Electronic Commerce and Free Speech

Jessica Litman*

Internet historians studying the end of the twentieth century will probably conclude that 1998 was the year that American entertainment and information industries achieved their initial objectives in their takeover of Netspace. In 1998, while the public's attention on Internet-related issues was absorbed with smut control, and the media debated the pros and cons of censorship and hard-core porn, big business persuaded politicians of both political parties to transfer much of the basic architecture of the Internet into business's hands, the better to promote the transformation of as much of the Net as possible into a giant American shopping mall. 1998 was the year that the White House handed over the keys to the Internet domain name system to the private sector, conditioned on a promise that domain name space would henceforth be more hospitable to trademark owners.[1] That same year, the United States Patent Office gave out patents covering Internet-based coupon-delivery systems, advertising targeted to specific recipients based on user preferences calculated from clickstream data, and the technology underlying P3P, a privacy protocol developed by the World Wide Web Consortium.[2] 1998 was the year that copyright owner interests persuaded Congress to enact a codicil to the copyright law giving copyright holders new tools to control the public's uses of their works.[3] Also in 1998, American industry convinced the U.S. government that avoiding the enactment of new legal protections for data privacy was worth the risk of a trade war with Europe.[4] A key theme running through the transformation was the expectation

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* Professor of Law, Wayne State University. An earlier version of this paper appeared in 1 Ethics and Information Technology 213 (1999). I'm grateful to Jon Weinberg for his many perceptive suggestions. I'd also like to thank James Boyle, Perry Cook, Larry Lessig, Stanley Katz and Ejan Mackaay for their helpful comments on earlier drafts. Internet citations were current as of June 21, 2000.

[1] See Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Nov. 25, 1998, URL: <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

[2] See U.S. Pat. No. 5,761,648; U.S. Pat. No. 5, 848, 396; U.S. Pat. No. 5,862,325; U.S. Pat. No. 5, 832, 212. The Internet patent gold rush has continued. See Seth Shulman, Software Patents Tangle the Web, Technology Review, March/April 2000, at URL: <http://www.techreview.com/articles/ma00/shulman.htm>; Rochelle Cooper Dreyfuss, Are Business Method Patents Bad for Business?, 16 Santa Clara Compuer & High Tech'y L.J. 263 (forthcoming 2000).

[3] See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998).

[4] See Edmund L. Andrews, European Law Aims to Protect Privacy of Personal Data, N.Y. Times, Oct. 26, 1998, at URL: <http://www.nytimes.com/library/tech/98/10/biztech/articles/26privacy.html>; Joel Reidenberg, Restoring Americans' Privacy in Electronic Commerce, 14 Berkeley Tech. L. J. 771 (1999). Eventually, Europe blinked. See, e.g., Privacy Safe Harbor Privacy Agreement

that the Internet could be used as a medium for the advertisement of (American) goods and services worldwide, and, moreover, could itself become a marketplace for the worldwide sale of (American) information and entertainment to consumers.

Back in 1992, the United States had feared it was a fading world power, hobbled by its budget deficit. The U.S. might have built the Internet, but it couldn't afford to *run* the Internet. If the Internet were to be developed into a new engine of economic growth, the private sector would need to bear the expense.[5] The Clinton administration devised an Internet policy based on supplying incentives for American business to invest in what it called the "National Information Infrastructure," and smoothing they way for commercial exploitation of its possibilities.[6] Over the life of the Clinton administration, under the aegis of the U.S. Department of Commerce, the government identified aspects of the Internet that might be transferred to private sector control, did what it could to make those aspects attractive targets for private sector capture, and adopted policies designed to facilitate the transfer.[7] Clinton administration policy documents emphasized the new potential for electronic commerce in information products.[8] To realize that potential, the administration supported measures to enhance the degree to which valuable information and ideas could be treated as proprietary.[9] Meanwhile, a number of businesses worked to make sure that the Internet would be a comfortable and familiar environment in which established conventional companies could do business; and one that would not be unduly receptive to new, upstart high-tech businesses that might take market share away from 1998's market leaders.

I.

If you look at which Internet-related bills have made it through Congress and which have not,[10] if you read the White House's *First Annual Report on*

Seen As Only the Beginning of Global Policy Debate, 5 Electronic Commerce & Law 625 (June 14, 2000).

[5] See White House Information Infrastructure Task Force, The National Information Infrastructure: Agenda for Action, Oct. 19, 1994, URL: <http://metalab.unc.edu/nii/NII-Agenda-for-Action.html>.

[6] See, e.g., Remarks by Vice President Al Gore at National Press Club, December 21, 1993, URL: <http://www.iitf.nist.gov/documents/speeches/gore_speech122193.html>; The National Information Infrastructure: Agenda for Action, supra note 5.

[7] See U.S. White House, The Framework for Global Electronic Commerce (July 1, 1997), URL: <http://www.whitehouse.gov/WH/New/Commerce/read.html>.

[8] See, e.g., The National Information Infrastructure: Agenda for Action, supra note 5.

[9] See, e.g., Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 211-238 (1995).

[10] See Courtney Macavinta, Congress passes slew of high-tech bills, C|net News.com, Nov. 24, 1999, at URL: <http://news.cnet.com/news/0-1005-200-1463637.html>; Internet and Tech Bills Become Law, Tech L. J., Oct. 22, 1998 at URL: <http://www.techlawjournal.com/internet/81022omn.htm>; Tech Bills that Failed in the 105th Congress, Tech L.J., Oct. 26, 1998, at URL: <http://www.techlawjournal.com/internet/81026.htm>.

Electronic Commerce,[11] if you follow the trade press accounts of who is suing whom, it's hard to miss a pronounced slant toward making commercial speech the favored flavor of discourse on the Internet. The signs that things were moving in that direction were there several years ago,[12] but most of us didn't take them very seriously. In our everyday milieu, after all, commercial speech had long been ubiquitous. Ads were everywhere: in our magazines and in our schools, in our newspapers and hospitals. Some of them were explicit; others were rendered more coyly. Manufacturers, for instance, paid huge sums for the privilege of being the candy that ET eats, the shades that the Men in Black wear, or the car that James Bond drives.[13] The idea that vast expanses of ads and shopping opportunities would be just a mouse click away seemed uninteresting.

In thinking about the effect of networked digital technology on the flow of information in general and freedom of expression in particular, most of us were struck instead by its implications for noncommercial speech. The most important factor seemed to be that the Internet enabled people to speak inexpensively. Once the capital investment of building the Internet in the first place had been sunk, people could speak to people all over at essentially no marginal cost, and they did.[14] A large number of the speakers were different people from the folks who spoke in conventional media, and what they had to say was often not the same stuff that gets said in conventional media.[15] Most obviously, there were lots of volunteers eager to express themselves to anyone willing to read or view what they posted.[16] And even when the search tools for finding the content one wanted on the Internet were unbelievably primitive, one could, with a little work and ingenuity, find all sorts of content that was worth reading and viewing.

Much of this was due to the magic of large numbers. It may seem to me as if I'm the only person out there who wants to make vegetable soup but is

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[11] U.S. Government Working Group on Electronic Commerce, First Annual Report (1998).

