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Proceed With Caution--Information Superhighway Under Construction: Selecting the Proper Intellectual Property Rights Paradigm to Apply to Passengers on the Interim-Net

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PROCEED WITH CAUTION—INFORMATION SUPERHIGHWAY UNDER CONSTRUCTION: SELECTING THE PROPER INTELLECTUAL PROPERTY RIGHTS PARADIGM TO APPLY TO PASSENGERS ON THE INTERIM-NET

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A recent survey on Internet response times indicates general satisfaction with the Internet but, nonetheless, I begun to view the Internet as a kind of interim-net. Clearly, in order to achieve, in a commercially reasonable fashion, that which is now being done in rudimentary form over the Internet, we need something different and faster. As that something comes on us, we are going to see, I believe, a regularization of that which is now problematic in terms of behavior over the Internet. I will discuss the interim-net today because it is simply not interesting to say that Internet legal problems will dissolve over time. I do believe, however, that that is exactly what will happen.

I believe that we are going through a transitory phase. It may last some number of years but, eventually, we will discover that, as little black boxes replace PC's, and as people are accessing the Internet through their TV sets, Internet behavior will be more like to the behavior we see through traditional media now.

The growth of the Internet as a medium of public communication has changed a medium designed for use by scientists and engineers into a potential replacement for television, telephone, radio, music, delivery systems, movies, books, and even cocktail parties.[1]

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[1] *See, e.g.*, Vic Sussman & Morgan Mannix, *Gold Rush in Cyberspace*, U.S. NEWS & WORLD REP., Nov. 13, 1995, at 72 (discussing Internet replacing televisions and telephones).

In many ways, the phenomenon of on-line communication is like the phenomenon of electrical power—a change agent.[2] In the same way that the electrical power grid transformed the nation, the Internet promises, or threatens, depending on your point of view, to create massive changes in the way we relate to one another, the way we do work, the way we entertain ourselves, and the way we live.

Since dimensions of human interaction on-line are all the dimensions that are experienced off-line, it is natural to expect the same range of behavior in the two environments.[3] Off-line behavior ranges from the sublime to the base, the artistic to the industrial, the altruistic to the commercial, the open to the conspiratorial, and the well-intentioned to the criminal; one would expect the same to obtain on-line and, in fact, it does.[4]

One would, therefore, further expect that the legal norms which the citizens of a free society impose on their communications in order to assure the social order off-line, would need to be extended to on-line communications as well. In fact, legal norms do need to be extended to the Internet, and they are being extended in that direction.[5]

Specific to today's discussion, the balancing of interests of intellectual property originators and owners, and their audiences or users, inherent in the current intellectual property laws needs to be extended to the on-line context. This balancing of interests seems to be more important in the case of trademark law,[6] in

[2] *See generally* Karen S. Frank, *Potential Liability on the Internet, in* CABLE TELEVISION LAW 1996, at 417, 417-24 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3962, 1996) (describing reach of Internet and its vast uses).

[3] *See, e.g.*, Catherine T. Clarke, *From Criminet to Cyber-perp: Toward an Inclusive Approach to Policing the Evolving Criminal Mens Rea on the Internet*, 75 OR. L. REV. 191, 203-05 (1996). "Most lawyers consider criminals on the net 'to be exactly the same as those outside the net:' that real-world criminals are the same as virtual-world criminals but for different media and environment." *Id.*

[4] *See generally id.* at 208-17 (discussing mens rea of on-line criminals and judiciary responses).

[5] *See* Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 426 at 9, 49-50 (PLI Pat., Copyrights, Trademarks, and Literary Course Handbook Series No. G-416, 1995) (discussing outstanding legal issues courts will address in future); *see also* David K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-mail*, 21 RUTGERS COMP. & TECH. L.J. 491, 496 (1995) (noting that "flaming" is common way to control behavior on Internet); Lawrence F. Young, *Combating Unauthorized Internet Access*, 35 JURIMETRICS J. 257, 261 (1995) (discussing use of contract law to control some forms of behavior on Internet).

