

**Putting down stakes: Exploring the political economy of property in cyberspace.**

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## **Introduction**

The law is a powerful force in the world. It has the ability to establish the truth and falsity of claims that extend far beyond the bounds of the customary restriction “under the law” (Balkin 2003). The law has the ability to establish as fact things that we know in our hearts are not so (Madison, 2005). As Balkin (2003: 8) puts it, law “is a form of cultural software that shapes the way we think about and apprehend the world.” Legal doctrines establish facts, as well as systems of rights and responsibilities associated with the social actors and objects that are created along with those facts (Tiller & Cross 2005). Among the facts established by law, we are especially concerned with the ways in which the law establishes a “cause of action” or a legal wrong.

Development and change in the nature of what we treat as right or wrong is the product of a complex interaction of socio-technical factors that include the strategic efforts of social actors seeking to maintain or establish advantage (Etzioni 1988). These actors bring a variety of resources to bear in their attempts to shape the law and its influence over the behavior of others. We have chosen to focus on the use of metaphor and analogy as resources in the discursive construction of the regime of rights that help to determine the reality of cyberspace.

## **Political economy and the transformation of cyberspace**

Cyberspace is the both the product and the process of its creation. Cyberspace is more than the Internet, although that socio-technical infrastructure of digital communication does provide the framework through which its countless interactions proceed. The number and variety of communicative interactions that define the character of cyberspace continue to expand as a function of socio-technical changes (Garrie 2005) that both shape, and are shaped by rather dramatic transformations in the global economy (Spar 2001).

Although there are ongoing debates about whether the emergence of global markets for information goods and services represents a fundamental change in the nature of the market system (Mosco 1996; Preston 2001; Webster 2002), there is little doubt that the commodification of information is a driving force in its transformation.

This process of commodification has been especially troubled, however, by the immaterial nature of information, and the associated difficulties of establishing the nature of property interests in these intangible goods (Landes & Posner 2004). Because of this difficulty, the effort to commodify information goods and services has meant an increase in legislative and judicial activity surrounding the problems related to the identification and enforcement of property rights (Chadwick 2006; Herman & Gandy 2006; Landes & Posner 2004).

We focus our attention in this chapter on the ways in which conflicts between cyberspace property and liberty interests are pursued within the US appellate court system. The appellate courts serve as the final authority on the meaning of legislative acts designed to control the behavior of cyberspace residents and transients. And, although the production of influence within the appellate court system differs in important ways from its production within the legislative arena (Baumgartner & Jones 1993), the pursuit of group interests through participation as petitioners or plaintiffs, or as friends of the court shares much in common with organized efforts to influence the legislative process. On the other hand, because appellate level judges tend not to be subject to the same kinds of periodic assessment that the election cycle represents for legislators, we assume that ideas and argumentation plays a more central role in these courts than in the nation's legislatures (Cass 1995). Although judicial decisions are bound to a certain degree by professional norms and expectations regarding the influence of legal doctrine and precedent, we are also mindful of the fact that jurists' interpretations of the law will be governed to some degree by their own moral, ethical and ideological cores (Balkin 1991).

A critical feature of laws regarding public and private property is the extent to which they provide a high level of confidence for innovators, investors, and consumers based on

their ability to predict how the law will be applied (Cass 2003). This concern with predictability is especially relevant to developments in the nature and variety of transactions that can be accomplished in cyberspace. This chapter will examine the ways in which the property rights system is being transformed within the appellate courts in the United States. Our focus will be on the use of language by different actors in the production of influence over judicial decisions.

## **The role of metaphor in the legal process**

In 1690 philosopher John Locke (1959: 146) wrote the following about metaphor:

... all the art of rhetoric, besides order and clearness; all the artificial and figurative application of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment; ... And therefore, however laudable or allowable oratory may render them in harangues and popular addresses, they are certainly, in all discourses that pretend to inform or instruct, wholly to be avoided...

Locke's concern about the misleading aspects of metaphor has been particularly salient within legal discourse. Susan Tiefenbrun (1986: 118-19) notes "Students of law are taught early in law school to avoid the use of emotive or metaphoric language in legal brief writing. Despite the generally held belief in this convention, metaphors are commonly found in cases." Further, as Haig Bosmajian (1992) demonstrates, it is the metaphors (or "tropological passages") in court opinions that are quoted in subsequent decisions.