[12] See, e.g., Michael Goldberg, Why Jim Clark Loves Mosaic, WIRED 2.10, Oct. 1994, at 118; Joshua Quittner, Billions Registered, WIRED 2.10, October 1994 at 50 .

[13] See Jessica Litman, Breakfast with Batman: The Public Interest in the Advertising Age, 108 Yale L.J. 1717, 1731-35 (1999).

[14] That sort of pricing structure isn't hardwired into the architecture, of course, and there's no particular reason why the price structure couldn't change to a more exclusionary schedule of tariffs if it turned out to be profitable to do so. Major media businesses might well welcome such a change, because of the entry barriers it would erect to speakers that are not (or not yet) major media businesses.

[15] See Jessica Litman, Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing), 29 N.Y.U. J. Int'l L. & Politics 237, 247-52 (1997).

[16] Even before the invention of the World Wide Web, there were thousands of Usenet news newsgroups, covering almost every conceivable subject, some of which received hundreds of posts each day from all over the world. See Ed Krol, The Whole Internet 151-185 (1994). See generally Lost In Usenet, URL: < http://www.faqs.org/usenet/>.

allergic to carrots and celery and beans, say, but it isn't true. You network together enough people, and you find several of me; we can trade recipes.[17]

Some of this was the magic of what Eugene Volokh has called "cheap speech."[18] I might have a half dozen recipes that I'd like to share with the world. They're good recipes, but not good enough to persuade some publisher to bring out a cookbook full of recipes like them, and, even if they were, I'm not going to try to shop them to a publisher, since that takes time and money and effort and I have a day job. But typing them up and sending them off to some recipe archive in the sky is incredibly easy.[19] It's precisely what I want to do on some rainy afternoon when I'm putting off grading exams, and I'm bored with computer solitaire. While I'm there, I can read someone else's.

Some of this derived from the magic of digital technology. Hypertext makes it possible to say some things in some ways that would be difficult without hypertext. Online chat is different from a conference call. The ability to interact with the content you're reading changes your relationship with the content and that, eventually, changes both the way the content is written and displayed and what the content means.[20] The ability to interact with the recipients of your content inspires distinct expression.[21]

In any event, in relatively short order, there was lots of content on the Internet that was different from stuff available in conventional media.[22] Many of the speakers on the Internet were different from the market leaders in the conventional media. We started hearing talk about the vast possibilities of a world in which everyone was her own publisher, in which distributors and other intermediaries were unnecessary, in which citizens need no longer rely on the news media in order to make political decisions, but could engage in true participatory democracy.[23]

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[17] See the Usenet food group rec.food.recipes, URL: <news:rec.food.recipes>. See also, e.g., alt.bread.recipes; alt.food.chocolate; alt.recipes.babies; alt.recipes.hawaii; rec.food.cuisine.jewish; rec.food.recipes.babies; rec.food.recipes.cats; rec.food.recipes.dogs.puppies.

[18] Eugene Volokh, Cheap Speech and What It Will Do, 104 Yale L.J. 1805 (1995).

[19] See, e.g., URL: <http://recipes.alastra.com/soups/fresh-mushroom.html>; URL: <http://recipes.alastra.com/microwave/poached-pears.html>.

[20] See M. Ethan Katsh, Rights, Camera, Action: Cyberspatial Settings and the First Amendment, 194 Yale L.J. 1681 (1995). It takes a little while to adjust to the implications of the new medium. You need to develop new criteria for evaluating the reliability of the content you're reading: nifty graphics, for instance, don't necessarily mean that the speaker knows whereof she speaks.

[21] Opportunities for sharing material have proved unexpectedly compelling. The wildly successful Napster software was invented by a college freshman seeking to combine music file sharing with the features of Internet Relay Chat. See Napster (Company Profile) at URL: <http://www.napster.com/company.html>. Napster acquired 10 million registered users in its first eight months of operation. See Matt Richtel, Napster Has a New Interim Chief and Gets a $15 Million Investment, New York Times, May 23, 2000, at C27.

[22] See Litman, Copyright Noncompliance, supra note 15, at 247-50.

[23] See, e.g., Volokh, supra note 18.

Legal scholars responded with a crop of scholarship on how the Internet would advance freedom of expression unless the government clamped down on all sorts of speech because it was afraid of smut.[24] The media portrayed the Internet as a vast source of accessible pornography,[25] and Congress moved to plant anti-pornography flags in the sand.[26] Lawmakers came up with an endless series of heavy-handed proposals to stop porn.[27] Whether Internet services, web sites, libraries, or schools should be permitted or required to protect children (or adults) from noxious content was an accessible issue, easily debated in the popular press.[28] Conventional and digital news media, along with libraries and schools, became parties in lawsuits challenging Internet censorship, and reported copiously on the suits' details.[29] We paid too much attention to those.[30] We were so busy watching the smut laws that we didn't pay enough attention to the other stuff going on at the same time.

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[24] See, e.g., Jerry Berman and Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 Yale L.J. 1619 (1995).

[25] See, e.g, Sex Finds Lucrative Home on the Web, USA Today, Sept. 3, 1997, URL: <http://www.usatoday.com/life/cyber/tech/ctb128.htm>; Philip Elmer-Dewitt, On a Screen Near You: Cyberporn, Time Magazine, July 3, 1995, at 38.

[26] See Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [CDA]; Reno v. ACLU, 521 U.S. 844 (1997).

[27] See CDA; Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998); S. 1482, 105th Cong., 1st Sess. (1997); S. 97, 106th Cong., 1st Sess. (1999). The Clinton administration cleverly recast the debate over content controls as an opportunity for private sector investment in content control software products. See Jonathan Weinberg, Rating the Net, 19 Hastings Comm/Ent L.J. 453 (1997).

[28] See American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); Pamela Mendels, Michigan Law Leaves Library's Internet Filters Open to Debate, N.Y. Times CyberTimes, Aug. 6, 1999 at URL: <http://www.nytimes.com/library/tech/99/08/cyber/articles/06michigan.html>.

[29] See, e.g., ACLU v. Reno, 31 F. Supp. 2d 473 (E.D.Pa. 1999), aff'd, 2000 U.S. App. LEXIS 14419 (3d Cir 2000); Cyberspace v. Engler, 55 F. Supp. 737 (E.D. MI 1999); Mainstream Loudoun v. Loudoun Country Library Board of Trustees, 24 F. Supp. 2d 552 (E.D.Va. 1998); American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

[30] Lest it seem that I am minimizing the threat to public decency and morals posed by the availability of pornography on the Internet, I should clarify my views: I don't think the threat to public decency and morals is especially significant, and see no particular reason for deeming it more pressing than the threat posed by other sorts of content that is prohibited by other nations but routinely tolerated, even celebrated, in the U.S. See, e.g., German Criminal Code § 130; German Law on the Dissemination of Publications Morally Harmful to Youth; Swedish Personal Data Act (1998:204); Singapore Broadcasting Authority, Internet Code of Practice, URL: <http://www.sba.gov.sg/internet.htm>. See generally Amber Jene Sayle, Note: Net Nation and The Digital Revolution: Regulation of Offensive Material for a New Community, 18 Wis. Int'l L.J. 257 (2000).

