

First Amendment

LAW LETTER



CONTENTS

Technology Shapes
21st Century
Newsgathering

Cybersquatting or
Cyberspeech?

Private Censorship,
Public Fora and
Chat Rooms

TECHNOLOGY SHAPES 21ST CENTURY NEWSGATHERING: Reflections from the Last Millennium and Its Last Month

BY BRUCE E. H. JOHNSON

Will the Internet change the gathering of news, and how? How will American institutions, including legal rules governing the media, be transformed by an interconnected world? As 1999 has clicked over into 2000, several recent events offer hints of profound change and remarkable continuity, suggesting ways that the 21st century media will be affected by new technologies.

This is not a new process. Technology shapes our lives in strange and unexpected ways, bringing changes that can overwhelm existing civic and political institutions. In past centuries, transforming the forms of communication and news led to the transformation or destruction of competing social systems.

Highlights of the last millennium in the United States—and in particular the last month of 1999—may offer some useful guidance about past technologies, how they changed the newsgathering process and the law, and where new media may be headed.

Printing

Printing and democracy were a combustible mixture. The American Revolution, for example, was the direct product of the invention of printing—ignited when 18th century chat-room participants and letter-writers suddenly decided to share their opinions with the public. The new technology appropriated the old: the letter, the dominant form of communication, was transformed into a newsgathering and opinion-shaping tool.¹

From 1763 to 1775, the number of newspapers in the Colonies doubled. These newspapers were said to be infected by a “nearly epidemic degree of seditious libel” with “press criticism of government policies and politicians” raging “contemptuously and scorchingly.”² When riots broke out in Boston in 1765, the Royal

CONTINUED ON PAGE 2

CYBERSQUATTING OR CYBERSPEECH? First Amendment Issues in the New Anticybersquatting Act

BY MARSHALL J. NELSON

On November 29, 1999, the Anticybersquatting Consumer Protection Act¹ was signed into law, amending Section 43 the federal Trademark Act, 15 U.S.C. § 1125, to create a new cause of action for trademark owners against registration of their trademarks as Internet domain names by others. Almost immediately, the NFL, NBA, NHL, and Major League Baseball announced that they were filing suit against the holders of such domain names as *nfltoday.com*, *rangers1.com*, *goredwings1.net* and *yankees1.com*, warning that “this will be the first of many lawsuits.”

The Anticybersquatting Act has been touted as a powerful new tool against pirates who traffic in domain names built on others’ trademarks, either holding them for extortionate resale, or using them to divert Internet traffic from the legitimate owner. Prior attempts to attack the problem in trademark infringement and dilution suits, although often successful, also ran into conceptual problems under traditional trademark analysis: Was the mere holding of a domain name a “use in commerce”? Did the momentary link to the wrong website rise to the “likelihood of confusion” necessary to prove infringement? Did domain name use of a trademark really dilute the distinctive quality of a “famous mark,” and was the mark really famous? The Act addressed these problems by creating a separate cause of action where the domain name holder simply “has a bad faith intent to profit from [use of another’s] mark.”²

The concept of bad faith was not in the original Anticybersquatting Bill, S. 1255. It, and the list of factors for determining bad faith, were added in part in response to another theme that was emerging from domain name cases in the courts—the fact that use of a trademark in a domain name might have a communicative function and might constitute a form of protected speech. In the words of Senator Hatch, addressing the substitute bill S. 1461: “the bill

CONTINUED ON PAGE 6

Governor, Thomas Bernard, blamed the *Boston Gazette*, and accused the newspaper of “raising that flame in America which has given so much trouble.” Two years later, Lord Grenville tried to persuade Parliament to censure “certain papers, published at Boston,” as “libelous and treasonable,” but was talked out of the effort, because “it was below the dignity of Parliament to pay any regard to angry newspaper writers.”³

By 1774 and 1775, royal authority had collapsed in the Colonies and “new authorities—committees and congresses—began putting together new popular structures of authority from the bottom up.”⁴ Legally speaking, these were informal associations; politically speaking, they were conspiracies, providing (to adopt the Web analogy) links to one another’s viewpoints. These Committees of Correspondence communicated with one another; but they also communicated with members of the public and shaped public opinion. These “correspondents” were not just letter writers; they also helped create news and became, in effect, newspaper correspondents. Some also promoted revolution.

As with today’s Internet, the latest technology made this revolution a worldwide event. For example, in April 1775, the Massachusetts Committee of Safety learned that the British Army General Thomas Gage was preparing an official report on the battles of Lexington and Concord, collected 100 depositions and letters from battle participants, and enlisted the owner and sailing master of a fast American schooner to transmit their evidence to London readers. Speed worked in their favor—as did the British commander’s view that information should be entrusted to “others in proportion to their rank.” Although the American ship had left Boston four days after General Gage’s, its accounts reached the London press two weeks before Gage’s and immediately shaped English public opinion in the Americans’ favor.⁵

Another well-known example was Thomas Paine’s influential *Common Sense*, one of 400 pamphlets produced by American printers in 1776. Paine originally had intended a series of letters but instead decided to write an anonymous pamphlet ridiculing monarchy and advocating American independence. It was published in Philadelphia in January 1776. Several printers immediately battled for the copyright, and unauthorized editions began pouring from colonial printing presses. One month later, a German translation appeared in Pennsylvania and *Common Sense* was published

in New York. By April, a Boston edition appeared and Paine estimated that 120,000 copies had been published. Editions soon appeared in Salem, Newport, Hartford, Lancaster, Newburyport, Norwich, Albany, and Providence. By May, *Common Sense* was circulating in Quebec and Warsaw’s *Gazeta Warszawska* was publishing excerpts. Later that year, editions appeared in London, Edinburgh, and Newcastle; a French translation was published in Rotterdam.⁶

Telegraphs, railroads, and telephones

Two 19th century innovations, the railroad and the telegraph, led to such varied results as the demise of the British aristocracy, the rise of Impressionism, the settlement of the American West, the creation of a global stock market, the abolition of slavery, and the replacement of local time by an international girdle of time zones.⁷ In the United States, the private press expanded its powers as it exploited new technologies. Through these technological shifts, newsgathering moved from individual to association and to corporate consolidation, which empowered an extensive system of private media that challenged serious governmental controls.

