expression face, ‘that comment doesn’t phase me’</td>
<td>@</td>
<td>Smiley big-face</td>
</tr>
<tr>
<td>:&lt;</td>
<td>User sports a mohawk and admires Mr. T</td>
<td>:&lt;</td>
<td>unSmiley frowning</td>
</tr>
<tr>
<td>:=</td>
<td>User which is tongue-tied</td>
<td>:=</td>
<td>User likes to scuba dive</td>
</tr>
<tr>
<td>:&lt;:</td>
<td>User licking its lips</td>
<td>:&lt;:</td>
<td>Egghead</td>
</tr>
<tr>
<td>:=:</td>
<td>User spitting out its chewing tobacco</td>
<td>:=:</td>
<td>UnSmiley big-face</td>
</tr>
<tr>
<td>:&lt;@</td>
<td>User after a BIZARRE comment</td>
<td>:&lt;@</td>
<td>Scuba Smiley big-face</td>
</tr>
<tr>
<td>:&lt;@:</td>
<td>User after eating something bitter</td>
<td>:&lt;@:</td>
<td>User is wearing toupee.</td>
</tr>
<tr>
<td>:&lt;@;</td>
<td>Hey hey</td>
<td>:&lt;@;</td>
<td>User, wearing toupee in wind.</td>
</tr>
<tr>
<td>:=:X</td>
<td>User is wearing a bow tie</td>
<td>:=:X</td>
<td>Smiley priest</td>
</tr>
<tr>
<td>:=:6</td>
<td>User after eating something sour</td>
<td>:=:6</td>
<td>Wry and winking</td>
</tr>
<tr>
<td>:=:0</td>
<td>User is an orator</td>
<td>:=:0</td>
<td>Cyclops got poked in the eye</td>
</tr>
<tr>
<td>:=:7</td>
<td>User after a wry statement</td>
<td>:=:7</td>
<td>User is a Bozo</td>
</tr>
<tr>
<td>:=:@</td>
<td>User with bushy mustache</td>
<td>:=:@</td>
<td>User is Santa Claus (Ho Ho Ho)</td>
</tr>
<tr>
<td>:=:@:</td>
<td>User face screaming</td>
<td>:=:@:</td>
<td>Dunce</td>
</tr>
<tr>
<td>:=:@;</td>
<td>User is a banker</td>
<td>:=:@;</td>
<td>User is a hosehead</td>
</tr>
<tr>
<td>:=:@:7</td>
<td>User with a mustache...</td>
<td>:=:@:7</td>
<td>Smiley punk with a mustache...</td>
</tr>
</tbody>
</table>
=:-)  Smiley punk-rocker
=:-((  (real punk rockers don't smile)
><:<  Mad
%-%^  User is Picasso
%-%)  User is cross-eyed
#-)  User partied all night
@:-)  Person submitting is Cyclops
@:|  Turban
|:-O  Birth
|:-)  User is asleep (boredom)
|P    Yuk
0-)   User wearing scuba mask
8-)   User wears glasses
8    Infinity
8-|   Suspense
8-#   Death
8-:)  Glasses on forehead
8:]   Normal smiling face except that User is a gorilla
B-|   User is wearing cheap sunglasses
g-)   Smiley with ponce-nez glasses
o-)   User is a cyclops
P-)   User is getting fresh
[::)  User is listening to Walkman radio
[::|  User is a robot
:o    Wow!
:o    Real unhappy
:|    Grim
:C    Just totally unbelieving
:=    Baboon
:B    Drooling
:v    Speaking
:,    Smirk
:v    Shout
:|    Anger
:w    Speak with forked tongue
:r    Sticking tongue out
:*    Oops!
:'    Wink
:T    Keeping a straight face
:)    Sardonic Incredulity
:D    Said with a smile
%-%<1>  Drunk with laughter
::x    Kiss kiss
::"    Purring lips
:[    Pouting
:-X   A big wet kiss!