Even those who believe that Internet pornography causes incalculable harm, however, would probably concede that porn makes irresistible politics. A vote to punish pornography is cheap and risk-free. Perhaps for that reason, arguments against Internet pornography have been offered in support of a wide variety of legislation with no intrinsic pornography connection. See, e.g., 145 Cong. Rec. S.9749 (July 29, 1999) (statement of Senator Hatch introducing the Domain Name Piracy Prevention Act of 1999).

II.

The talk about a world without publishers, record companies, motion picture studios, and software distributors also came to the attention of publishers, record companies, motion picture studios, and software distributors, who understandably didn't like that picture. While most of us were watching the smut bills on their constitutional journey, the representatives of commercial media managed to accomplish a fair amount to protect themselves from being eclipsed any time soon.

Commercial media found the Internet frightening, and with good reason. Entertainment and information merchants tend to express that fear as a fear of massive piracy, but piracy turns out to be not so hard a nut to crack. Piracy over digital networks leaves incriminating electron trails; you can track it down and avenge it.[31] Increasingly, moreover, there are tools to prevent it. A variety of technological locks, booby-traps and other devices have been deployed that make unauthorized use difficult for the huge majority of users, few of whom are dedicated hackers.[32] The really scary thing was not, I think, piracy, but obsolescence. In the long term, other media might grow up and eclipse the current market leaders, just as player pianos yielded to radios in the 1920s, and movies superseded live theatre in the 1930s and 1940s.[33] Even in the short term, the Internet posed a threat, because it facilitated an enormous amount of free speech that could divert potential consumers from the speech they had to pay for.

When I speak of free speech, I mean speech that doesn't cost any money. To distill it down to the simplest formulation: free speech has the potential to

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[31] See Software and Information Industry Association, Seven Warning Signs of Piracy: How ISPs Can Protect Themselves, URL: <http://www.siia.net/piracy/policy/int_7.asp>. BMI, for example, has dispatched a "Musicbot" to sniff out and measure the incidence of unlicensed music on the Internet. See BMI MusicBot™ Version 2.0 Announced, July 14, 1998, at URL: <http://www.bmi.com/iama/webcaster/technology/musicbot.asp>. The Association of American Publishers has introduced a digital watermarking project that it characterizes as "branding" texts so that their owners can always find them. See The Digital Object Identifier, at URL: <http://www.doi.org>. The Recording Industry Association of America has persuaded consumer electronics manufacturers to incorporate copyright-protection technology into portable digital music players that will "detect illegitimately distributed music." See Secure Digital Music Initiative, Guide to the SDMI Portable Device Specification Part 1, Version 1.0 (July 8 1999) at 3, URL: <http://www.sdmi.org/download/port_device_spec_guide.pdf>. The RIAA also touts its ability to identify and shut down online music pirates. See RIAA, Education, Innovation and Enforcement, URL: <http://www.riaa.org/Protect-Online-3.cfm>. The Napster litigation has demonstrated the ease with which the massive unauthorized exchange of digital files may be tracked, and the identity of individual infringers may be traced. See, e.g., John Borland, Metallica fingers 335,435 Napster Users, May 1, 2000 at URL: < http://news.cnet.com/news/0-1005-200-1798138.html>; Napster, Information About Metallica's Request to Disable Napster Users, URL: <http://www.napster.com/metallica-notice.html>.

[32] See Julie Cohen, Copyright and the Jurisprudence of Self Help, 13 Berkeley Tech. L.J. 1089 1092-96 (1998).

[33] See Jessica Litman, Revising Copyright Law for the Information Age, 75 Ore. L. Rev. 19, 27-30 (1995).

squeeze out expensive speech. Not completely, of course. There's plenty of information out there that isn't fungible. I buy hardcover books. I subscribe to particular periodicals and wouldn't be happy with their competitors. But a lot of information is fungible enough. I don't really care who tells me the weather. All of the weather reporters get their data from the National Weather Service, and if I have a choice between free weather and pay weather, I'll take the free weather every time. Free, after all, is free. If I can get similar information from a free database and a proprietary database, I'll usually pick the free one, at least if I'm the person who's paying. If some scholarly work exists both in expensive bound form and free digital form, I may well be willing to buy the book to have it on my shelf. But I surely won't buy two copies so that I can have one for home and another for work. And when it comes to assigning it to my students, I'm likely to pick the free electronic version.[34]

Free speech may drive out speech people have to pay for. At first, that doesn't seem like a problem. Our entire free-expression jurisprudence is built on the premise that the more speech easily available to the most people, the better.[35] If, however, you happen to be in the business of selling speech, a glut of free stuff (especially high quality free stuff) has the potential to run you out of business. If you are a publicly-traded company that employs a bunch of people, pays your taxes, gives back to your community, and makes campaign contributions to your elected representatives, then it's easy to persuade policymakers that your financial health is important to the general welfare, and anything that threatens to drive you out of business is a threat to the public interest.

So, we have a puzzle. Do we continue to advance the free expression agenda at the cost of significant economic consequences, or do we moderate our commitment to free speech with a generous dollop of economic realism? We haven't had to worry about this before, because speaking in a meaningful way to a large audience was expensive, and people couldn't afford to do serious mass speaking for free for very long.[36] Now that it's much cheaper, though, it doesn't take much to give out information to the whole world, every day, for free, for years, and people do. Of course much of it is dreck. But, there's the magic of large numbers again: some of it is excellent by any standard.[37] When we were imagining the Internet, we didn't fully appreciate the implications of that. Representatives of conventional media saw it before we did.

Conventional media wanted to market their own brands of new improved digital media, but many discovered that they couldn't persuade readers to pay

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[34] The hornbook I recommend to my copyright students, for example, is Terry Carroll, Copyright F.A.Q. (1994), URL: < http://www.tjc.com/copyright/>, available only online and only for free.

[35] See Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J. concurring); Cohen v. California, 403 U.S. 15, 24 (1971); Reno v. ACLU, 521 U.S. at 874-82.

[36] See Jonathan Weinberg, Questioning Broadcast Regulation, 86 Mich. L. Rev. 1269, 1271-85 (1988).

[37] See Litman, Copyright Non-Compliance, supra note 15, at 247-251.

for them. They tried a variety of different strategies. One popular scheme was to give out free samples: "this online publication will be free for a trial period, but then you'll have to buy a subscription."[38] The date for paying kept slipping. Some electronic publications initiated a paid subscription policy, and then decided to discontinue it when their readership dropped.[39] They tried advertising. That works okay, if the ads don't take too long to load. Some people actually read them. But, you know what? The small upstart speakers can sell advertising, too. And they do. Go surf some college students' web pages -- you'll find banner ads.[40] Or check out individual home pages on GEOCITIES.COM, an Internet service provider that inserts ads into all its subscribers' web sites.[41] Here's the bottom line: If you are a distributor of information or entertainment who wants to sell content over the Internet, it isn't going to be enough to arm yourself with advanced weapons to prevent piracy. There are too many volunteers out there. You need to get rid of them, or marginalize them, or make life difficult for them, in order to compete on your own terms.

Academics and civil libertarians have been watching the pornography follies, so many of us didn't notice when commercial content owners scored some significant progress in herding free speakers off the Net. There's an important synergy between persuading the government to give your industry some friendly new laws or regulations, and using new and old legal tools to make life more difficult or expensive for inconvenient competitors who aren't necessarily doing anything illegal. What's been notable about the past few years is that businesses have been able to combine the two strategies to make the Internet a much safer place to sell.