The invention of the telegraph coincided with an era of American law that reflected the “release” of private entrepreneurial “energy.”⁸ New technology immediately broke down barriers of time and distance, states simplified their incorporation procedures to allow more businesses to take new risks without undue liability burdens, and, as the “penny press” expanded the reading public, these technological and legal changes drove a new profit motive: “Increasingly, news was worth money.”⁹ Financier James Rothschild—whose family fortune was based on exclusive control of access to financial information—complained that, with the telegraph, “anyone can get the news.”¹⁰

The telegraph was efficient for delivering news to newspaper offices, but it was not suitable for distributing news directly to readers. Thus, newspapers immediately utilized the new modes of communication by associating with other newspapers across the United States. Because speed was important, the press no longer relied on the efforts of individual correspondents writing sporadic letters from distant cities. The Associated Press, one of these “news agencies,” established “cozy relationships with the telegraph companies and was soon able to dominate the business of selling news to newspapers.”¹¹ Among AP members, news stories were shared—much like current Web links.

The DWT Communications, Media and Information Technologies Department is experienced in the full range of legal issues facing the media, telecommunications, technology and related industries. Our attorneys assist broadcasters, publishers and journalists in all aspects of media law, including pre-publication review, access to courtrooms and public records, newsroom subpoenas and defamation, and invasion of privacy defense. We provide counseling, regulatory, business and litigation services for national and regional clients in the telecom, entertainment and computer industries and our First Amendment and intellectual property lawyers represent advertisers nationwide.

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The French observer Alexis de Tocqueville, when he visited America in 1831, remarked on the “spirit of association” and how “that freedom of association favors the welfare and even the tranquillity of the citizens.”^{1,2} De Tocqueville also saw a powerful press, capable of resisting governmental power. The “hallmark of the American journalist,” he noted, “is a direct and coarse attack, without any subtleties, on the passions of his readers; he disregards principles to seize on people, following them into their private lives and laying bare their weaknesses and their vices.” Yet, nothing was “rarer than to see judicial proceedings taken against” the media, because Americans believed the people, not the government, were sovereign and that courts were “powerless” against the press.¹³

After the Civil War, the explosion of investment in railroads (financed, ironically, by government grants) led to the Gilded Age and to the consolidation of vast corporate structures, as private capital became newly energized and powerful, dwarfing existing governmental institutions.¹⁴ Such consolidation was typical, as well, within the telegraph industry; by 1880, one company (Western Union) handled 80 percent of America’s message traffic.¹⁵

Meanwhile, courts creatively applied and adapted the Constitution and the common law to encourage use of the new technologies, allowing the spread of wires without unnecessary legal risks. Because railroads and telegraphs operated in interstate commerce, the United States Supreme Court prevented states from regulating them.¹⁶ Recognizing that immunity to transmit libelous messages “must be broad enough” to enable the telegraph company to render its public service efficiently and with dispatch, and “that speed is the essence of the service,”¹⁷ federal and state courts also devised new common law privileges to avoid hamstringing the new technologies with libel judgments. The courts even extended this conduit immunity to the newspapers’ news associations—developing the so-called “wire service” defense,¹⁸ which created the doctrinal base for the *New York Times v. Sullivan* “actual malice” rule.

Adapting to these new technologies, the American media also consolidated, with Hearst, Pulitzer, and other chains dominating national discourse and retaining reporters as corporate employees (a relationship typified by Hearst’s classic telegram to artist Frederic Remington—“You furnish the pictures and I’ll furnish the war.”)¹⁹ Yellow journalism was powerful enough to press the buttons of government; when America jumped into war with Spain in 1898, it

was “the *Journal’s* war.”²⁰ Meanwhile, *laissez faire* government became somewhat irrelevant to the new media empires, requiring few court decisions on press rights and producing the so-called “forgotten years” for freedoms of speech and press.²¹ Indeed, the 19th century “produced some important issues for individual civil liberties, but showed no impressive record of grappling with them.”²²

Radio, television, and cable

Government firmly took control of two 20th century news technologies, radio and television. Interestingly, the broadcast regulatory system, a product of the Progressive Era, was in fact an accident—the consequence of a stray iceberg in North Atlantic shipping lanes.

Between 1906 and 1912, America experienced its first radio boom. As with today’s Internet, the broadcast spectrum was largely unregulated and controlled by amateurs. Hundreds of “schoolboys” across the United States built radio sets and sent messages to one another. These amateurs behaved like “kids”—indeed, some amateurs “deliberately sent false or obscene messages, especially to the navy,” which began mounting a campaign (largely unsuccessful, at first) to curb their activities.²³

In April 1912, the *Titanic* sank, accompanied by “ceaseless interference, cruel rumors, and misleading messages that filled the air from unknown sources during the disaster.”²⁴ The press unanimously denounced radio amateurs after the *Titanic* disaster “for interfering with ‘legitimate’ message handling. What caused the amateurs to lose their freedom to roam the ether at will was not so much that the government would no longer tolerate that freedom, but that a very influential business, the press, found their activities a disruptive encroachment on its turf.”²⁵ The disaster led to a public demand for increased government regulation of the wireless spectrum. As a result of the *Titanic*, “the United States government seized control of the airwaves.”²⁶

The Radio Act of 1912 began federal control of the American radio spectrum. Later, prodded by Secretary of Commerce Herbert Hoover, Congress enacted the Radio Act of 1927 which expressly rejected any private ownership of the airwaves, developed an emphasis on the “broadcast” rather than point-to-point format, and adopted a public utility model for license allocation and distribution.