[6] *See* Religious Tech. Ctr. v. Netcom On-Line Communications Serv., Inc. 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (refusing to hold Internet access provider liable for copyright infringement committed by bulletin board subscriber); *see also* Guy Alvarez, *New Legal*

terms of actual behavior today; trademark law[7] is also important. In terms of copyright law, many of us are familiar with the domain name problem[8] that seems to be resolving itself. Patent laws present interesting questions as well.[9]

In some cases, new legal paradigms may need to be created, but this should be done gingerly and with great reserve. The Communications Decency Act[10] has illustrated that the creation of new legal paradigms can lead to confusion, as much or more confusion than certainty.[11] In the intellectual property area, however, it is important that we have more certainty than confusion in order for authors, inventors, and suppliers to know that they will obtain the rewards that the intellectual property laws and the Constitution were designed to encourage.

Three points need to be addressed at the outset. First, virtually any intellectual property problem that could be created in a hard copy form or an off-line form can be reproduced on-line. Second, the Internet intellectual property issues operate on two different levels. There is one level for the users and the content providers. In the copyright context with respect to the copyright laws, a user

Issues on the Net, AM. LAW 28, 29 (Dec. Supp. 1995) (suggesting that Internet will not flourish if significant protection against theft and copyright abuse is not offered).

[7] *See* Katherine S. Dueker, *Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses*, 9 HARV. J.L. & TECH. 438, 491 (1996) (noting Federal Trademark Dilution Act of 1995 extension of dilution protection to federal marks by amending Lanham Act to create federal cause of action for dilution of owners of "famous marks"). *See generally* Ronald Abramson, *Trademarks and the Internet*, *in* ADVANCED SEMINAR ON TRADEMARK LAW 1996, at 299, 303-14 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. G4-3965, 1996) (providing analysis of current issues concerning trademarks and Internet).

[8] *See* Dueker, *supra* note 7, at 492 (providing background information about domain names and discussing disputes arising over domain names); *see also* Richard Zaitlen and David Victor, *The New Internet Domain Name Guidelines: Still Winner-Take-All*, 13 No. 5 COMPUTER LAW 12, 14 (1996) (noting recent disputes resulting from companies realizing competitors and third parties were registering their trademarked names as domain names). *See generally* Abramson, *supra* note 7, at 312-14 (providing domain name dispute policy of NSI).

[9] *See* Byron F. Marchant, *On-Line and the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World*, 39 How. L.J. 477, 490 (1996) (acknowledging patent infringement actions result when software subject to patent protection is downloaded without being licensed). *See generally* Wayne M. Kennard, *Obtaining and Litigating Software Patents*, in 16TH ANNUAL INSTITUTE ON COMPUTER LAW, at 193 (PLI Pat., Copyrights, Trademarks, Literary Prop. Course Handbook Series No. 64-3989, 1996) (providing practice guide for protecting software via patent system).

[10] 18 U.S.C. § 1462 (1996).

[11] *See, e.g.*, Shea v. Reno, 930 F. Supp. 916, 922-24 (S.D.N.Y. 1996) (holding language of Communications Decency Act unconstitutionally overbroad).

or content provider on-line is likely to be in the same position as the user or content provider off-line.[12]

There is also a second level, which is the level of the infrastructure that makes the Internet work.[13] Infrastructure providers are not like content providers. At present, it is not clear what they are like, yet the paradigms have to be transported. In some cases, it has been sought to impose publisher-type liability. *Stratton Oakmont v. Prodigy*,[14] for example, is a defamation case, not an intellectual property case, but it held publisher strict liability to apply to an access provider with regard to content, that the provider did not create but encouraged to be created in one of its on-line forums.[15]

A different paradigm, that of the distributor, has also been transported in the Internet context in both the *Cubby-CompuServe* case[16] and—implicitly—in the *Netcom-Scientology* case.[17] Liability was based on whether or not the provider had knowledge of the action that was being taken by a user of its facilities.[18]

[12] *See* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 20-21 (1996) (discussing Clinton Administration Report entitled, "Intellectual Property and the National Information Infrastructure," known as White Paper, which concludes that current copyright law is "fundamentally adequate and effective"). *But see* Jessica R. Friedman, *Report*, 64 FORDHAM L. REV. 705, 720 (1995) (discussing proposed changes to Copyright Act to increase available protection against digital infringement); *see also* Richard E. Wiley, *Who Will Be the Players on the Information Superhighway?*, in COMMUNICATIONS LAW 1994, at 793-821 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. G4-3924, 1994) (arguing "nature of electronic information presents a serious technological challenge to copyright owner's ability to prevent unauthorized use of their works" under current Copyright Act).