III.

On the regulation front, once we look past the familiar high drama over pornography, it appears that both the Clinton administration and Congress have been falling all over themselves to help business to move its business onto the Internet.[42] The dynamic relied on the government's conception of the Internet as an engine to drive the United States economy. What the engine was

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[38] See Ashley Dunn, Surf & Turf: In the Free Web Orchard, Who Will Pay for Fruit?, N.Y. Times CyberTimes, July 24, 1996.

[39] See Alex Kuczynski, Slate Ends Its 10-Month Experiment With Subscriptions, N.Y. Times, Feb. 15, 1999, at C11.

[40] Banner ad swap networks and sponsor-supported banner ad placement services have sprung up all over the web to facilitate free or low cost banner advertising on any web site willing to volunteer to host ads. See, e.g., Banner Network, URL: <http://adnetwork.linkexchange.com/>; BannerSwap, URL: <http://www.bannerswap.com/>.

[41] See Yahoo! GeoCities Terms of Service ¶ 11, URL: <http://docs.yahoo.com/info/terms/geoterms.html>.

[42] See, e.g., Framework for Global Electronic Commerce, supra note 7; Cybersquatting and Consumer Protection: Ensuring Domain Name Integrity: Hearing on S. 1255 Before the Senate Comm. on the Judiciary, 106th Cong, 1st Sess. (July 22, 1999).

supposed to do was to transform the existing Internet infrastructure into a giant American shopping mall and multiplex in the sky. The government's regulatory strategy was to identify what needed to be done to facilitate electronic commerce, to do that, and to do as little as possible except for that.[43]

The rhetoric deployed to support this strategy changed over time. Back in the early years of the Clinton Administration, when the only folks who actually used the Internet were students and geeks, it was common to describe the Internet as if it were a collection of empty pipes, with no content anyone would want to read, just waiting to be turned into a 500 channel television transmission machine.[44] People insisted that nobody would subscribe to Internet service unless there were something to see there, and nobody would post any content worth reading unless the poster believed it would make a profit, so we needed to redesign the legal infrastructure to ensure that folks had control over what they posted and were confident of making money.[45]

While that story was making the rounds, of course, millions of people signed up for Internet access, Internet-related stocks went through the roof, advertisers started buying banner ads on college students' home-made Web pages, and company after company included a URL for its own Web page in its television commercials. Then we began to hear a new story, about how, since the Internet was borderless, folks from other countries were stealing American stuff, and we needed to change the legal infrastructure to foil the pirates.[46] To stop all those foreigners from stealing valuable intellectual property from important companies, we needed to show our trading partners that we were also taking an unyielding stance against domestic pirates (and, anyway, the domestic pirates were stealing valuable intellectual property from important companies, too.)[47]

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[43] See U.S. Government Working Group on Electronic Commerce, supra note 11.

[44] See, e.g, United States Patent & Trademark Office, United States Department of Commerce, National Information Infrastructure Task Force Working Group on Intellectual Property, Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative (Thursday, November 18, 1993) (testimony of Steven J. Metalitz, Information Industry Council); Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 6-7 (1994).

[45] See, e.g., Bruce A. Lehman, Copyright Fair Use and the National Information Infrastructure (address delivered at George Mason University, Feb. 23, 1996), Red Rock Eater News Service (Feb. 25, 1999), URL: <http://commons.somewhere.com/rre/1996/Copyright.Fair.Use.and.t.html>; Copyright Protection on the Internet: Hearing Before the Courts and Intellectual Property Subcomm. of the House Comm. on the Judiciary, 104th Cong, 2d Sess. (Feb. 7, 1996) (testimony of Barbara Munder for the Information Industry Association).

[46] See NII Copyright Protection Act of 1995: Hearing on H.R. 2441 Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 2d Sess. (Feb. 8, 1996) (opening statement of Rep. Carlos Moorehead); id. (testimony of Jack Valenti, Motion Picture Association of America).

[47] See WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. On Courts and Intellectual

That story sold. A coalition of conventional media interests persuaded Congress to enact the *Digital Millennium Copyright Act* to help them out.[48] The effect (and, I would argue, the intent) of that law is to give commercial content owners a break in the form of entry barriers against upstart new competitors.[49] The law has a cornucopia of measures that are supposed to prevent piracy, and a large number of narrow, detailed carve-outs for identified interests who are scrupulous about crossing a bunch of Ts and dotting a slew of Is. Of course, you have to know about the Ts and the Is. Among other things, what that means is that it is now exceedingly perilous to do any sort of business over the Internet unless you have a copyright lawyer looking over your shoulder.

The *Digital Millennium Copyright Act* is, by any measure, an ugly law. I defy anyone to understand its major provisions on a first (or fifth) careful reading.[50] It takes general principles, like "fairness," and translates them into exceptionally long, complicated, wordy, counter-intuitive and internally inconsistent proscriptions. One example is the Act's newfangled substitute for the traditional copyright fair use privilege, which requires a triennial formal administrative proceeding in order to gain a legal privilege to make unauthorized uses that, because of other provisions in the Act, will not be technically feasible in any event.[51]

Another example is the supposed safe harbor for Internet service providers whose subscribers, without the service providers' knowledge, post material that

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Property of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (Sept. 17, 1997)(testimony of Robert Holleyman, BSA); id. (testimony of Hilary B. Rosen, RIAA).

[48] Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998), codified at 17 U.S.C. § 101 et. seq. [DMCA]. See Jessica Litman, Digital Copyright and Information Policy, in Kraig M. Hill et. al., Globalization Of Intellectual Property In The 21st Century (CASRIP Publication Series # 4) 299 (1999).

[49] Along with dozens of other copyright law professors, I spent time and energy over the past six years trying to influence the shape of the copyright law Congress enacted to expand copyright to networked digital technology. And, along with my compatriots, I have to confess that we were snookered. We were outbid, outplayed and outclassed. Although some would debate the point, I have absolutely no hesitation in confessing that the Digital Millennium Copyright Act enacted by Congress in 1998 is kinder to commercial content owners and much, much worse for the public in general than the original law proposed by Bruce Lehman's infamous White Paper. Compare H.R. 2441, 104th Cong., 1st Sess. (1995) with DMCA, Pub. L. No. 105-304, 112 Stat. 2861 (1998).

[50] The most comprehensible summary of the DMCA comes from the Register of Copyrights and is available on the Copyright Office web site. See United States Copyright Office, The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary, URL: <http://lcweb.loc.gov/copyright/legislation/dmca.pdf>.