::P    Tongue hanging out in anticipation
:-Y   A quiet aside
8-|   Eyes wide with surprise
><:<  Absolutely livid!!
&:-)  Tearful
{-    "Good Grief!" (Charlie Brown?)
:-)   "This wine tashted pretty good"
8-)   "wow, maan!
8-O   "Omigod!!" (done after "rm -rf * ?)
:-    "Hmmm.
|~(    "Someone just busted my nose".
:"D   "Great! I like it!"
B-D   "Serves you right, dummy!!"
%-%)  User has been staring at a green screen for 15 hours straight
:*)   User is drunk
[:    User is a robot
8-)   User is wearing sunglasses
B:-)   Sunglasses on head
::-)  User wears normal glasses
B-)   User wears horn-rimmed glasses
8:-)   User is a little girl
::{    User has a mustache
::{    User wears lipstick
::[    User is a Vampire
:E    Bucktoothed vampire
:F    Bucktoothed vampire with one tooth missing
:7    User just made a wry statement
;(-   User is crying
;:-)   User is so happy, s/he is crying
:---@  User is screaming
:=#   User wears braces
:"    User has a broken nose
:<)   User is from an Ivy League School
;&    User is tongue tied.
+:+:-) User is the Pope or holds some other religious office
::*    User shaved one of his eyebrows off this morning
;:@    Same thing...other side
|I    User is asleep
|:-O   User is yawning/snoring
O-)   Megaton Man On Patrol! (or else, user is a scuba diver)
O :-)  User is an angel (at heart, at least)
-P    Nyahhh!
:S    User just made an incoherent statement
:D    User is laughing (at you!)
:X    User's lips are sealed
:C    User is really bummed
:-    User is skeptical
C=:-)  User is a chef
@=    User is pro-nuclear war
*:<=) User is wearing a Santa Claus Hat
3:o]   Pet smiley
3:o[   Mean Pet smiley
d8=   Your pet beaver is wearing goggles and a hard hat.
E:-)   User is a Ham radio operator
%-%   User is braindead
[::   User is braindead
21010812
111395
(:I  User is an egghead
K:P  User is a little kid with a propeller beenie
@:@-) User is wearing a turban
:-O  No Yelling! (Quiet Lab)
     The invisible smiley
.-)  User only has one eye
.,-) Ditto...but he's winking
X-{  User just died
  \%\%\%\%\%\%\%
C=}) >;{O) Mega-Smileys... A drunk, devilish
     chef with a toupee in an updraft, a
     mustache, and a double chin
  :J- Gleep...a friendly midget smiley who will
     gladly be your friend
  :-) Happy
  :->) hmm, let me think...
  :-D  Laughter
  :[ ] Real Downer
  :-<  what pretences!
  :-{  oh boy, the headmaster!...
  :-O  Yelling
  []  Hugs and
  :*  Kisses
  :-' smiley spitting out its chewing tobacco
  :-'- smiley bland face
  :-'  "  
  :-'$ smiley face with its mouth wired shut
  8-)  smiley swimmer
  :-*  smiley after eating something bitter
  :&  smiley which is tongue-tied
  :-o  smiley orator
  :-[ un-smiley blockhead
  :-]  smiley blockhead
  :-{  smiley variation on a theme
  :}  ditto
  {:-) smiley with his hair parted in the middle
  }:-) above in an updraft
  :\- undecided smiley
  :/- lefty undecided smiley
  :-| "have an ordinary day" smiley
  :-c  bummed out smiley
  0-)  smiley cyclops (scuba diver?)
  :<  midget unsmile
  :>  midget smiley
  :-)  ha ha
  ~ ~:-( net.flame
  /-)  hee hee
  |-D  ho ho
  :-(  boo hoo
  X-{  net.suicide
  :-O  uh oh
  >::I  net.startrek
  :-P  nyah nyah