That metaphors may, in fact, play a critical role in legal discourse, where clear, logical thinking is paramount, should no longer come as a surprise given recent work in the philosophy of language. Certainly, Frank Lakoff and Mark Johnson's (2003) seminal work, *Metaphors We Live By*, helped scholars across academic discourses gain a greater appreciation for the vital, central role of metaphor in human cognition and communication.

In Lakoff and Johnson's framework, metaphor is constructed of a *source* and *target* domain. The source domain is one in which the communicating agents are assumed to be familiar (or at least to share knowledge of certain relative characteristics) while the target domain is the less familiar area, where understanding can be increased via association with the source domain. The act of communicating in metaphor is an invitation to the receiver to consider the less familiar in terms of the more familiar. The familiar aspects of the source domain are its *entailments*. The entailments inherent in metaphoric expressions mean that certain aspects of the target domain are highlighted while others are hidden. This aspect of metaphorical concepts (that they both *highlight* and *hide*) has led to much criticism of legal metaphors such as the seemingly passé "cyberspace" and the still dominant "marketplace of ideas" (Ingber 1984).

## **The metaphoric construction of cyberspace**

The cyberspace "metaphor" is technically not a metaphor at all but a portmanteau -- a merging of the two words *cybernetics* and *space*. To say that the Internet is a "library" or a "town square" are metaphorical constructions that involve key entailments of a source domain (library, town square) that the receiver of the message can then map on to the target domain (the Internet). In the case of cyberspace, the entailments of this source domain, other than that it is some form of space, do not emerge from common experience. People derive their sense of the meaning of cyberspace from its usage in popular culture, mass media and other extant discourses.

At least partly for this reason, the cyberspace metaphor has had a tortuous history. While the word as first used was associated with freedom, independence and new frontiers (Barlow 1996; Johnson & Post 1996), its overt spatial entailments came to be seen as playing into established interests and the march of global capitalism (Cohen 2007; Lemley 2002; Hunter 2003). Today, the term seems to have lost much of its power (both positive and negative) and is instead just one of the words one might pull from a

thesaurus to avoid the stylistic *faux pas* of repeating the word Internet or network one too many times.<sup>1</sup>

### ***Marketplace of Ideas***

The “marketplace of ideas” reference, first coined by Justice Holmes in his dissenting opinion in the 1919 case *Abrams v. United States*, has become the dominant metaphor in free speech cases. Though the importance of the “marketplace of ideas” metaphor is beyond debate, its actual impact on legal discourse is harder to gauge. Cass Sunstein (1993a: 178) has criticized the metaphor for what it hides, for obscuring important aspects of free speech in a democracy: “The preconditions of an economic marketplace can be specified by the assumptions of neoclassical economics. The same is not at all true for the preconditions of a system of free expression.” In his view, “Aggregative or marketplace notions disregard the extent to which political outcomes are supposed to depend on discussion and debate, or a commitment to political equality, and on the reasons offered for or against alternatives” (Sunstein 1993a: 249).

Although there is clearly some truth to Sunstein's observation, the entailments of a given metaphor and its effects on legal and regulatory decisions are not always clear. Philip Napoli's (1999) examination of the “marketplace of ideas” metaphor in FCC policy discourse over a period of 33 years showed that it was used with two very distinct sets of entailments in mind: the “economic dimension,” which Sunstein criticizes above, and the “democratic theory dimension,” which is much more focused on the role of free speech in democratic self-government.

The results of Napoli's analysis indicate that the FCC has not consistently associated specific kinds of regulatory policymaking with particular interpretations of the marketplace of ideas concept. Thus, although the marketplace of ideas metaphor typically has been used to justify deregulation of the communications industry, these decisions

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<sup>1</sup> [Although we recognize its decreasing importance as strategic metaphor in legal argument, we remain partial to the term in academic prose for, at least, its value in referencing the phenomenon of global, electronic, networked communication that is not completely reducible to “the Internet.”](#)

have been predicated almost as much upon democratic theory principles as they have upon promoting economic efficiency and consumer satisfaction (Napoli 1999:164).