[51] I refer, here, to the provisions of the new 17 U.S.C. § 1201(a)(1), which prohibit consumers from circumventing technological devices that restrict access to works, but exclude from the prohibition works of a class that is determined by the Librarian of Congress in a periodic rulemaking to be entitled to a temporary exception on grounds not made explicit in the statute. Section 1201(a)(2), however, prohibits anyone from offering to the public or otherwise trafficking in any technology, product, service, or device designed to circumvent technological access restrictions, even for works ruled exempt in the administrative proceeding. See also Universal City Studios v. Reimerdes, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000) ("If Congress had meant the fair use defense to apply to such actions, it would have said so.").

turns out to infringe someone's copyright. The service provider safe harbor provisions of the DMCA[52] were billed as a codification of the sensible standards for service provider liability articulated by a trial court in *Religious Technology Center v. Netcom On-line Communications Services.*[53] The DMCA's version of *Netcom*, however, has little to do with common sense. There are different rules for avoiding liability for different sorts of subscriber conduct. The statute identifies distinct categories of problematic events that *may* be able to qualify for a privilege: transitory communications, system caching, hosting of subscribers' files, and technical infringements committed through the use of search engines and other information location tools.[54] It sets different rules and conditions for absolution, depending on which category the offending conduct fits into. There are further special rules and conditions for non-profit educational institutions. None of the categories, rules and conditions make much sense on their own terms. Rather, each set gives the wary ISP an opportunity to jump through a long, complicated series of hoops and thereby avoid liability.[55] Finding all of the hoops requires the services of a very attentive copyright lawyer.

But, while this stuff was going on, one of the things the bill's supporters said was, "Hey, it's not so bad, because all the stuff that's available on the Internet today will still be there tomorrow, alongside the commercial stuff, and you can still read the free stuff if you want to."[56] That may yet turn out to be true, but the early signs aren't encouraging. The new copyright law puts in place a complex system of entry barriers that will discourage amateurs who know the law is there, and that is, I believe, intended to do so.[57] It also gives content owners a bunch of new tools to stop piracy. Now that those tools exist, though, they are being used to stop free speakers who are not pirates.

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[52] Online Copyright Infringement Liability Limitation Act, DMCA § 202, codified at 17 U.S.C. § 512.

[53] 907 F. Supp. 1361 (N.D. Cal. 1995). In Netcom, the Church of Scientology sought to hold Internet service providers strictly liable for the infringing posts of their subscribers, disgruntled former Scientologists. The court refused to impose liability on an Internet service provider for infringement it had no reason to know about and no ability to control. The House Judiciary Committee Report explains: "[T]he bill essentially codifies the result in the leading and most thoughtful judicial decision to date: Religious Technology Center v. Netcom On-line Communications Services, Inc." H.R. Rep. No. 551, part 1, 105th Cong., 2d Sess. 11 (1998).

[54] See DMCA § 202, codified at 17 U.S.C. § 512.

[55] See U.S. Copyright Office Summary, supra note 50, at 8-14; A&M Records v. Napster, Inc., 2000 U.S. Dist. LEXIS 6243 (N.D. Cal. 2000).

[56] A number of witnesses gave testimony to this effect in the Hearing before the House Telecommunications and Trade Subcommittee. See Intellectual Property: Hearing Before the Telecommunications, Trade And Consumer Protection Subcommittee Of The House Commerce Committee, 105th Cong., 2d Sess. (June 5, 1998) (testimony of George Vradenburg III, America Online); id. (testimony of Robert Holleyman, Business Software Alliance).

[57] See Litman, Digital Copyright and Information Policy, supra note 48; Jessica Litman, New Copyright Paradigms in Laura A. Gassaway, Growing Pains: Adapting Copyright for Libraries, Education and Society 63, 66-80 (1997).

The highest profile dispute of this sort is between the recording industry and anyone who wants to use a digital file format called MP3.[58] MP3 allows the transmission of high quality music recordings over the Internet. You can download the music and play it through your computer's speakers. You can keep a whole music library on your hard disk. MP3 can of course be used for unauthorized recordings. It also can be used for authorized recordings; it is, after all, just a file format.[59] Independent bands have been distributing their music directly to consumers in MP3 format, some for free and others for money. Bigger bands have posted files containing free samples. There are advertising-supported sites out there devoted to MP3 hype and MP3 tips and MP3 files. Companies have brought out portable MP3 players that let you take an hour's worth of music with you wherever you go.

The recording industry tried to shut this all down. All of it. Not only the pirate sites, but the authorized sites.[60] Bands who posted MP3 files on their web pages were ordered to take them down or lose their recording contracts.[61] When the first portable player came out, the recording industry filed suit to stop it.[62] MP3 sites received a variety of threatening bigfoot letters demanding that they take down any information that discussed ways to convert proprietary files into MP3.[63] The recording industry perceived that many consumers wouldn't buy pay-per-listen music if free music were readily available. From that viewpoint, it's completely reasonable for it to try to sweep all the free music off the Net.

The tools the recording companies used in this campaign were the tools the copyright statute gave them, but they employed those tools to try to elbow legitimate as well as illegitimate activity out of the online market. The Recording Industry Association used its infringement lawsuit against the

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[58] See MP3 Rocks the Web, WIRED News, at URL: <http://www.wired.com/news/news/mpthree/>; Jon Pareles, With a Click, a New Era of Music Dawns, N.Y. Times, Nov. 15, 1998, section 2 at 1.

[59] Thus, a number of musicians without recording contracts have used MP3 to distribute their recorded performances directly to potential fans. See URL: <http://www.mp3.com>. Those authorized recordings are legal. The RIAA has argued that the number of authorized MP3 files is dwarfed by the number of unauthorized files. The majority of unauthorized consumer-created MP3 files, however, are arguably legal under current law. In Recording Industry Association v. Diamond Multimedia, 180 F.3d 1072 (9th Cir. 1999), the Court of Appeals for the 9th Circuit concluded that making personal copies of recorded music on the hard disk of a computer was permitted under the statute. See also 17 U.S.C. § 1008 (shielding consumers from liability for noncommercial reproduction of music).

[60] See Music Download Debate Continues, C|Net News.Com, Dec. 16, 1998, at URL: <http://www.news.com/News/Item/0,4,29980,00.html>. See also Electronic Frontier Foundation, Electronic Frontier Foundation Digital Audio and Free Expression Policy Statement, May, 1999, at URL: < http://www.eff.org/cafe/eff_audio_statement.html>.

[61] See Neil Strauss, Free Web Music Spreads From Campus to Office, NY Times, April 5, 1999, at A1.

[62] See Recording Industry Association v. Diamond Multimedia, 29 F. Supp. 2d 624 (C.D. CA 1998), aff'd, 180 F.3d 1072 (9th Cir. 1999).

[63] See, e.g., Liquid Audio Hits MP3.com with Cease and Desist (Nov. 1, 1998), URL: <http://www.mp3.com/news/122.html>.

manufacturer of the Rio portable MP3 player as a threat against all consumer electronics manufacturers, and demanded that no business market a portable device capable of playing MP3 files. Instead, the Recording Industry Association insisted, portable digital players should be compatible only with secure, encrypted recording formats. The courts, however, ruled that the lawsuit against the Rio was meritless.[64] Meanwhile, the recording industry failed to come up with a competing digital specification. Thus, in the spring of 1999, as consumer electronics manufacturers geared up their production lines for the Christmas season, there was little secure encrypted musical content available for download, and lots of MP3 files. A device designed to play scarce content but to be incompatible with the content consumers wanted to play was unlikely to make it into a lot of Christmas stockings.