[13] *See, e.g.*, Henry H. Perritt, Jr., *What is the Internet? in* WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET, at 11-13 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. G4-3979, 1996), 443 P.L.I. PAT. 11, 13 (1996) (listing characteristics of Internet infrastructure).

[14] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding board leader of computer bulletin board acted as agent for defendant Prodigy in libel action).

[15] *Id.*

[16] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (granting summary judgment and holding computer service company not liable for defamatory statements made by on-line subscriber).

[17] Religious Tech. Ctr. v. Netcom On-Line Comm., 907 F. Supp. 1361 (N.D. Cal. 1995) (holding operator of on-line bulletin board service neither directly nor vicariously liable for infringement of plaintiff's copyright).

[18] *See id.* at 1372. "[I]t 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." *Id.*; *see also* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (granting partial summary judgment for plaintiff where defendant made unauthorized use of plaintiff's copyrighted photographs and trademarks through defendant's on-line bulletin board service).

The common carrier paradigm is often discussed as well, and the service providers have, in many ways, encouraged thinking about their liability (or freedom therefrom) in that way.[19] Common carriers are basically not liable for the content that is transported over their systems.[20] In general, however, I do not believe the common carrier paradigm is viable for access providers over the Internet.

There will be some kind of liability imposed. More than likely, in most cases, liability will be based on knowledge, which inherently creates its own problems. If you are informed, for example, that a particular WEB page contains copyright infringing material, what do you do as, let us say, the system host of that WEB page?[21] Do you delete the page? Do you ask for proof of infringement? What kind of proof would you ask for? If there is a question of whether the material, although copied, might be subject to a fair use defense, then what do you do? It is easy to see that the move away from strict liability, while creating some kind of certainty, also leaves many problems to be assessed.

Contract carriage is perhaps a more useful paradigm for infrastructure providers.[22] In the truck industry, unregulated carriage, which is based on agreements, is the paradigm.[23] This is plausible in the Internet environment where there are agreements between users and providers, and between providers and interim carriers.

One last paradigm that we need to be watchful of is the broadcasting paradigm.[24] With the advent of Web TV and other services

[19] *See* Hon. Marybeth Peter, *The Spring 1996 Horace S. Marges Lecture: The National Information Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS 341, 355-57 (1996) (discussing liability of on-line service providers); *see also* E. Walter Van Valkenberg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 324 (1996). "Regulation of service providers generally should correspond to regulations applicable to common carriers." *Id.*

[20] *See, e.g.*, Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL COMP. & INFO. L. 211, 241 (1996). "[C]ommon carriers typically take no responsibility for the content of the information their systems carry." *Id.*

[21] *See, e.g.*, Barry D. Weiss, *Barbed Wires and Branding in Cyberspace: The Future of Copyright Protection*, in Understanding Basic Copyrights, Trademarks & Literary Prop. Course Handbook Series No. G4-3974, 1996) (discussing copyrightability of website).

[22] *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Comm., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995) (setting forth Netcom's arguments analogizing on-line service to different recognized common carriers).

[23] *See generally* Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM. L.J. 447, 472-77 (1996) (discussing carriage contract paradigm in terms of long-distance carriers).

[24] *See, e.g.*, Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527 (1996) (discussing regulation of broadcast media).

designed to make surfing the Internet as much like watching TV as possible, we will soon be in a world where people sit in front of their televisions with a remote device and can either change channels on the television or surf the Internet. Once this becomes a large practice, the rules that apply to broadcasters, where content speech can be regulated to a greater extent than in other forms on other media of expression may be sought to be applied to the Internet access providers. When this happens, some interesting challenges will arise in attempting to compel an infrastructure industry to meet the regulatory requirements of what is basically self-censorship.

The industry is up to the challenge. The focus on the Decency Act has diverted attention away from the technical solutions that either are in place already or can be in place. I hope it has not diverted development money away from the technical solutions, because technical solutions will become increasingly important to the infrastructure people as time goes progresses.