Napoli's observations help to underscore a number of key issues that arise in the study of metaphor and legal discourse. How does metaphor affect legal reasoning? What motivates its use? How does metaphor help jurists to understand new and unfamiliar legal contexts? In what cases can metaphor constrain reasoning in ways that negatively impact the public interest?

There is considerable disagreement in the legal literature as to the specific role of metaphor. Hunter (2003) suggests that metaphor, when used to understand the Internet, often clouds and constrains the thinking of the court. McGowan (2005), however, through careful readings of the cyber-trespass case law, makes a compelling counter-argument that judges are more sophisticated in their reasoning than the "metaphor claim" suggests. Further, McGowan (2005: 4) points out, focusing exclusively on metaphorical constraint "trivializes judicial opinions without engaging them."

While McGowan is persuasive, and his paper is a much needed correction to the "second enclosure movement discourse" and its tendency to have an unflattering, one dimensional view of judicial intellect, Balganes (2006) shows us that jurists can still be led astray. This can happen when a chain of case decisions, beginning with instrumental, rather than truly conceptual uses of metaphor, becomes locked into a conceptual path that ends up corrupting the core concepts along the way. Deference to precedents means that discursive course corrections become more and more difficult. This outcome is quite clear in the case of decisions regarding property and trespass.

In the case of intangible property, including the Internet, he suggests that:

This imposition of 'propertiness' is done through the use of metaphors, which transplant individual elements of property concepts from the tangible world to the intangible sphere. Thus, intangible equivalents

for the conceptual elements of boundaries, physical control, possession and the like are created in this process (Balganesh 2006: 316).

The troubles, according to Balganesh (2006: 282-3), began in earnest when a court needed to provide a rationale to justify its attempt to curb the actions of spammers. The *CompuServe* court reasoned that electronic “interference” with a server could be equated with a tangible invasion, and thus it was appropriate to apply the doctrine of trespass to transactions in cyberspace. The rhetorical stance selected by the court was not without consequence for subsequent cases involving troublesome “access” and “use” of Internet resources:

In the process of adapting the doctrine to meet the requirements of cyberspace and fashioning a new remedy however, courts soon began to ignore the conceptual nuances that it involved and had come to incorporate in recognition of the nature of the resources it was applied in relation to, i.e., movables. As a consequence, the body of law that has emerged in relation to cybertrespass is replete with doctrinal ambiguities and inconsistencies...(Balganesh 2006: 267).

The tragedy, in this case, may be that recovering from such a discursive misstep may be made increasingly difficult due to the nature of associated path dependencies.

## **Actors and interests**

Capitalism requires some degree of predictability for its operation. Entrepreneurs and investors, and to a certain extent, even consumers need to have some degree of confidence that promises will be honored. They all rely upon the courts to apply the laws in a predictable fashion when the facts of the case at hand are sufficiently similar to the facts of cases decided in the past (Stinchcombe 1999).

Courts (and judges) issue opinions that combine decisions and the rationales for them with carefully chosen analogies and metaphors in order to make their reasoning available to others as both justification and guidance (Berger 2002). When, as is quite likely in the case of cyberspace transgressions, there are competing doctrines that are arguably relevant to the facts at hand, judges can select the doctrine that supports a preferred policy outcome (Cass 1995). A well-crafted opinion that uses a familiar, or an especially

powerful metaphor to justify a particular doctrinal choice allows the court to appear principled, when it may in fact be pursuing a political end (Tiller & Cross 2005).

### ***Friends of the Court***

Friends of the court (amici) are active, and increasingly important participants in appellate decision-making (Kearney & Merrill, 2000; Songer & Sheehan, 1993). Their participation is limited primarily to the provision of formal arguments, or amicus briefs. Amicus briefs can be offered in support of petitioners, respondents, or they may claim neutrality, suggesting that their comments are not meant to favor either side. The nature of the interests that amici might pursue include the defense of institutional interests, such as those represented by members of congress who participate in cases in which congressional legislation and rulemaking authority is being challenged.