This licensing model meant the removal of minority viewpoints from broadcasting in favor of the “general public...interest.” Thus, the Federal Radio Commission, created by the 1927

law, immediately attacked “propaganda stations,” warned a New York Socialist station that it must “operate with due regard for the opinions of others,” announced that there was no “room in the broadcast band for every school of thought... each to have its separate broadcasting stations, its mouth-piece in the ether,” and removed the licenses of KGEF in Los Angeles because of the “sensational” attacks on public officials and corruption by “Fighting Bob” Shuler, and of KFKB in Kansas City because of the efforts by the “goat-gland doctor,” John R. Brinkley, to promote his peculiar theories of rejuvenating middle-aged male sexuality.²⁷

The Communications Act of 1934, with its emphasis on administrative expertise, continued this trend. By that time, the dominant European-based political ideologies—including Fascism, Socialism, and Communism, together with the American New Deal—were premised on theories of major government control over the private market. Moreover, in contrast to the legal system that had shaped the news media’s use of 19th century technologies and encouraged association and consolidation, broadcast licensees’ efforts to associate and combine were subject to strict government controls. While none of the federal regulatory statutes had expressly dealt with broadcast networks, the Federal Communications Commission extended its controls over networks with its “chain broadcasting rules,” and was upheld by the Supreme Court in 1943.²⁸

These regulations, which imposed major barriers to entry, nurtured large media broadcast entities that were subject to significant federal controls and protections. By the 1960s, an American industrial structure built on large companies such as the Big Three automakers was mirrored by a media system comprised of three large television networks. These national broadcast networks were devoted to a large public, providing undifferentiated national news to everyone.

In 1964, in a case involving a major national newspaper, the United States Supreme Court granted the news media major First Amendment protection against local governmental authorities that had sought to use state libel laws to stop coverage of civil rights protests that undermined Southern élites.²⁹ But, for broadcasters, the federal licensing system devised in the *Titanic’s* wake brought a noteworthy erosion of First Amendment rights. Based on the rationale that the broadcast spectrum was a uniquely scarce public resource (a theory that has been severely criticized),³⁰ government regulations, such as right-of-reply requirements³¹ and content controls³² were routinely upheld by the

federal courts. Frequently, the major networks found themselves battling directly with United States senators or the Executive Branch—for example, Edward R. Murrow and Senator McCarthy—to defend First Amendment values. By the 1970’s, the government’s control of this licensing structure was the springboard for the Nixon Administration’s “assault on the networks,”³³ a campaign that was finally aborted by Watergate.

In recent years, telecasting has moved beyond broadcast technology. With the development of cable news systems—neither dependent on broadcast licenses nor entangled with a “scarcity” theory mandating government involvement—the courts have allowed more First Amendment protections for television. For example, they developed a doctrine called “intermediate scrutiny” that permits cable news companies to escape some (but not all) of the limitations of the federal television licensing system and allows fewer content controls than regular broadcasting.³⁴ For the electronic media, however, use of new technology has been accompanied by new liabilities, as some courts have begun expanding privacy definitions and penalizing routine electronic news-gathering techniques.³⁵

Internet trends

By the beginning of 2000, with America Online poised to purchase Time Warner, the Internet has now become a major player among national and international news media. But, at least in the United States, its technology and politics are very different from print, broadcast, or cable. Several events from the last month of 1999 show, moreover, that the Web is already blazing a new trail in newsgathering, which recalls the informal but revolutionary links between 18th century printers and correspondents, the entrepreneurial strengths of the 19th century, and the government battles faced by 20th century media.

Web news certainly has broken with the broadcast news model launched at the beginning of the 20th century with the sinking of the *Titanic*. This is because, despite Vice-President Gore’s recent claims of paternity,³⁶ the Internet is really the libertarian child of Reaganism and Thatcherism. Proponents of greater government involvement and control over the Web, such as Harvard’s Lawrence Lessig,³⁷ are thus the exception rather than the rule. In *Reno v. ACLU*,³⁸ the Supreme Court decisively rejected a broadcasting analogy and endorsed the conclusion that the Internet, as “the most participatory form of mass speech ever developed,” is entitled to “the highest protection from government intrusion.”

With its libertarian impetus intact after *Reno v. ACLU*, Net newsgathering has returned American media to its Revolutionary roots, with everyone in the world a potential correspondent. One of the most stunning demonstrations of this new medium occurred from November 30 to December 3, 1999, when the World Trade Organization's ministerial conference met in Seattle. The WTO meeting was overshadowed by (in the words of local news anchor Jean Enersen) "the first post-modern riot, the first riot to be organized on the Internet," with thousands of anti-trade protesters demonstrating against the WTO, blocking and attacking WTO delegates, and vandalizing downtown Seattle. In the following days, joined by the National Guard, the Seattle police switched tactics, took control of a major section of the city center, and began arresting and battling demonstrators and local civilians.

Anti-WTO activists dissatisfied with coverage of trade issues by "the mainstream press" organized the Seattle Independent Media Center, rented a storefront location near the epicenter of the riots and protests, persuaded local technology firms to donate equipment and services, and created a news website (www.indymedia.org) devoted exclusively to anti-WTO information and activities.

