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Edited by
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Metaphoric reinforcement of the virtual fence

Factors shaping the political economy of property in cyberspace

Oscar H. Gandy, Jr. and Kenneth Neil Farrall

Understanding the political economy of the internet requires a comprehensive assessment of the strategic resources that interested actors bring to bear at critical points of engagement with those institutions that identify, assign, and enforce the rights and responsibilities that define it. This chapter is focused on the role of the U.S. Supreme Court and the appellate courts that help to set its agenda in defining the nature of property in cyberspace. An analysis of the strategic use of metaphor by justices, judges, plaintiffs, defendants, and a rapidly growing pool of “friends of the court,” reveals the ways in which boundaries are drawn, fences are raised, and rules regarding their height, density, and inviolability are set into place. While legal scholars assume that some logic governs the use of particular metaphors, such as those that reflect an internal or users’ perspective rather than an external or engineering orientation, the fact is that it is strategic impact, rather than logic or allegiance to a particular community of interest, that governs their use. Although continuing tension between property and liberty interests has marked the development of cyberspace, appellate courts have tended to use a broad array of metaphoric constructions to justify reinforcing limits on access to virtual property. The future of cyberspace will be shaped, explained, and justified through the strategic use of metaphors and analogies. The challenge will be to understand how their use reflects and reinforces existing distributions of power.

Fences are both a technical and a symbolic force when marshaled by those who seek to announce and defend their property interests. Fences are also seen as a constraint on the freedom of others to make use of public or collective resources. Although the ultimate status of a particular bit of fence was often determined through the use of deadly force (Anderson and Hill, 1975), the resolution of these conflicts at a more general level came to depend upon the establishment, interpretation, and enforcement of the rule of law (McFerrin and Wills, 2007).

Laws defending the use of barbed wire in the American West had much in common with Section 1201 of the Digital Millennium Copyright Act (Herman and Gandy, 2006). Each served to reinforce the claims of property rights holders who were engaged in the development of new frontiers.

The power of law is magical. It 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 and Cross, 2005). 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 power or advantage over others (Etzioni, 1988). These actors bring a variety of resources to bear in their attempts to shape the law and its influence over behavior. We have chosen to focus on the use of metaphor and analogy as resources in the discursive construction of the regime of rights and responsibilities that helps to determine the character of cyberspace.

Political economy and the transformation of cyberspace

Cyberspace is more than the internet, although its infrastructure provides the matrix within which its countless transactions and interactions take place. The number and variety of communicative interactions that determine the character of cyberspace continue to expand as a function of socio-technical factors (Garrie, 2005) that both shape, and are shaped by, 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 (Webster, 2002), there is little doubt that the commodification of information has been 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 and

defending property interests in these intangible goods. A substantial increase in legislative and judicial activity has been a largely ineffective response to this growing uncertainty (Landes and Posner, 2004).

We focus our attention in this chapter on the ways in which conflicts between property and liberty interests in cyberspace have been pursued within the U.S. appellate court system. The appellate courts serve as the final authority on the meaning of legislative acts designed to establish rights as well as to control the behavior of cyberspace residents and guests. And, although the production of influence within the appellate court system differs in important ways from its production within the legislative arena (Baumgartner and Jones, 1993), the pursuit of group interests in both venues shares much in common.

Although judicial decisions are constrained to a certain extent 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 shaped to some degree by their own moral, ethical, and ideological commitments (Balkin, 1991).

The metaphoric construction of cyberspace

In 1690 philosopher John Locke 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, 1959: 146)

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, however, metaphors are commonly found in cases.” Further, as Haig Bosmajian (1992) demonstrates, it is the metaphors (or “tropological passages”) in court opinions that are likely to be 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, George 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.

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.

The cyberspace metaphor has had a tortuous history. While the word as first used was associated with freedom, independence, and new frontiers (Barlow, 1996; Post and Johnson, 2006), its overt spatial entailments came to be seen as playing into the hands of established interests and the march of global capitalism (Cohen, 2007). Far too often, from the perspective of some, courts have tended to oppose the treatment of cyberspace locales as equivalent to spaces in the material world, in part because it might subject service providers to additional burdens under equal accommodations laws (*Access Now v. Southwest Airlines*, 2002). 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.