Paul Collins (2006) suggests that the arguments presented by “pressure groups” have had a measurable impact on the policy decisions reported by the Supreme Court. Amici play a role in the courts similar to that played by lobbyists seeking to influence the legislature—they provide information, including information about the preferences of other interested parties and the public more generally (Hula 1999; Songer & Sheehan 1993; Spriggs & Wahlbeck 1997). While the informational component of amicus briefs often contains “alternative and reframed legal arguments,” what Collins (2006: 11) sees as particularly important is the way these arguments are used to illustrate the “broader social ramifications of the case.”

While the influence of amicus briefs is difficult to determine clearly, in part as a function of the nature of the dependent measures chosen by analysts, as well as by a rather dramatic increase in the number of amicus briefs being submitted, most observers conclude that the ideological bias of the courts determines the extent to which a court will use arguments from an amicus brief (Kearney & Merrill 2000). Indeed, legal scholars suggest that when the court is politically unified, even established legal doctrine will be ignored if it is in conflict with the policy preferences of the majority (Tiller & Cross 2005). Such patterns are especially clear at the level of specialized courts, like the DC

Circuit Court when reviewing decisions by an administrative agency like the FCC (Cross & Tiller 1998).

### ***Issues, concerns and perspectives***

As new issues emerge in relation to the nature of information rights and responsibilities in cyberspace, parties and interests engage in active search for appropriate metaphors and analogies in an effort to shape the perspectives that will govern the courts' decisions (Lipton 2003; Madison 2004; O'Rourke 2001; Taylor & Madison 2006). Because, as Klaus Krippendorff (1993: 3) argues, "metaphors are the linguistic vehicles through which something new is constructed," it is appropriate that they are brought into use routinely in the judicial construction of cyberspace.

The ways in which a court might interpret the facts of a particular case involving the Internet may depend upon whether the discourse focuses on the ways in which users perceive their interactions or transactions, or on the ways in which an engineer might describe them. A users' perspective might reflect a kind of "virtual reality" that can be readily distinguished from the physical reality of computers, peripherals and network infrastructure. Orin Kerr (2003: 357) labels these two perspectives internal and external, and he suggests: "many of the disputes within the field of 'cyberlaw' boil down to clashes between internal and external perspectives."

We recognize that an internal perspective governs when users "surf the web" or "browse" through the products of an online store. We understand from an external perspective that the event appears "quite different -- and significantly more complicated" (Kerr 2003: 363). Typing the domain name "amazon.com" initiates a series of data exchanges between the individual's home computer, special computers on the Internet known as Domain Name Servers (DNS) and the servers owned by Amazon. In terms of the decisions that a court might make, it matters whether email is seen as similar, or critically distinct from the envelopes and packages delivered by postal workers.

Kerr (2003) argues that in our efforts to apply the laws of the physical world to those of the virtual world we tend to look for analogies or metaphors that support the application

of those laws. On the other hand, those who oppose constraints on the imagined freedoms of cyberspace challenge the appropriateness of those metaphors, and then they offer what they hope are more compelling alternatives (Froomkin 1995).

Just as the metaphors used to characterize cyberspace are likely to change as a function of the kinds of interactions and transactions that make up the primary uses of the Internet change, the metaphors used in judicial decisions and briefs are likely to change in response to the novel conflicts that arise (Moberly 2004). Intellectual property disputes have dramatically increased in prominence on the appellate courts' agendas (Landes & Posner 2004). Still other disputes surround attempts by corporate actors to transform information about consumers into valuable property that can be sold, traded, or used strategically for competitive advantage (Barnhizer 2006). Additional disputes over cyberspace objects and interactions are likely to emerge as persons seeking to protect their interests come to define those interests in terms of property (Lipton 2003; Radin 2006).

Cases that we see as being critical to the development of cyberspace are primarily concerned with the establishment and enforcement of property rights. However, these cases are also important because their resolution usually involves an effort to balance the interests of property holders, against other interests and values that are placed at risk as property rights are extended. We understand these risks as threats to freedom and autonomy. The search for a morally and politically defensible balance between property and liberty interests is at the heart of the judicial construction of cyberspace.

Among the more troublesome issues in the development of cyberspace law and policy is the nature of property, and the meaning of property rights as they relate to theft, unauthorized access or trespass (Loughlan 2006). In the context of capitalist markets, the right to exclude non-payers from access to information goods and services is the most important right. Transactions in cyberspace are fundamentally communicative interactions involving the flow of information between computers. Information is intangible or immaterial. Information is often confused with the material markers, like

books, films and records that make it accessible. It is the characteristics of information that leads economists to refer to information products as public goods (Hoskins, McFadyen & Finn 2004; Noll 1993).