During the WTO meeting and the accompanying protests and riots, the Independent Media Center encouraged members of the public opposed to free trade policies (even the Buchanan for President campaign) to post their own information and commentary on their website without prior editorial intervention or scrutiny. During the disturbances, protesters brought film to the Center for immediate processing and posting on the Web. The Indymedia website also invited contributors to "[p]ublish your text article, audio segment, video footage, or picture" by clicking and transmitting this information for immediate uploading to the Web. Thus, viewers across the world could click on the page and see current photographs of altercations between Seattle police and protesters and receive live streaming video and audio.

Facilitating this democratic viewpoint of Web journalism is a growing body of case law that firmly rejects defamation and privacy liability by third parties such as websites and Internet service providers. Courts have recognized that, to facilitate freedom of speech, the Internet must be shielded from major liabilities. Thus, like their 19th century predecessors who nursed the growth of telegraphy, some courts have protected the Internet as an organ of

interstate and international commerce and have refused state regulatory schemes.³⁹ Also, beginning with *Zeran v. AOL*⁴⁰ in 1997, courts have consistently applied Section 230 of the Communications Decency Act⁴¹ in dismissing defamation and similar state law claims against ISP's and others.

On December 2, 1999, while police and anti-trade demonstrators were fighting in Seattle, the New York Court of Appeals extended the *Zeran* principle when it refused to hold Prodigy Services Company liable for negligence or defamation resulting from some vulgar email messages and bulletin board postings by an unknown imposter using the plaintiff's name.⁴² Citing telegraph and telephone legal cases, the court rejected such liability as a matter of common law doctrine and extended to this Internet "conduit" the same "common-law qualified privilege accorded to telephone and telegraph companies." Like its predecessors grappling with the "wire service" defense, the New York court freely admitted that its choice was motivated by public policy—its view that the "public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation."

But the legal battles between government and the media, which typified much of 20th century press law, are not over. With the rise of the Internet, it appears that "privacy" is the newest argument against press freedom. On December 14, 1999, the Committee on Financial Disclosure of the Judicial Conference of the United States refused the request of an internet news service, APBNews.com,⁴³ for a copy of certain public records that listed the 1998 financial disclosures by members of the federal judiciary. The Committee was opposed to APBNews.com's request because it intended to post the financial data on its website so that individual readers could make use of the information. These same documents had been routinely released to reporters in the past, resulting in major news articles about the judges' conflicts of interest that were published in the *Kansas City Star* and the *Washington Post*.

Aided by a temporary restraining order that was quickly issued by a Florida federal judge a few days earlier, the Committee ruled that these public records were not public records as far as the Internet is concerned and decided to change the rules because they feared real publicity—*i.e.*, ready accessibility online. To justify its decision, the Committee adopted what a *Washington Post* editorial characterized as a "laughable" interpretation of the Ethics in

Government Act and ruled that they must be kept from Internet users. Simultaneously, the Committee permitted other media to obtain the same financial records.

The Committee's decision to brand the Web taboo, of course, illegally discriminates against one form of journalism in favor of others. More tellingly, it also illustrates a familiar attitude that has surfaced repeatedly during the last millennium of American history—the distrust of democracy—and recalls British General Gage's policy to share useful information with "others in proportion to their rank."

On December 22, 1999, as the 1900's drew to a close, APBNews.com filed suit in federal court in New York City. "This is a fight to gain access to public records for all Internet users," said Mark Sauter, chief operating officer of APB Online Inc., the parent company of APBnews.com. "The Internet is not just a legitimate but a superior means to disseminate these documents to the public."

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CYBERSQUATTING OR CYBERSPEECH

CONTINUED FROM PAGE 1

balances the property interests of trademark owners with the interests of Internet users who would make fair use of others' marks or otherwise engage in protected speech online."³

The concept of a domain name, a mere Internet address, as protected speech seems counterintuitive at first. Indeed, the court in *Planned Parenthood Federation of America Inc. v. Bucci*, No. 97 Civ. 0629, 42 U.S.P.Q.2d 1430, 1997 WL 133313 (S.D.N.Y. Mar. 19, 1997) rejected such an argument by the defendant seeking to justify his use of *plannedparenthood.com* to identify his anti-abortion website. The court held that because "defendant's use of the trademarked term 'planned parenthood' is not part of a communicative message, but rather, serves to identify a product or item," his infringement on the plaintiff's mark was not protected by the First Amendment. 42 U.S.P.Q.2d at 1440-41.

But other courts recognized that a domain name might carry a communicative message. In *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 964 n.9 (C.D. Cal. 1997) (citing *American Civil Liberties Union of Georgia v. Miller*, 977 F.Supp. 1228, 1233-34 (N.D.Ga.1997)), the court noted that "Internet users may also have a free speech interest in non-infringing uses of domain names that are similar or identical to trademarks." In *Bally Total Fitness Holding Corp. v. Faber*, 29 F.Supp.2d 1161, 1165 (C.D. Cal.1998), which involved the defendant's use of "Bally sucks" as the title of his web page, the court noted that Faber was *not* using the Bally name in his domain name, but stated, "even if Faber did use the mark as part of a larger domain name, such as 'ballysucks.com,' this would not necessarily be a violation as a matter of law." The court went on to note that "[a]n individual who wishes to engage in consumer commentary must have the full range of marks that the trademark owner has to identify the trademark owner as the object of the criticism," and "[a]pplying Bally's argument would extend trademark protection to eclipse First Amendment rights." *Id.* at 1165 n.4, 1166.