Metaphor as a twin-edged sword

There is considerable disagreement in the legal literature as to the specific role of metaphor in the development of cyberspace. Hunter (2001) 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 metaphoric blinders' criticism suggests. Further, as McGowan (2005: 4) points out, focusing exclusively on metaphorical constraint "trivializes judicial opinions without engaging them."

While McGowan is persuasive, Balganesch (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 activated by familiar metaphors means that discursive course corrections become more and more difficult. This outcome is quite clear in the case of decisions regarding the definition of property and trespass as they relate to intangibles (Balganesch, 2006: 316).

The troubles, according to Balganesch (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 his view, the "doctrinal ambiguities and inconsistencies" that have followed the *CompuServe* decision (Balganesch, 2006: 267) may make recovering from its discursive mis-steps exceedingly difficult due to the nature of associated path dependencies.

Metaphoric dominance and distortion

The fact that metaphors both highlight and hide has led to much criticism of

particularly dominant legal metaphors such as the "marketplace of ideas" (Ingber, 1984). The phrase, 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. On the other hand, although the importance of the marketplace of ideas metaphor is beyond debate, its actual impact on legal discourse is harder to gauge. Cass Sunstein (1993) has criticized the metaphor for what it hides, for obscuring important aspects of free speech in a democracy. 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, 1993: 249).

Philip Napoli's (1999) examination of the use of the marketplace metaphor in the Federal Communications Commission (FCC) policy discourse over a period of 33 years showed that it had been 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.

Napoli's analysis suggests that the FCC has not consistently associated specific kinds of regulatory policy-making with particular interpretations of the marketplace of ideas concept. Thus, although this metaphor typically has been used to justify deregulation of the communications industry, these decisions have been predicated almost as much upon democratic theory principles as they have upon the goal of 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?

The strategic use of metaphor

In order to answer these questions, we must first recognize that metaphors are instrumental resources, used strategically by plaintiffs, defendants, and a host of interested parties in an effort to influence the outcome of a court's deliberation. These discursive resources are deployed at critical moments through well-established channels and means that include briefs, direct testimony, and the majority and dissenting opinions of the court.

Courts (and judges) issue finely crafted opinions that are woven throughout with analogies and metaphors that have been selected because of their likely effect in making judicial 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, opinions are likely to make use of a metaphor that foregrounds a particular doctrine that supports a preferred behavioral or policy outcome (Cass, 1995). A carefully constructed 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 and Cross, 2005).

Friends of the court (*amici*) are active, and increasingly important, participants in appellate decision-making (Kearney and Merrill, 2000). Their involvement is limited primarily to the provision of formal arguments, or *amicus* briefs. The nature of the interests that *amici* might pursue

are quite varied, but they include the defense of institutional interests, such as those represented by members of some professional group such as librarians or engineers. On occasion, members of Congress or representatives of administrative agencies offer briefs in support of prior decisions that have been 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 (Spriggs and 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 precisely, in part as a function of the nature of the dependent measures chosen by analysts (Songer and Sheehan, 1993), 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 highlight arguments drawn from an *amicus* brief (Kearney and Merrill, 2000). Indeed, legal scholars suggest that when a court is politically unified, even established legal doctrine will be ignored if it is in conflict with the policy preferences of the court's majority (Tiller and Cross, 2005).

Property versus liberty interests

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). Conflicts over objects and interactions in cyberspace tend to arise as individuals and institutions seeking to protect their interests come to define those interests in terms of property (Radin, 2006).

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, 2004).

A difficult problem of representation emerges in those cases where the theft or misappropriation of property 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 (McGowan, 2005).

Often in cases in which the nature of the link between tangible property and theft is difficult to establish, petitioners will deploy metaphors that they hope will influence the characterization of those charged with misbehavior. 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 image of lawless and dangerous criminals that 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 hacktivism as

being similar to other forms of civil disobedience (Kreimer, 2001), or to accept well-publicized hacks of supposedly secure systems as a form of whistle-blowing (Jordan and Taylor, 1998: 773).