The Recording Industry Association began looking for a fallback position. It proposed that manufacturers market portable devices temporarily capable of playing MP3 files. The devices would incorporate a trigger, however, which could be activated remotely once the recording industry's Secure Digital Music Initiative was up and running, to disable MP3 compatibility. As described in the popular press, the compromise would mean that consumers could run out and buy portable digital players that would allow them to listen to downloaded music in the MP3 format as well as such music as they might be able to find in the encrypted SDMI format. One day in the not so far future, the recording industry would direct manufacturers to press some virtual button, sending a signal to all portable digital players, wherever they might be. The signal would suddenly disable the device from playing any MP3 files at all, forcing the consumer to either toss her player in the trash or run to her computer and download encrypted replacements.[65] That proposal proved unpopular with device manufacturers. Without a robust secure digital music specification, the recording industry has so far been unable to muscle unencrypted music out of the marketplace. Record companies have settled for a two-stage rollout in which stage 1 machines will be MP3 compatible, but will be subject to a voluntary future software upgrade that will allow them to play SDMI music, and also prevent them from playing a still vaguely-defined category of other music.[66]

As the SDMI effort bogged down, a nineteen year old college freshman invented Napster, which may be the recording industry's worst nightmare. Napster is software that permits individuals to locate and share files across the Internet.[67] Shawn Fanning developed the software to make it easier to find, share and talk about music files with other music fans. He made the software

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[64] Recording Industry Association v. Diamond Multimedia, 180 F.3d 1072 (9th Cir. 1999), aff'g 29 F. Supp. 2d 624 (C.D. CA 1998).

[65] See Christopher Jones, Music Biz Builds a Time Bomb, WIRED News, May 14, 1999, at URL: <http://www.wired.com/news/news/technology/story/19682.html>.

[66] See SDMI Guide, supra note 31. The rollout of SDMI-compliant devices has thus far failed to proceed on schedule.

[67] See Peter Lewis, Napster Rocks the Web, New York Times, June 29, 2000 (Nat'l ed.) at D1.

available for free download; millions of people installed Napster and began trade MP3 files with one another. The recording industry filed suit against Napster even before the company could officially launch the product.[68] Napster and many of the individuals who use its software to exchange MP3 files have credible arguments that they are doing nothing illegal under current law.[69] The recording industry has pursued its lawsuit fervently, in the face of bad press from normally supportive sources,[70] because, from its vantage point, it would be intolerable that Napter be legal.

The recording industry's campaign to banish MP3 from the Internet has so far failed because the industry has consistently overplayed its hand. It demanded too much in return for too little. It asked consumers, websites and consumer electronics manufacturers to shun a popular format in favor of a specification that was, and is still, vaporware. This temporary defeat, however, may not mean much in the long term. The most prominent MP3 sites have already succumbed to Internet IPO fever.[71] They, too, are looking for ways to make money fast selling digital music. They aren't volunteers any more, and they have stockholders to please.

IV.

We are in the end stages of a takeover of domain name space, in which control over Internet domain names is being handed over to the private sector.[72] The domain name system, which pairs unique numbers corresponding to computers connected to the Internet with easy-to-remember alphanumeric strings, originated for the convenience of human users. The Internic, under contract to the U.S. government, handed out domain names on a first-come, first-served basis.[73] The first applicant for the domain ACME.COM, for example, was neither Acme Auto Repair nor Warner Brothers, but a fellow named Jef

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[68] See A&M Records v. Napster, Inc., 54 U.S.P.Q.2D (BNA) 1746 (N.D. Cal. 2000).

[69] Napster has a strong argument under Sony v. Universal City Studios, 464 U.S. 417 (1984), that it cannot be held liable for contributory infringement because its service is capable of substantial non-infringing use. Individuals' exchange of MP3 files are an unlikely candidate for fair use, but may fall within the statutory exemption for specified noncommercial consumer reproductions of musical recordings. 17 U.S.C. § 1008. In addition, Napster has asserted that it fits the statutory definition of a "service provider" in section 512 of the statute, and is therefore entitled to claim the benefit of the service provider safe harbor. See supra notes 52 -- 55 and accompanying text. Napster's activities seem to fit within the literal language of the statute. On May 5, 2000, however, Judge Patel denied Napster's summary judgment motion on its asserted 512 defense. 2000 U.S. Dist. LEXIS 6243 at 29-30.

[70] See Napster Agonistes, Wall Street Journal, June 19, 2000; Why Block Free Exchange of Records and Movies?, USA Today, June 23, 2000, at 16A.

[71] See Joanna Glasner, Musicmaker IPO Hits High Note, WIRED News, July 7, 1999, at URL: <http://www.wired.com/news/news/politics/mpthree/story/20606.html>; Beth Lipton, Net music gets louder next week, C|net News.Com, July 16, 1999, at URL: <http://www.news.com/News/Item/0,4,39310,00.html>; Richtel, supra note 21.

[72] See Larry Lessig, Governance and the DNS Process, URL: <http://cyber.harvard.edu/works/lessig/cpsr.pdf>; U.S. Government Working Group on Electronic Commerce, supra note 11, at 12-13.

[73] See generally Ellen Rony & Peter Rony, The Domain Name Handbook 15-244 (1998).

Poskanzer who has long been a fan of Wile E. Coyote;[74] the first applicant for CANDYLAND.COM was not Hasbro, but the proprietor of a sexually explicit Web site.[75] Outraged trademark owners filed trademark infringement suits against occupiers of domains they wanted for themselves.[76] Some won;[77] some lost.[78] The trademark bar insisted that the only legitimate domain name use of an alphanumeric string that was also a trademark was a trademark use by the trademark owner. They demanded a system that allowed trademark owners to oust non-trademark owners of domain names incorporating their marks, and that permitted trademark owners to prevent any subsequent registration of any domain name incorporating their marks in any top level domain.[79]

Trademark owners' legitimate concerns could have been resolved by expanding the number of generic top level domains to give multiple claimants access to domains containing the same alphanumeric strings. Jef Poskanzer could keep ACME.COM, and Warner Brothers could take ACME.BIZ, while the Acme glass company could have ACME.GLASS and so forth.[80] That struck the trademark bar as absolutely unacceptable: the owner of the mark TRADEMARK® not only wanted (and argued that it was entitled to) a domain name featuring TRADEMARK, but needed and (was entitled) to be the *only* entity on the Internet that had a domain name containing TRADEMARK. Multiplying the top level domains, trademark owners argued, would merely multiply the potential for confusion.[81]

As a prediction, that one is flawed. Consumers know that there are lots of different businesses named Acme, and don't expect any given Acme to be the particular Acme they have in mind. If consumers learned that there were lots of acme-based domain names on the web, they wouldn't expect any particular one to belong to either Poskanzer or Warner Brothers. They wouldn't be confused.

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[74] See Acme Laboratories, URL: <http://www.acme.com>.

[75] See Hasbro, Inc. v. Internet Entertainment Group, 40 U.S.P.Q.2d 1479 (W.D. Wash. 1996).

[76] See Rony & Rony, supra note 73, at 299-378.

[77] See, e.g., Cardservice International, Inc. v. McGee, 950 F. Supp. 737 (E.D. Va. 1997); Hasbro, Inc. v. Internet Entertainment Group, 40 U.S.P.Q.2d 1479 (W.D. Wash. 1996); Intermatic Inc. v. Toeppen, 40 U.S.P.Q.2d 1412 (N.D. Ill. 1996).