Most recently, in *Name.Space, Inc. v. Network Solutions, Inc.*, No. 99-6080, 2000 WL 48668, at *10 (2d Cir., Jan. 21, 2000), the Second Circuit addressed the issue head-on. Although it affirmed the district court's finding that three letter top level domains (.com, .net, .org) were *not* expressive speech, the court went on to address at length the circumstances under which domain names might well be entitled to First Amendment protection, and concluded, among other things:

[T]he functionality of domain names does not automatically place them beyond the reach of the First Amendment. Although domain names do have a functional purpose, whether the mix of functionality and expression is "sufficiently imbued with the elements of communication" depends on the domain name in question, the intentions of the registrant, the contents of the website, and the technical protocols that govern the DNS. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." (citation omitted)).

The court also noted in passing that the district court in *Planned Parenthood* had applied exactly this kind of analysis in concluding properly that the defendant's appropriation of *plannedparenthood.com* was not protected.

These factors are carried forward in the Anti-cybersquatting Act. In determining whether

adoption of a domain name incorporating another's trademark bears the requisite bad faith intent, the Act lists among the nine factors to be considered, "the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name," and concludes that bad faith shall not be found "in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful."⁴

Lest there be any confusion as to the intent of these sections, the legislative history includes the following explanation:

[U]nder paragraph (1)(B)(iv), a court may consider the person's legitimate non-commercial or fair use of the mark in a web site that is accessible under the domain name at issue. This factor is intended to balance the interests of trademark owners with the interests of those who would make lawful noncommercial or fair uses of others' marks online, such as in comparative advertising, comment, criticism, parody, news reporting, etc. The fact that a person may use a mark in a site in such a lawful manner may be an indication that the person's registration or use of the domain name lacked the required element of bad-faith.⁵

The Act also closes with a savings clause, Section 3008, which states expressly, "Nothing in this title shall affect... a person's right of free speech or expression under the first amendment of the United States Constitution."

An obvious purpose of these provisions is to protect dissent and protest websites that need to identify their subject matter online. Senator Leahy noted in his criticism of the original S. 1255, "While the speech contained on those [protest] sites is clearly constitutionally protected, S. 1255 would criminalize[] the use of the trademarked name to reach the site and make them difficult to search for and find online."⁶ The new Section 1125(d)(1)(B)(iv) addresses this problem. But what about the opposite kind of site—the "fan site" that, far from protesting, proclaims the domain name owner's enthusiasm for or allegiance to an entertainer or sports team?

According to press announcements, the domain names on professional sports' hit list include those that incorporate team names: *rangers1.com*, *goredwings1.net* and *yankees1.com*, for example. If it turns out that these are simply being warehoused for resale to the proper trademark owners, the remedies of the Act should

probably apply. On the other hand, prior to passage of the Act a number of collegiate sports fan sites—clearly devoted to news, information and commentary about sports teams—received traditional cease-and-desist letters from colleges objecting to use of team names and nicknames, even names of the institutions, in their domain names.⁷ Properly applied, both the Act and traditional trademark law should provide protection for these communicative uses as well.

The right to make nominative or communicative use of trademarks is well established outside the Internet context. In *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992) the court noted that trademark protection "does not extend to rendering newspaper articles, conversations, polls and comparative advertising impossible... [T]he trademark laws do not give the New Kids the right to channel their fans' enthusiasm (and dollars) only into items licensed or authorized by them." *Id.* at 308-09; see also *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) ("[O]ne can capitalize on a market or fad created by another provided that it is not accomplished by confusing the public into mistakenly purchasing the product in the belief that the product is the product of the competitor.") (quoting *American Footwear Corp. v. General Footwear Co.*, 609 F.2d 655, 662 (2d Cir. 1979)).

In *New Kids*, Judge Kozinski specifically described the use of a sports team's trademarked name as a protected use:

For example, one might refer to "the two-time world champions" or "the professional basketball team from Chicago," but it's far simpler (and more likely to be understood) to refer to the Chicago Bulls. In such cases, use of the trademark does not imply sponsorship or endorsement of the product because the mark is used only to describe the thing, rather than to identify its source.

971 F.2d at 306. Where the trademark is used to identify the subject matter of news and commentary on a website, the communicative function should be even clearer.

The Anticybersquatting Act recognizes this principle, expressly in its legislative history noted above ("a court may consider the person's legitimate non-commercial or fair use of the mark in a web site that is accessible under the domain name at issue" in determining good or bad faith) and implicitly in its recognition of the communicative function of domain names. Without such protection, as one witness noted, the Act would "make every fan a criminal."⁹

The Anticybersquatting Act is only a few months old, and the full extent of its application remains to be seen.¹⁰ However, with such clear legislative history and the concurrent benefit of Judge Katzmann's thoughtful analysis in *Name.Space, Inc. v. NSI*, supra, there is hope that the Act will, as predicted by Congress, strike the proper balance between the rights of trademark owners and those who would use those trademarks to identify online "comment, criticism, parody, news reporting, etc." and will in fact "not affect traditional trademark defenses, such as fair use, or a person's first amendment rights."¹¹

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Private Censorship, Public Fora and Chat Rooms

BY KRAIG L. M. BAKER AND THOMAS R. BURKE

The Internet has provided opportunities unlike any other for geographically diverse people to come together and have open and honest discussions about matters of public interest. In fact, the notion that the Internet is widely participatory, facilitates communications from under-represented groups and creates relative parity among its users was a crucial basis for the Supreme Court's invalidation of the Communications Decency Act.¹ Most of the fora where people come together to discuss issues on the Internet—chat rooms, bulletin boards, etc. (collectively "chat rooms"), are, however, like shopping malls, newspapers, and cable systems—privately owned. This conjunction of privately owned fora with the Internet's tradition of unfettered free speech has created tensions between users and operators of the chat rooms. On the one hand, users argue that they should have the same free speech rights on the information superhighway that they have on the streets and sidewalks of their hometown. On the other, the operators of these chat rooms feel they should have the same rights as a private

property or media owner to exclude speech with which they disagree.