Among the characteristics of public goods that are the most problematic for the establishment and enforcement of property rights are those relating to non-rivalry, and non-excludability. Non-rivalrous consumption means that use of information by one party does not reduce or limit the ability of additional parties to make use of that resource. This means that information can be “taken” and used, while still “possessed” by another. The fact that information is so easily accessed, and reproduced and distributed means that it is difficult, if not impossible to prevent access by others who may not be entitled to that access. These public goods characteristics have represented serious problems for the creation of markets for information goods and services, and the development of “intellectual property” law represents an attempt to establish meaningful rights in information (Landes & Posner 2004; Lemley 2005; Lipton 2003).

In order to convince the courts that property rights in information, or in the infrastructures that enable the exploitation of those rights have been abridged, plaintiffs have to establish parallels between crimes against property in the material world and crimes against property in cyberspace (Lipton 2003). A great variety of metaphors and analogies have been deployed in the attempt to establish the link (Loughlan 2006, Radin 2006).

For example, the charge of illegitimate enrichment, or the abuse of rights derived from the investment of labor invites the strategic deployment of a variety of metaphors about crimes against property. They often focus on the characterization of those who misbehave. Persons who derive benefit from the creative labor of others are compared with those who would “reap without sowing.” Such a construction is less menacing than the lawless and dangerous criminals whose image is evoked by reference to “pirates” (Loughlan 2006: 218). Nissenbaum (2004:199) identifies recent decisions by the courts as contributing to the characterization of hackers as the “white-collar criminals and

terrorists of the Information Age.” Because they have been constructed rhetorically as criminals, it is difficult for the uninvolved and uninformed to treat cases of “hactivism” as being similar to other forms of civil disobedience (Kreimer 2001), or to treat well-publicized hacks of supposedly secure systems as a form of whistle-blowing (Jordan & Taylor 1998: 773).

A difficult problem of representation emerges in those cases where the theft or misappropriation is based on unauthorized access to some facility. Here, the challenge is to describe this property in such a way as to make the law of trespass seem appropriate. Within the common law in the United States, important distinctions have been made between trespass to real property and trespass to chattels (Burke 1999; Collins, K. 2006; McGowan 2005; O’Rourke 2001). Gaining unauthorized access to documents, like email, may arguably involve unauthorized access to the servers on which the documents are stored.

Another issue of concern in cases involving crimes against property is the demonstration and assessment of the harm caused to the plaintiff or the plaintiff’s interests. The problems involved in this determination are quite substantial when the property is intangible, or the harm or loss is speculative or potential, rather than documented. Still, we find courts willing to grant that a plaintiff has met the requisite demonstration of harm when the burden has been as insignificant as an increase in the number of electrons “flowing through a system,” a loss of the full functionality of a server, or the distraction of otherwise productive workers by unauthorized e-mail.

## **Central cases**

We have identified a small number of cases as being critically important turning points in the path-dependent development of cyberspace property law. Our selection of these cases is not based entirely on our assessment of their impact—we have also been attracted to many of them because of the ways in which the deployment of metaphors reflects the primary division of property and liberty interests.

***MGM v. Grokster***

Of all the cases we examined, this intellectual property case drew the highest level of involvement by friends of the court. Fifty-five amicus briefs were filed, and the greatest proportion of these briefs (47.2%) supported the respondents (Grokster, et al.) or the lower court's favorable decision rejecting the charge of contributory infringement.

Briefs were presented by coalitions of academics, representing a variety of disciplines from intellectual property law to media studies and computer science. Briefs were also presented by coalitions of authors, music publishers, broadcasters, motion picture studios, as well as venture capitalists, and telecommunications service firms. Public interest organizations on the right and the left formed a loose coalition in support of the respondents, while the US government submitted a brief in support of MGM. A coalition of 39 state governments, excluding California, supported the copyright interests. They were joined by a coalition of high profile economists including Kenneth Arrow, Gary Becker, William Landes and Steven Levitt who charged the lower courts with encouraging inefficiency in markets, in part because they have relied too heavily on overly simplistic rules, such as those derived from *Sony* (Arrow, et al. 2005: 7-8).