[78] See, e.g., Gateway 2000 v. Gateway.com, 1997 U.S. Dist. LEXIS 2144 (W.D.N.C. 1997); Maritz v. Cybergold, 947 F. Supp. 1338 (E.D. Mo. 1996).

[79] See Craig Simon, Overview of the DNS Controversy (May 19, 2000), URL: <http://www.flywheel.com/ircw/overview.html>.

[80] See Jonathan Postel, Memorandum: New Registries and the Delegation of International Top Level Domain (June 1996) , online at URL: <http://www.newdom.com/archive/draft-postel-iana-itld-admin-01.txt>; Generic Top Level Domain Memorandum of Understanding § 9, Feb. 28, 1997, at URL: <http://www.gTLD-MoU.org/gTLD-MoU.html >.

[81] See International Trademark Association, INTA Response to the U.S. Government Paper on the Improvement of Technical Management of Internet Names and Addresses (March 18, 1998), URL: <http://www.ntia.doc.gov/ntiahome/domainname/130dftmail/scanned/INTA.htm>; Continued Oversight Hearing before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (Feb. 12, 1998) (testimony of David C. Stimson, INTA).

Of course, a powerful potential marketing tool might thereby be lost, but that, without more, seems an insufficient reason to structure the Internet domain name system around trademark owners' demands. Trademark owners have insisted that they need to control any domain names containing words over which they claim trademark rights, but they want not to dilute the value of that asset by multiplying it. Instead, they demanded a way to preemptively reserve domain names containing their marks across all top level domains.[82]

Congress was sympathetic.[83] The Clinton administration had committed itself to restructuring the legal infrastructure of the Internet to facilitate electronic commerce,[84] and the trademark bar insisted that a trademark-friendly domain name system was a crucial part of that transition.[85] Trademark owners pushed hard, in both international and domestic fora, to recast the domain name system into something more hospitable to the owners of valuable trademarks, and downright hostile to folks who select their domain names with something other than trademark rights in mind.[86]

The White House directed the Commerce Department to supervise the privatization of the administration of the Domain Name System in a fashion that resolved trademark owners' concerns.[87] Working closely with a variety of different industry interests, the Commerce Department came up with ICANN -- the "Internet Corporation for Assigned Names and Numbers."[88] ICANN has generated an enormous amount of controversy for a range of reasons, most of them related to a perception that it is neither broadly representative of the universe of Internet users nor designed in a way to make it accountable to its constituents.[89] The fact that ICANN's assurances to the Commerce Department incorporate explicit and implicit promises that established commercial speakers

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[82] See World Intellectual Property Organization, Interim Report on the WIPO Internet Domain Name Process, Chapter 4 at ¶¶ 202-244, URL: <http://wipo2.wipo.int/process/eng/processhome.html>.

[83] See generally Intellectual Property: Oversight Hearings on Internet Domain Trademark Protection Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 1st & 2d Sess. (1998); Internet Domain Names: Hearing Before the Subcomm. On Basic Research of the House Science Comm., 105th Cong., 1st & 2d Sess. (1998).

[84] See U.S. Government Working Group on Electronic Commerce, supra note 11.

[85] See, e.g, International Trademark Association, supra note 81; International Trademark Association, Harmonizing Domain Names and Brand Protection, URL: <http://www.inta.org/harmdom.htm>.

[86] See Jessica Litman, The DNS Wars: Trademarks and the Internet Domain Name System, 4 J. Small & Emerging Bus. L 149 (2000).

[87] See U.S. Government Working Group on Electronic Commerce, supra note 11, at 12.

[88] See Lessig, supra note 72; ICANN Home Page, URL: <http://www.icann.org>.

[89] See Domain Name System Privatization: Is ICANN Out of Control?: Hearing Before the Subcomm. On Oversight and Investigations of the House Comm. on Commerce, 106th Cong., 1st Sess. (July 22, 1999) (testimony of Jonathan Weinberg, Wayne State University); Ellen Roney & Peter Rony, The Domain Name Handbook, URL: <http://www.domainhandbook.com/>; Berkman Center for Internet & Society, ICANN Public Meetings, URL: <http://cyber.law.harvard.edu/icann/>.

will find it easy to take valuable domain names away from small companies, amateurs and volunteers (and will further be able to limit them in their efforts to get new ones) has not yet been high on the list of popular objections.[90] That may change. With the Department of Commerce's approval, ICANN adopted an organizational structure that gives representatives of intellectual property interests a influential role in any decisions.[91] In 1999 ICANN adopted a mandatory arbitration procedure to permit owners of trademarks and service marks to oust prior domain name registrants.[92] Although ICANN's initial charge included responsibility for creating new generic top level domains to compete with .com,[93] ICANN has thus far confined itself to studying whether to do so.[94] Trademark interests, meanwhile, have insisted that any introduction of a new top level domain be preceded by an opportunity to give trademark and service mark owners the ability to preempt the registration of any domain name similar to any trademark or service mark in any generic top level domain.[95]

As ICANN put its dispute resolution procedure in place, impatient trademark owners persuaded Congress to enact the *Anticybersquatting Consumer Protection Act*, giving trademark owners a sheaf of new remedies against registrants of domain names alleged to infringe or dilute their trademarks.[96]

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[90] But see Domain Name System Privatization, supra note 89 (testimony of Mikki Barry, Domain Name Rights Coalition); A. Michael Froomkin, A Critique of WIPO's RFC 3 (February, 1999) at URL: <http://www.law.miami.edu/~amf/>; Jonathan Weinberg, Comments on WIPO RFC-3, URL: <http://www.law.wayne.edu/weinberg/rfc3.pdf>.

[91] See ICANN Organizational Chart (modified 4/23/00), URL: <http://www.icann.org/general/icann-org-chart_frame.htm>; Milton Mueller, ICANN and Internet Governance: sorting through the debris of "self-regulation", 1 info, No. 6, December 1999 at 497, 519-520.

[92] See ICANN, Uniform Domain name Dispute Resolution Policy, URL: <http://www.icann.org/udrp/udrp.htm>; see, e.g., Fiber-Shield Industries v. Fiber Shield (Toronto) Ltd., NAF # FA1000092054 (Feb. 29, 2000); J. Crew International v. crew.com, WIPO # D2000-0054 (April 30, 2000); Hewlett-Packard Co. v. Burgar, NAF # FA2000093564 (April 10, 2000).

[93] See United States Department Of Commerce, Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (Jun. 10, 1998).

[94] See ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains (June 13, 2000), at URL: <http://www.icann.org/yokohama/new-tld-topic.htm>; ICANN DNSO Names Council, Consideration of Introducing New Generic Top-Level Domains (April 20, 2000), at <http://www.icann.org/dnso/gtld-topic-20apr00.htm>.

[95] See ICANN/DNSO Intellectual Property Constituency, Sunrise Proposal Plus 20 (April 14, 2000), at URL: <http://ipc.songbird.com/IPC_Sunrise_Proposal.htm>; ICANN DNSO Names Council Working Group B Final Report ,URL: < http://www.dnso.org/dnso/notes/20000515.NCwgb-report.html>.