Traditionally, most operators of chat rooms censored chat room speech only where they received complaints that certain speech was potentially defamatory or obscene. However, on October 15, 1999, Yahoo!, the most popular website on the Internet, announced that it would begin censoring controversial material from its chat rooms and bulletin boards. Yahoo! plans to censor these messages even though the truthfulness of the messages was not in dispute and despite the fact that there were no complaints from third parties. A Yahoo! spokesman justified the decision by stating that "Yahoo! has to be careful because what we publish can influence a lot of people's lives."² Yahoo! is not alone in restricting third party material in its chat rooms. There is tremendous public and political pressure on operators of chat rooms to shield children from controversial material and to prevent the disclosure of confidential financial information or fraudulent statements that could affect a company's stock price. These pressures have forced operators of chat rooms independently to monitor and censor content.

Despite the fact that traditional First Amendment jurisprudence provides almost blanket protection for private parties to control speech on their private property and despite Section 230 of the 1996 Telecommunications Act's³ shield of operators of chat rooms and websites from liability for the acts and statements of third parties, until the Supreme Court or a significant number of lower courts makes a definitive statement on this issue, it may be inevitable that operators of chat rooms will be subjected to creative lawsuits alleging that the operator's exclusion of certain speech violates the user's First Amendment rights.⁴ The questions raised in any such lawsuit would be (1) whether this private control and exclusion of third party speech in chat rooms implicates the First Amendment; and (2) how will creative plaintiffs use the First Amendment to attempt to subject an operator of chat rooms to limitations on the type of speech it can exclude and how it may be excluded.

Private Censorship

It is well established that there are very few situations in which private conduct can be attributed to the state and scrutinized under the First Amendment.⁵ A private actor may be subject to First Amendment scrutiny only where a private forum provides a "public function" undeniably governmental in nature (e.g., a company town) or where the speech takes place in a medium not open to all (e.g., cable television). As a result, an operator of a website or chat room likely only

could be subject to First Amendment limitations where it is providing a “public function” or where the Internet can be demonstrated to be a medium that is not open to all.

The “Public Function” Doctrine: The Shopping Center Analogy

The Supreme Court has sharply limited the scope and application of the “public function” doctrine. The Court has held that private individuals or groups are subject to constitutional limitations and become agencies or instrumentalities of the State only where they “are endowed by the State with powers or functions governmental in nature.”⁶ These “powers or functions,” however, must be in areas that are undeniably governmental in nature—such as supervising voting or enforcing the law—not in areas where the entity is merely providing a function that competes with a traditional governmental area. The classic example of a private entity that has many public attributes, but is not an agency or instrumentality of the state, is the shopping mall.

The Internet is more analogous to a shopping mall than to the “company town” that does fall within the “public function” doctrine. Like most chat rooms and websites on the Internet, the shopping mall has many public attributes, but is privately owned. Moreover, both are open to the public, both provide common areas for people to interact, and both provide opportunities for effective public demonstrations or airing of political views. However, unlike a company town, neither shopping malls nor the Internet have all of the characteristics of any other American town.⁷ Courts have generally held that shopping malls do not have powers or functions that are governmental in nature merely by virtue of being large or clustered and, therefore, mall operations are not subject to constitutional restrictions.⁸ Considering the similarities of a Yahoo! chat room to the common area of a shopping center and the fact that courts have been particularly sensitive to expanding the “public function” doctrine, it is unlikely that a court will expand the “public function” doctrine to chat rooms on the Internet. Therefore, any argument that the operator of a chat room should be treated as a state actor and subject to First Amendment limitations based on an analogy to a shopping mall probably will fail.

Nevertheless, providing avenues for public discourse is an important governmental role. Unlike shopping malls, one of the Internet’s core functions is to provide a forum for people to debate issues of public concern. Further, the Internet provides a unique forum to connect geographically diverse people and, therefore, offers a more compelling argument for access than the mere

shopping mall and, as such, treads on more constitutionally complex terrain. As a result, courts may consider an alternative framework to analyze private restraints on chat room speech. One possibility is the cable system analogy.

Limited Access to the Medium: The Cable System Analogy

Courts also have placed limits on the rights of private owners to exclude or censor third party speech on cable systems or other areas where access to the medium is limited. The Supreme Court has held that “there is no sanctuary for the First Amendment for unlimited private censorship in a medium not open to all.”⁹ The key question then becomes whether the Internet is a medium “open to all” or is limited and, therefore, subject to the same First Amendment scrutiny faced by broadcasters.

The leading case on subjecting private fora to First Amendment scrutiny is *Denver Area Educational Telecommunications Consortium, Inc. v. FCC (“Denver Area”).*¹⁰ In this case, the Supreme Court upheld a law that permits cable system operators to prohibit “patently offensive” programming transmitted over “leased channels.”¹¹ The plurality opinion specifically rejected the position that it “must ignore the expressive interests...altogether” of the private forum providers.¹² As such, the expressive interest of Yahoo! or the equivalent likely cannot be dismissed when determining whether a chat room should be subject to public forum doctrines. *Denver Area* would seem to permit Yahoo! or any other operator of a chatroom or website to control or exclude the opinions of third parties.

Denver Area, however, also recognized that the speech rights of a forum owner are not the exclusive consideration, particularly where the forum owners have not historically exercised editorial control over the content.¹³ In essence, the Court held that if an entity or industry has not traditionally controlled the content of a forum—for example, the content of leased channels on a cable system—the selective or sudden exercise of such editorial control receives less constitutional protection than if the entity or industry had been exercising its editorial control all along. This holding suggests that to the extent that chat rooms have been left unsupervised for free and open debate, a court may give the free speech rights of the website operator less weight than in the context of a website in which content historically was monitored or controlled.