Despite the number of amici supporting the network service provider, and P2P technology more generally, a unanimous Supreme Court ruled against Grokster, vacated the decision of the Circuit Court, and remanded the case for further determination of liability (MGM v. Grokster 2005).

Information service providers used a variety of metaphors to describe the status of a market in which a cloud of uncertainty hung over its participants. Where advocates of free speech were likely to talk about the "chilling effect" of a court's decision, investors and venture capitalists tended to talk about the risky and dangerous environment for entrepreneurs. Representatives of the copyright industries offered similarly gloomy images of the economic landscape they would face without a favorable decision by the court.

Because the *Grokster* case was so fundamentally concerned about the making of unauthorized copies, it was in the interest of those seeking to avoid restrictions on P2P technology to underscore the fact that digital technology in general, and the Internet in particular functioned by making copies. They relied upon metaphors and analogies based on an external perspective in order to inform the court how the technology worked. They argued that the operation of the Internet could not be imagined without widespread copying. The brief from the Intel Corporation reminded the court that “to access information from a book, one opens the book. But information stored digitally can be accessed only by copying it from stored memory...”(Intel Corporation 2005: 22). In the oral arguments phase of the case, Grokster’s representative, Richard Taranto, makes the point that nearly every component of the infrastructure, and nearly every participant in the process of Internet communication makes digital copies. He suggested that the challenge for the court was determining just “which pieces, if any, and under what standard, get singled out for a judicially fashioned secondary copyright liability doctrine” (Taranto 2005: 36).

The proposed “tests” that would determine whether a new technology was capable of “substantial non-infringing uses” came in for numerous pointed critiques. Intel suggested that the test would “require an innovator to have a crystal ball” because it would “require innovators to anticipate often unforeseeable infringing uses to which their inventions...might be put” (Intel Corporation 2005: 16-17).

*Grokster* amici frequently challenged the accuracy and relevance of metaphors offered by their opponents. In its brief, the National Venture Capitalist Association (NVCA) accused the entertainment industry of “crying wolf for a century, ever since John Philip Sousa claimed that the player piano spelled the end of music in America” (NVCA 2005: 11). They suggest that the industry is “like the drunk searching for his key under the street lamp because the light is there” when they “focus their attacks on the inventors, investors, and entrepreneurs who create the technologies that make the many acts of infringement so easy to commit” rather than on those who actually infringe (NVCA 2005:14).

***Universal City v. Reimerdes***

We examined the case of *Universal City v. Reimerdes* (2000) because of the ways in which a central feature of the Internet had been placed at risk by copyright interests seeking to extend liability to those who merely provide hypertext links to content. As in the *Grokster* case, *Reimerdes* (later *Corley*) attracted a large number of amici representing property and liberty interests.

First Amendment interests were concerned because the defendant, Eric Corley, was a publisher whose website often contained material related to stories printed in his magazine. In this case, the site included a copy of the decryption program “DeCSS”, so named because it was routinely used to “circumvent” CSS, the software that the motion picture industry was using to prevent unauthorized viewing and copying of its films. Corley’s site also included links to other websites that had posted the program. Following a decision by the District Court in NY to grant an injunction against Corley, he appealed to the 2<sup>nd</sup> Circuit. Although the Circuit Court recognized the complex policy issues balancing access and fair use aspects of communications and technology policy against copyright interests, they sidestepped those issues and affirmed the lower court decision barring posting or linking to other sites posting the software (*Universal City Studios, Inc. v. Corley* 2001).

There were two ways in which hyperlinks were discussed within the courts. One, which we would understand as an internal construction, emphasized the transportation of the user to some “place”; the other, which may also be presented from the users’ (internal) perspective, emphasized the transportation of text, or image, or in this case, a computer program to the user. External constructions focused on the actions, and the technology of the transfer. In noting the distinction, the Circuit Court re-visited the explanation offered by the District Court Judge (*Universal City Studios, v. Corley* 2001: 455-6):

In applying the DMCA to linking (via hyperlinks), Judge Kaplan recognized, as he had with DeCSS code, that a hyperlink has both a speech and a nonspeech component. It conveys information, the Internet address of the linked web page, and has the functional capacity to bring the content of the linked web page to the

user's computer screen (or, as Judge Kaplan put it, to 'take one almost instantaneously to the desired location").

