

INTERNET LAW SYMPOSIUM

Introduction

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In the movie *Il Postino*, Mario, an Italian postal worker, encounters the love of his life at the same time that he becomes acquainted with the Chilean poet-in-exile Pablo Neruda. The lowly mailman asks the established poet to teach him how to write love poetry. Neruda introduces him to the idea of the "metaphor." This idea transforms the life of the younger man and succeeds in attracting his beloved to him. The idealistic new poet's life as a family man then triggers encounters with corrupt local government officials, and eventually leads to his untimely death at a political demonstration.

The search for the right metaphor for the Internet occupies some of the "best minds of my generation."¹ And as with the protagonist in *Il Postino*, academics' search for the "killer-app"² metaphor is intertwined with their attitudes toward government. The themes of metaphor and government underlie the otherwise disparate methodologies and conclusions generated in the Internet Symposium articles.³ The various authors could be categorized according to their preferred metaphors, but I prefer to categorize them by their attitudes toward governmental involvement in regulation of the Internet. Three see government as a necessary evil, two others view it as necessary and good, and two more approach it as sufficient but not necessary.

Ninth Circuit Judge Alex Kozinski, who holds the perhaps oxymoronic status of a libertarian judge, expresses his skepticism about the search for a metaphor by rearranging the letters of "information

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1. Allen Ginsburg, *Howl*, in *HOWL AND OTHER POEMS* (1956).

2. Killer application, that is, a terrific software package.

3. The Articles are based on a live symposium held at Seattle University in September 1996. Internet Law Symposium '96: Second Annual International Law & Policy Summit for the Global Internet (September 9-10, 1996).

superhighway" to spell "enormous hairy pig with fan." In tweaking the over-used metaphor of the infobahn, he leads into the observation that metaphors "tend to hide what the real issues are." What are some of those issues for him? "[T]here's some really pretty extreme things in here. Do we really mean that communications on the airways can't be controlled at all? For example, how about blackmail? How about espionage? How about child pornography? Are you in favor of being able to download snuff flicks?" With these questions, Judge Kozinski expresses not only his impatience at the metatranscendent solutions that the right metaphor will supposedly work upon specific legal problems, but also a skepticism about what I term the cyberlibertarian perspective. He is suggesting, astonishingly, that law might provide rules to govern human activities on the Internet. This suggestion is startling from someone who might be predicted to embrace the anarchic, free-wheeling, individualistic qualities of the Internet. The thought astonishes too because so much of the published legal discourse on the Internet to date has focused on rules that emanate from sources other than government—sources such as private contractual arrangements or even technical specifications—which regulate behavior on the Internet.⁴ Judge Kozinski's metaphor of the hairy pig is somehow a reply to those who argue that legal rules should always be decentralized. It is tied to an optimism about the ability of government to manage this new medium in familiar ways, despite his general distrust of government interference in private matters.

Jonathan Wallace and Michael Green, on the other hand, are extremely serious about both trusting the power of analogy and metaphor and mistrusting the power of government. They believe that a new communication medium quickly gives rise to a new analogy or metaphor and that a government that works with inadequate models for the technology is a dangerous government. Underlying their search for a metaphorical Rosetta Stone is a skepticism about the judiciary's

4. See generally David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace* 48 STAN. L. REV. 1367 (1996); David Post, *Anarchy and State on the Internet: An Essay on law-Making in Cyberspace*, 1995 J. ONLINE L. art. 3 (1995) <<http://warthog.cc.wm.edu/law/publications/jol/post.html>>; Robert Dunne, *Detering Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 JURIMETRICS J. 1 (1994); Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 PITTSBURGH L. REV. 993 (1994); A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE 129 (1997) (also found at <<http://www.law.miami.edu/~froomkin/articles/arbitr.htm>>). But see Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Julie E. Cohen, *The Right to Read Anonymously: A Closer Look at Copyright Management*, 28 CONN. L. REV. 981 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996).

ability to fashion a coherent First Amendment law. Along the way, they also express some doubt about government's role in regulating speech, a doubt that is of course embedded in the language of the First Amendment itself. The authors note that medium-specific First Amendment doctrine, which "examines the underlying technology of the communication to find 'the proper fit between First Amendment values and competing interests,'"⁵ has resulted in a patchwork of rationales unsatisfying to those who value either consistency or a broad ambit of free speech.

While the Internet as a medium of communication can be analogized to many existing forms of communication, it may arguably be so unique as to justify protection even broader than that accorded to print. Wallace and Green therefore propose that the Internet should be likened to a printing press or virtual town hall for First Amendment purposes. Despite their opposite approaches to the question of metaphor, I place Wallace and Green with Judge Kozinski in the camp of those who accept government as a necessary evil in Internet lawmaking.

By contrast, two other authors display what I call a necessary-and-good approach toward government and the Internet. George Chen describes a comprehensive plan of top-down regulation in Taiwan so as to implement its NII initiative. The government's role seems unquestioned as well as pervasive. For example, Chen describes a recent court decision involving copyrighted material downloaded from the Internet to make a CD-Rom compilation, which was then offered by the defendant as a free gift to accompany his magazine. Despite raising a fair-use defense that was premised on the nature of the Internet as facilitating the circulation of information, the defendant was found guilty and sentenced to seven months imprisonment (suspended for three years).⁶ Such a harsh punishment for copyright violations is almost unthinkable in the United States, and recent efforts to criminalize activities that might be permissible under the current 1976 Copyright Act are being strongly resisted.⁷ Chen does not engage in metaphor-fitting, but he does analyze how the Internet may or may not fit under existing definitions of broadcast media or publications that are currently regulated in Taiwan.