In *Denver Area*, the Court also defined what constituted a public forum more flexibly than it traditionally had. Specifically, the Court held that

the "public nature" of a cable channel was an important factor for determining a government's interest and whether the Cable Act passed the strict scrutiny test.¹⁴ Specifically, the Court held that "access channels, even if analogous to ordinary public fora from the standpoint of the programmer, must also be considered from the standpoint of the viewer. An access channel is not a forum confined to a discrete public space."¹⁵ The Internet possesses a similar "public nature" as a cable channel and likely will be subject to similar public forum analysis.

Ultimately, though, evaluating whether a right of public access and free speech for a forum user is consistent with the First Amendment rights of the forum owner will be inextricably fact-bound. The Supreme Court has long addressed cases it recognized as implicating free speech rights in purely private disputes, where the government's only role was to play referee. How the Court perceives the free speech rights of the forum owner and forum user varies with the medium of communication. For example, a right of access to the private media was upheld in the broadcast context¹⁶ and rejected in the newspaper context.¹⁷ Most recently, the Court rejected a special interest group's claim of access to a privately organized parade.¹⁸ Each of these cases involved private parties who asserted speech rights at the expense of other private parties, not the government. It is unclear where a court will draw the line with respect to fora on the Internet.

Users of chat rooms and websites will likely be entitled to some First Amendment protection from the acts of the forum owners if they can prove that the Internet is "not open to all." This determination will undoubtedly be fact driven and the outcome is unclear. On the one hand, speech on the Internet is more open to public participation than speech in other media, especially the broadcast channels in Denver Area. Moreover, it is much easier to own and operate a website than it is to own and operate a broadcast channel or cable system.

Nevertheless, the increasing domination of commercial providers continues to bring the Internet closer to the limited access models of traditional media. Furthermore, plaintiffs may argue that the costs and technological sophistication associated with creating, operating and maintaining a website are still so significant that they serve as a significant obstacle to exercising one's right to free speech. It is entirely possible that a court may view keeping chat rooms and other public fora on the Internet free from private censorship as necessary to permit speakers of limited means or technological sophistication to exercise their free speech rights.

Conclusion

It is unclear how courts will proceed to determine an individual's access and free speech rights in a privately owned and operated chat room. In the short term, there are few risks to website operators for monitoring and excluding third party content from their chat rooms and websites. It seems most likely that a court would view the Internet as a medium open to all and analyze a plaintiff's claims using the shopping mall analogy, and, as a result, provide blanket protection for the actions of the web site owner. In the long term, however, the commercial consolidation of various Internet fora, the continued expansion of the Internet's role in society, and the potential exhaustion of certain Internet resources (for example, the supply of IP addresses for new websites), may make the Internet a limited resource and subject owners and operators of websites and chat rooms to a hybrid status similar to that currently experienced by cable system operators.

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Technology and Newsgathering Footnotes

- ¹The modern art of letter writing originated in the 11th century as a branch of rhetoric; its practitioners sought to carve out an official intermediary role between subjects and institutions in the hope "that a class of verbal ministers might be created between society's estates." Alain Boureau, *The Letter-Writing Norm, a Mediaeval Invention*, in CORRESPONDENCE: MODELS OF LETTER-WRITING FROM THE MIDDLE AGES TO THE NINETEENTH CENTURY 24-58 (Roger Chartier, et al., eds. 1997).
- ²Leonard Levy, EMERGENCE OF A FREE PRESS x (1985).
- ³See Theodore Draper, A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION (1996).
- ⁴Gordon S. Wood, THE RADICALISM OF THE AMERICAN REVOLUTION 213 (1992).
- ⁵See David Hackett Fischer, PAUL REVERE'S RIDE 273-76 (1994).
- ⁶John Keane, TOM PAINE: A POLITICAL LIFE 109-10 (1995).
- ⁷See Michael Freeman, RAILWAYS AND THE VICTORIAN IMAGINATION (1999).
- ⁸See James Willard Hurst, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-32 (1956).
- ⁹Tom Standage, THE VICTORIAN INTERNET 148 (1998).
- ¹⁰Niall Ferguson, THE HOUSE OF ROTHSCHILD: THE WORLD'S BANKER, 1849-1999 65 (1999).
- ¹¹Standage, *supra*, at 150.
- ¹²Alexis de Tocqueville, DEMOCRACY IN AMERICA 494, 495 (G. Lawrence trans. 1966).
- ¹³*Id.* at 168-69.
- ¹⁴See David Haward Bain, EMPIRE EXPRESS (1999).
- ¹⁵Standage, *supra*, at 171.
- ¹⁶See *California v. Pacific Railroad Cos.*, 127 U.S. 39 (1887); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1877).
- ¹⁷*O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940); *Von Meysenburg v. Western Union Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944).
- ¹⁸See 1 Robert D. Sack, SACK ON DEFAMATION § 5.5.2 (3d. ed. 1999); *Layne v. Tribune Co.*, 146 So. 234, 238 (Fla. 1933).
- ¹⁹See Joyce Milton, THE YELLOW KIDS: FOREIGN CORRESPONDENTS IN THE HEYDAY OF YELLOW JOURNALISM xii (1989).
- ²⁰Ben Procter, WILLIAM RANDOLPH HEARST, THE EARLY YEARS, 1863-1910 115-34 (1998).
- ²¹See David M. Rabban, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).
- ²²Hurst, *supra*, at 31.
- ²³Susan J. Douglas, INVENTING AMERICAN BROADCASTING: 1899-1922 208 (1987).
- ²⁴*Id.* at 228.
- ²⁵*Id.* at 238.
- ²⁶Thomas G. Krattenmaker & Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING 5 (1994).
- ²⁷*Id.* at 23-28.
- ²⁸*NBC v. United States*, 319 U.S. 190 (1943).
- ²⁹*New York Times v. Sullivan*, 376 U.S. 254 (1964).
- ³⁰See, e.g., Krattenmaker & Powe, *supra*, at 206 (noting that the "chaos" that allegedly justified federal regulation stemmed from the decision of the drafters of the Radio Act and Communications Act to avoid "creating a conventional private property rights mechanism for the ether").
- ³¹*Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).
- ³²*Pacifica Foundation v. FCC*, 438 U.S. 726 (1978).
- ³³See Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 121-61 (1987).
- ³⁴See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).
- ³⁵For example, interviewing the subject of a news story is what reporters ordinarily do and asking questions is a "routine" reporting technique protected by the First Amendment. See *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509 (1986). If the reporter is a member of the electronic media and uses a microphone and tape recorder rather than a pencil to record the interview, however, he or she now risks invasion of privacy liability to the interviewee merely because, as some courts have suggested, "a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication's contents." *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 1999 U.S. App. LEXIS 33928 (9th Cir. 1999) (quoting *Sanders v. ABC*, 20 Cal. 4th 907, 915 (1999)); *contra Deteresa v. ABC, Inc.*, 121 F.3d 460 (9th Cir. 1997)).
- ³⁶The claims are not entirely unjustified. The ARPANet, which later became the Internet, was originally developed by the federal government and nurtured while Gore was in the United States Senate.
- ³⁷See Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE (1999).
- ³⁸521 U.S. 844 (1997).
- ³⁹See, e.g., *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Some courts have attempted to impose more local government controls