The ACLU and its colleagues offered an extended metaphor describing the Internet as "a vast library" where "links serve as both its card catalog and its digital footnotes" (ACLU, et al. 2000: 21-22). The brief also suggested "linking effectively ties the entire web together into a single interconnected body of knowledge made up of all individually published web pages of different users around the world." Like the computer scientists, these amici sought to challenge the court's arguments regarding functionality by suggesting that if an annotated bible and Thomas Aquinas' commentaries were shelved near each other on a library's shelves, this enhanced access should somehow lessen the constitutional protection that those commentaries would ordinarily have enjoyed (ACLU, et al. 2000: 22-3). They also challenged the court's assertion that linking to a site with the DeCSS program was the "functional equivalent" of providing the program more directly (24).

The US government also saw this case as being of particular importance, and participated as an intervener in support of copyright interests. The government's brief repeated the district court's evocation of an internally oriented transportation metaphor to characterize the function of hyperlinks as a way to "transfer the user to another web page." In the government's view, the "sole function of a link is to 'take one almost instantaneously to the desired destination (on the Internet) with the mere click of an electronic mouse'" (United States 2000: 60-1).

The government rejected the characterization of code as speech, suggesting instead that links are "the technological bridges that connect different Internet web sites for myriad purposes." Further they argued that for "those who use Internet links to join with others who share their beliefs, the act of linking might be said to constitute association in cyberspace" (United States 2000: 64). By emphasizing the associative function of hyperlinks, the government sought to invoke the application of First Amendment principles that relate to associational contact, rather than speech and the press. Arguably

this was because associations whose purpose is unlawful do not enjoy the same level of constitutional protection as those whose views are merely unpopular.

The Court noted that the defendants and their allies focused on speech, and assiduously avoided consideration of the functional aspects of hyperlinks. In discussing the strategic use of metaphor and analogy, the Court noted that the:

Appellants' supplemental papers enthusiastically embraced the arguable analogy between printing bookstore addresses and displaying on a web page links to web sites at which DeCSS may be accessed.... Like many analogies posited to illuminate legal issues, the bookstore analogy is helpful primarily in identifying characteristics that distinguish it from the context of the pending dispute (Universal City Studios, v. Corley 2001: 457-457).

For the Court, the distinction that mattered was that the "digital world" ensured that "the materials are available for instantaneous worldwide distribution before any preventive measures can be effectively taken" (Universal City Studios, v. Corley 2001: 457).

### ***Additional cases***

A series of cases concerned with the use of cookies and other technical resources (Bellia 2005; Oppenheimer 2006) exemplified the extremes to which some courts would go in support of commercial interests when they conflict with the interests of segments of the public. In the *DoubleClick* case (2001), the court's opinion moved back and forth between internal and external perspectives. At one moment, the court notes in a footnote that "user" does not really refer to individuals, but to computers (DoubleClick 2001, note 7: 502). Later, however, in discussing the use of GIF tags, the court used an internal perspective in noting that "unseen, they record the users' movements throughout the affiliated Web site, enabling DoubleClick to learn what information the user sought and viewed" (DoubleClick 2001: 504).

The court rejected the effort by the plaintiffs to define consumers, rather than the web sites they visit as "users," in a failed attempt to establish that consumers, rather than the sites, have the right to accept or refuse cookies. The court relied upon an external perspective to define web sites as the most active users of Internet access (DoubleClick

2001: 509), but in the same opinion, the court proffered an internal, user-oriented perspective to establish a requisite level of consent (DoubleClick 2001: 511):

GIF information is generated and collected when users use their computer “mouse” or other instruments to navigate through Web pages and access information. Although the users’ requests for data come through clicks, not keystrokes, they nonetheless are voluntary and purposeful. Therefore, because plaintiffs’ GET, POST and GIF submissions to DoubleClick-affiliated Web sites are all “intended for” those Web sites, the Web sites’ authorization is sufficient to except DoubleClick’s access under § 2701 (c) (2).