5. *ACLU v. Reno*, 929 F. Supp. 824, 873 (E.D. Pa. 1996).

6. *See Taiwan v. Chun-I Hwang*, 84 Su-Tse No. 2341 (July 26, 1996).

7. *See U.S. v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994); H.R. 2441, 104th Cong., 1st Session (1995).

Robert Cumbow, too, strongly believes that government does have an unquestioned role to play in applying copyright law to the Internet. Like Judge Kozinski, but unlike Wallace and Green, he engages in severe metaphor deconstruction while remaining unperturbed by the possible high-handedness of government intervention. Despite his skepticism about metaphors, he reaches the same conclusion as Wallace and Green do with their quest to compare the Internet to an existing medium of communication: that "Internet communication is, quite simply, a print medium." This allows him to conclude that copyright law applies to the Internet as easily as it did to any other print media in the past.⁸ The interesting result is that a "print" model may encourage freer expression under the first amendment, but simultaneously may inhibit expression under copyright law because digital documents then become subject to control by the private author in a way that government cannot replicate.⁹

The final two authors follow the logic of those who would transfer some rule-making authority from the government to third party Internet Service Providers (ISPs)¹⁰—or what I term the sufficient but not necessary approach to governmental regulation of the Internet. Kelly Kunsch pays attention to the culture of Internet users who will resist top-down legal regulation. Nonetheless, he, like the other contributors in this volume believes that law has a role to play in setting rules for the road. From Kunsch's perspective as a law librarian, there is a pressing need to ensure authenticity and integrity of documents disseminated on the Internet regardless of whether those documents are disseminated publicly by the private sector or the traditional "public" sector of government. The private system of regulation that he proposes rests heavily on verification of primary domain names by local domain owners. By "making registered domain owners legally responsible for their sites, market or liability factors insure integrity of the site. This includes not only the duty to secure the site, but also that of discovering tampering on the site." Thus Kunsch proposes that domain owners serve as the point of legal

8. *But see* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L. J. 29 (1994); Pamela Samuelson, *The Copyright Grab*, WIRED 4.01, January 1996 (also found at <<http://sunsite.unc.edu/negativland/white.htm>>).

9. The Church of Scientology has demonstrated this principle in both print and electronic media. *See, e.g.*, Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 131 (N.D. Ca. 1995); Religious Technology Center v. Lerma 1996 WL 633131 (E.D. Va. Oct. 4, 1996).

10. For convenience, I will refer to any entity that provides access or content to the Internet as ISPs. David Post has proposed that legal rule-making will naturally gravitate to this level of social organization.

regulation, relying on private legal remedies such as breach of warranty or negligence to encourage authentication of documents posted on the site. His solution is in line with those cyberlibertarians who believe that private ordering through contract is the most natural form of legal regulation on the Internet.

Neal Friedman and Kevin Siebert discuss the efficacy of the private ordering imagined by Kunsch and others, through the specific and concrete example of domain name registration. They find this private system of legal regulation highly wanting. Newly emerging intellectual property interests in domain names, which have become extremely valuable commercially in an extremely short amount of time, are being assigned by a government contractor that has little public accountability—Network Solutions, Inc. (NSI). As problematic as this privatization of entitlement distribution is the shifting positions that NSI has vis-à-vis its assignment of entitlements. Trademark disputes over domain name assignments have exploded in the past year. When NSI's policy was to put a domain name on "hold" based on a mere allegation of trademark infringement, it was criticized. When it changed its policy so that it did not put the domain name on hold pending outcome of the lawsuit, it was further criticized.

The proposal on the table now would take any domain name registrar out of the dispute resolution business.¹¹ Whatever the final resolution of these policy shifts, the domain name controversy tells us that nongovernmental third parties who function as legal rule-makers or rule-enforcers can be just as problematic, if not more so, than the government they are intended to supplant. NSI's policies have resulted in extra-judicial "private" injunctions; they have been implemented without any public notice and comment period; and they have not satisfied their "customers"—the users who allegedly detest governmental regulation of the Internet. Yet proposals abound to place upon private ISPs analogous legal responsibilities of policing obscenity, copyright infringement, and defamation.¹² Vicarious liability theories have become a staple feature of Internet law reform, placing the

11. See Robert Shaw, *Internet Domain Names: Whose Domain Is This?* (visited April 25, 1997) <<http://www.itu.int/intreg/dns.html>>.

12. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (discussing safe harbor provisions for transmission of indecent materials); Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (September 1995) (discussing ISP liability for copyright infringement); *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (NY Sup. Ct. May 24, 1995) (discussing ISP liability for delivery of defamatory material). But see Niva Elkin-Koren, *Copyright and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L. J. 345 (1995).

responsibility for the enforcement of legal norms on technology providers or third parties to the underlying dispute. ISPs are regarded as a logical node for the imposition of legal norms that are typically imposed through private law litigation or public legislation.

What is the state of what some of us have the foolhardiness to term "Internet Law"? If one year on the Internet is equivalent to seven human years, then perhaps what we are witnessing is a shift from first to second generation concerns. Does the public/private distinction cohere or dissolve in cyberspace? Do rules shift from domains such as national governments to metadomains such as international organizations or subdomains such as ISPs? These Articles—through their implicit or explicit discussion of rule-making authorities, analogies, and metaphors—suggest that the questions now are not questions of "whether" but rather questions of "how."