- over the Internet. See, e.g., *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999).
- ⁴⁰958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998).
- ⁴¹47 U.S.C. § 230.
- ⁴²*Lunney v. Prodigy Services Co.*, 1999 WL 1082126 (N.Y. 1999).
- ⁴³Members of the New York office of Davis Wright Tremaine LLP represented APBNews.com in connection with this dispute.

Cybersquatting or Cyberspeech Footnotes

- ¹Pub. L. 106-113, §§ 3001-10, 113 Stat. 1501 (1999).
- ²§ 3002 (codified at 15 U.S.C. § 1125(d)(1)(A)).
- ³145 CONG. REC. S9744-01 at 41 (1999).
- ⁴§ 3002(a) (codified at 15 U.S.C. § 1125(d)(1)(B)(i)).
- ⁵145 CONG. REC. S9744-01 at 57 (1999).
- ⁶*Id.* at 72.
- ⁷One such letter, objecting to *putigers.com*, began, "The names 'Princeton' and 'Princeton University' are registered trademarks of Princeton University. Also, 'PU' refers to Princeton University. Princeton's name must be licensed in order to be used in any way... You are required immediately to cease and desist this unlicensed usage of Princeton University's names."
- ⁸145 CONG. REC. S9744-01 at 57 (1999).
- ⁹*Id.* at 72.
- ¹⁰The first federal appellate court to consider the Act found that the domain name registrant did act with the requisite "bad faith." See *Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, Nos. 98-7452(L), 98-7538 (XAP), 2000 WL 124389, at *7-8 (2d Cir. Feb. 2, 2000).
- ¹¹*Id.* at 43 55.

Private Censorship Footnotes

- ¹*ACLU v. Reno*, 117 S.Ct. 2329 (1997).
- ²Ross Kerber, "Yahoo Censoring Chat Boards Even When Postings' Subjects Haven't Complained," *Boston Globe*, November 3, 1999.
- ³47 U.S.C. § 230, see also *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).
- ⁴Such lawsuits are not without precedent in other media. For example, in the 1970s a number of plaintiffs claimed that the unique role of the news media prohibited newspapers from refusing to run advertisements. See e.g., *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971). It wasn't until the U.S. Supreme Court definitively held in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) that there was no right of response that these lawsuits dried up. For an example of plaintiff creativity in the new media context, consider the class action lawsuit filed on February 9, 2000 in a Texas state court against Yahoo! and broadcast.com alleging that the companies' use of "cookies," or little text files written into a computer's hard drive to identify a computer user, violates Texas' anti-stalking law. Susan Borreson, "Do You Yahoo?," *Texas Lawyer*, February 14, 2000, published on-line at www.lawnewsnetwork.com/stories/A15989-2000Feb11.html.
- ⁵See, e.g., *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978) ("most rights secured by the Constitution are protected only against infringement by governments").
- ⁶*Evans v. Newton*, 382 U.S. 296, 299 (1966).
- ⁷See *Marsh v. State of Alabama*, 326 U.S. 501 (1946).
- ⁸See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) ("The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center."). This article does not consider cases holding states may provide free speech rights in shopping malls and other privately owned facilities. See e.g., *Lloyd Corporation v. Whiffen*, 315 Or. 500, 849 P.2d 446 (1993); *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 908, *aff'd* 447 U.S. 74 (1980).
- ⁹*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).
- ¹⁰518 U.S. 727 (1996).
- ¹¹A "leased channel" is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. See 47 U.S.C. § 532(b).
- ¹²518 U.S. at 747; see also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down statute that would have required a newspaper to provide a right of reply for subjects of a newspaper's articles).
- ¹³*Id.* at 760.
- ¹⁴*Id.* at 804.
- ¹⁵*Id.*
- ¹⁶*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
- ¹⁷*Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).
- ¹⁸*Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

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