*DoubleClick*, and a related case (Pharmatrak 2003) also demonstrate the reluctance of the courts to identify marketing and related invasions of privacy with actionable harm (Siebecker 2003). The courts suggest that the collection or capture of personal information through cookies or other devices is not harmful, even though the court recognizes that the information has economic value. And, despite the talk about the nature of the “attention economy” (Goldhaber 1997; Goldman 2006), the court said:

We do not commonly believe that the economic value of our attention is unjustly taken from us when we choose to watch a television show or read a newspaper with advertisements... We see no reason why Web site advertising should be treated any differently.... Similarly, although demographic information is valued highly (as DoubleClick undoubtedly believed when it paid over one billion dollars for Abacus), the value of its collection has never been considered an economic loss to the subject. Demographic information is constantly collected on all consumers by marketers, mail-order catalogues and retailers. However, we are unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors (DoubleClick 2001: 525).

Where a district court refused to find harm in repeated use of consumer information for marketing purposes, district and appeals courts found harm in the probability that the use of “robots” or automated queries of a database would be harmful, especially if others adopted the practice (*Register.com v. Verio* 2004: 404). A similar determination on the part of California appeals court judges (*Intel Corp. v. Hamidi* 2001) led the court to

stretch belief, logic, and legal doctrine in an attempt to make the facts of the case fit within the scope of the law governing trespass to chattels. Although the California Supreme Court reversed the lower court decision in the instant case (*Intel Corp. v. Hamidi* 2003), its comments on a prior line of cases reflected a willingness to embrace the chattels option rather than risk a more “hasty” metaphoric leap that would “propertize” the internet more completely (Balganesh 2006: 297-9). A relatively progressive California court specifically rejected a proposal with propertization at its core offered by conservative law and economics scholar Richard Epstein (*Intel Corp. v. Hamidi* 2003: 1360-61):

In effect, Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass. Epstein's argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it... Metaphor is a two-edged sword. Indeed, the metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass... That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property.

The court's use of an internal perspective to ridicule Epstein's proposal helps to remind us that metaphor, while influential, is not all powerful:

Since Intel does not claim Hamidi's electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the "hallways" of Intel's computers and bursting out of employees' computers to read them Hamidi's missives. But such fictions promise more confusion than clarity in the law (*Intel Corp. v. Hamidi* 2003: 1361).

The majority distanced itself from the posture taken by a dissenting opinion by accusing its author of having relied too heavily on analogies and metaphors that tended to distract the unwary from the “plain facts” regarding the nature of the act of communication.

## **Conclusion: Looking toward the future of cyberspace**

It would be naïve to assume that the decision by the California Supreme Court in *Hamidi* represents a final turning point along the path toward the future of cyberspace. Although the court majority appeared to understand the implications for speech and the flow of information that a wholesale metaphoric transformation of cyberspace into real property represents, there are enough signs in the decisions being made by other courts to suggest that the encirclement of the commons still proceeds at a steady clip (Balkin 2004; Lessig 2001). The defense of property interests through legal and technical means is especially likely to narrow the scope of reasonable expectations of privacy in cyberspace (Cohen 1996). The challenges to liberty interests don’t end there however, the ways in which we will enjoy cyberspace as a common space of free association may be further limited by the decisions of future courts.

In *Reimerdes*, the court denied that the hyperlink could be viewed as an act of speech but was willing to think of it as an act of association. In a more recent court case (*The Gentle Wind Project v. Judy Garvey*), the court was asked to consider whether the exchange of emails between putatively individual parties was enough to classify them as an “association-in-fact,” a form of illicit enterprise, one of the four elements a plaintiff must demonstrate in order to successfully establish liability under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Although the court determined that the simple exchange of emails was not enough to establish the existence of an organized entity, it also admitted that “it remains somewhat unclear what attributes are required to make an association of persons qualify as an ‘enterprise’ (*The Gentle Wind Project v. Judy Garvey*, US District Court of Maine, Civil No. 04-103-P-C, p. 8). Our analyses suggest that such a determination will depend upon the nature of the actors and interests that such associations place at risk.

We invite policy scholars to join us in the critical assessment of the ways in which interested parties deploy their rhetorical weapons in this ongoing struggle to establish and defend private and public terrain in cyberspace.

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