[96] Anticybersquatting Consumer Protection Act, P.L. 106-113, div b, § 1000(a)(9), 113 Stat. 1536 (1999), codified at 15 U.S.C. 1125(D) (2000). See Sporty's Farm L.L.C., v. Sportsman's Market, Inc., 202 F.3d 489 (2d Cir. 2000); Caesars World v. Caesars-Palace.Com, 54 U.S.P.Q.2d (Bna) 1121 (E.D. Va 2000); Morrison & Foerster v. Wick, 94 F. Supp. 2d 1125 (D. Colo. 2000).

These developments would be less troubling if we didn't already have plenty of evidence that trademark owners were using the legal tools at their disposal to persuade legitimate users of contested alphanumeric strings to forgo lawful uses. Trademark owners have threatened litigation against amateurs, critics, fans, children and coincidental adopters of domain names claimed to be too close to valuable marks.[97] Trademark litigants have insisted that because Internet search engines index sites according to all of the words that they contain, use of a trademarked word on a site, or even in the meta tags to a site, constitutes infringement and dilution.[98] The idea, here, is that if a customer seeking, say, PLAYBOY® ONLINE, types the word "playboy" into a search engine, and receives a list of links including a page maintained by someone who used to be a Playboy Playmate, and another by someone who insists the erotic pictures at the site are better than Playboy's, that Playboy's mark is thereby infringed and diluted.[99] Even worse, Playboy complains, on top of the list is a paid banner ad from some pornographic business that isn't Playboy's.[100] So far, the courts have, in the main, treated such claims cautiously, but plenty of threatened sites have chosen to close down or to conform their page to lawyers' demands rather than be dragged into court.[101] That is, we are perilously close to conceding that ownership of a trademark gives one the exclusive right to use the word on the Internet.

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[97] The well-publicized cases of two-year-old Veronica Sams's "Little Veronica" website at <http://www.veronica.org> and 12 year-old Chris "Pokey" Van Allen's web page at <http://www.pokey.org> pitted trademark owners against children whose parents had registered their children's names in the .org domain. The registration and operation of the web sites was unquestionably innocent, and there was no plausible likelihood that consumers would be misled. Nonetheless, in both cases, the trademark owners demanded that the children's web sites be taken down. A flood of negative publicity persuaded the trademark owners in both cases to back down. Publicity also persuaded the Colgate Palmolive Company to drop its legal action against Benjamin Kite, operator of a noncommercial site at www.ajax.org named after the Greek warrior. See Paul Festa, Ajax.org Wins Trademark Fight, C|Net News.Com, Oct. 20, 1998 at URL: <http://www.news.com/News/Item/0,4,27742,00.html>; How We Got Colgate Palmolive to Back Down, URL: <http://www.ajax.org/ajax/colpal/>.

[98] See, e.g., Playboy v. Welles, 7 F. Supp. 2d 1098 (SD Cal. 1998); Brookfield Communications v. West Coast Entertainment, 174 F.3d 1036 (9th Cir. 1999); Oppedahl & Larson v. Advanced Concepts, Civil Action No. 97-Z-1592 (D. Colo. 1997), URL: < http://www.patents.com/ac/index.sht>; Carl Kaplan, Cyberlaw Journal: Lawsuits Challenge Search Engines' Practice of 'Selling' Trademarks, N.Y. Times CyberTimes, February 12, 1999, at <http://www.nytimes.com/library/tech/99/02/cyber/cyberlaw/12law.html>.

[99] See Playboy v. Welles, 7 F. Supp. 2d 1098 (SD Cal. 1998); Playboy Enterprises v. Asia Focus, 1998 WL 724000 (ED Va 1998); Playboy Enterprises v. Calvin Designer Label, Civil Action No. 97-3204 CAL (filed 9/27/97). See also, e.g., Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997).

[100] See Playboy Enterprises v. Netscape Communications, 55 F. Supp. 2d 1070 (C.D. Cal.), aff'd, 202 F.3d 278 (9th Cir. 1999).

[101] See, e.g., Washington Post v. TotalNEWS, No. 97 Civ. 1190 (PKL). See generally Ellen Roney, Domain Name Handbook Domain Diaries, URL: <http://www.domainhandbook.com/dd.html>.

V.

In the past few years, we've seen a lot of something that used to be very rare, which is big companies going after little fish (college students, critics, amateurs and other volunteers) and threatening them with ruinous intellectual property litigation if they don't remove their stuff from the Web, or if they don't vacate a particular domain name, or if they don't buy a license and stop giving away their content for free. Entertainment companies are even cracking down on fan websites, apparently sufficiently concerned about volunteer competition to be willing to bite the hands that feed them.[102] Now, most of the little fish roll over and play dead. You would too, if it were going to cost you half a million dollars to get a court to say that what you'd been doing was perfectly legal. Some of them take their sites down,[103] some give up their domain names,[104] some buy licenses and start selling stuff they used to offer for free. But, if they decide to litigate, the new laws have a lot of sneaky legal tools in them that favor the big content owners.[105]

So, we have a trend. To make the Internet into a viable shopping mall, merchants need to evict the riff-raff who are hanging around and giving out free stuff. It's reminiscent of the behavior that goes on over rent-controlled apartments. We can't actually throw the occupants out, but we can make their lives unpleasant. We can make them all need to hire lawyers if they want to stick around. We can jigger the rules so that it's hard for them to win. In order to transform the Internet into an engine of economic growth, we have reformed the legal infrastructure in a host of ways to favor commercial speech over its noncommercial sisters.

Several years ago, when the news media spoke breathlessly of the Information Superhighway or the National Information Infrastructure as if it was going to be a hugely enhanced and expanded version of commercial

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[102] See, e.g., DC Comics Crackdown: A Heroes Special Report, Heroes May, 1999, at URL: <http://victorian.fortunecity.com/belvedere/223/archive/hsr1/ >; Webmasters for a Free La Femme Nikita, URL: <http://www.geocities.com/TelevisionCity/9932/index.htm>; Keeping the Menace Down, WIRED News, April 27, 1999 at URL: <http://www.wired.com/news/business/0,1367,19355,00.html>. One can spin the recent crackdowns on fan sites in different ways. Some (although not all) of the targeted sites were created by fans on Internet services, like Geocities.com and Tripod.com, that add banner advertisements to all subscriber web pages. The subscribers get none of the advertising revenue, but instead are given free or low-cost access to the Internet. One can sympathize with intellectual property owners who wish to ensure that only they receive such advertising revenue as is generated by their properties. On the other hand, the effect of a no-unauthorized-advertising policy, if that's what the recent crackdowns reflect, is to increase the cost of putting up fan sites by preventing their appearance on low-cost or free advertising-supported Internet access services.

[103] According to the RIAA, 60% of the sites it shut down in 1997 were college or university web pages. See Strauss, supra note 61.

[104] See Rony & Rony, supra note 73, at 299-378.

[105] See, e.g., 17 U.S.C. § 1201; 15 U.S.C. § 43(d).

subscription television augmented by lots of home shopping opportunities,[106] I chalked that vision up to a failure of imagination. Lately, I've been wondering whether I might not have underestimated it. Increasingly, it's looking like a blueprint for an edifice that's well under construction.

[106] See, e.g., Paul Farhi, TCI's Malone Quietly Assembling an Empire, Washington Post, Oct. 14, 1993 at A1; Benjamin J. Stein, More Channels, More Laziness, Washington Post, Nov. 2, 1993, at A19.