Another difficulty 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 even when the burden is as insignificant as an increase in the number of electrons flowing through a system, some temporary loss of the full functionality of a server, or the distraction of otherwise productive workers by unauthorized e-mail (*Intel Corp. v. Hamidi*, 2003). The courts' assessments of these burdens are rarely based upon any readily agreeable standard of measure; instead they reflect the courts' evaluation of the relative worth of an imagined class of victims and the agents who might cause them harm. Well-chosen metaphors help to establish and reinforce the impressions that their sponsors desire.

The tyranny of perspective: internal versus external

The ways in which a court might interpret the facts of a particular cyberspace case 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.”

As Kerr (2003) observes, judges and other participants move easily between internal and external perspectives, depending upon the nature of the argument they seek to make. He suggests 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 particular doctrines. On the other hand, those who oppose constraints on the imagined freedoms of cyberspace challenge the appropriateness of those metaphors (Froomkin, 1995). Legal scholars, such as Lawrence Lessig, who frequently intervene as friends of the court, often reveal well-established preferences for one perspective over another. Kerr (2003: 374) identifies Lessig’s famous declaration that “Code is law” as the basis for his belief that “because external code is internal law, we should regulate external code from an internal perspective.”

We are not in a position to suggest which perspectives should determine the outcome of cases and the future of cyberspace; instead we seek to characterize the ways in which these perspectives, inherent in the metaphors chosen to convey them, have been used strategically by the competing interests that come before the court.

Central cases and their metaphors

We have identified three cases that we believe mark critically important turning points in the path-dependent development of cyberspace. We have also been attracted to these cases because of the ways in which the deployment of metaphors reflects fundamental tensions between property and liberty interests.

The judges who decide these cases arguably seek to achieve an appropriate balance between the interests of property holders and a host of other interests and values that are placed at risk as property rights are extended or reinforced. We understand many of these risks as threats to freedom and autonomy. We see the search for a morally and politically defensible balance between property and liberty interests as being at the heart of the judicial construction of cyberspace. We review these cases in chronological order because each provides a framework against which the subsequent cases are likely to be compared.

Universal City Studios v. Reimerdes: hyperlinks as the ties that bind

We examined the case of *Universal City Studios v. Reimerdes* (2000) because of the ways in which a fundamental feature of cyberspace navigation was explicitly challenged. The U.S. Court of Appeals affirmed the decision of a lower court that barred the publication of a computer program, or the provision of hypertext links to other websites publishing the program because of its likely use for copyright infringement.

The *Reimerdes* (later *Corley*) case attracted a large number of amici representing both property and liberty interests (*Universal City Studios v. Corley*, 2001). First Amendment interests were involved because the defendant, Eric Corley, was a publisher whose website often contained material related to stories printed in his magazine. In this particular 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 2nd Circuit. Although the Court explicitly recognized the complex policy concerns that required the balancing of access and fair use aspects of communications and technology policy against copyright interests, they chose to sidestep these issues and define the provision of hyperlinks as the equivalent of trafficking in dangerous contraband.

There were two ways in which hyperlinks were discussed within the courts. One, which we would characterize as an internal construction, emphasized the transportation of the user to some place; the other, which was also 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 of users, and the technology involved in the transfer. In noting the distinction, the Circuit Court revisited the explanation offered by the District Court judge:

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").

(Universal City Studios v. Corley,
2001: 455–6)

The American Civil Liberties Union (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.*, 2001: 21–2). 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 many of the participating 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.*, 2001: 22–4). 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.

The U.S. government also saw this case as being of particular importance, and participated as an intervenor 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, 2001: 60–1).

On the other hand, the government rejected the characterization of code as speech, suggesting instead that hyperlinks are "the technological bridges that connect different internet websites 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, 2001: 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 would not enjoy the same level of constitutional protection as the speech of those whose views are merely unpopular.

The Court noted that the defendants and their allies focused on speech, while assiduously avoiding consideration of the functional aspects of hyperlinks. In discussing this transparently 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 websites 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)

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*).

Despite its implications for First Amendment interests and concerns, this Court acted to defend copyright interests against what it came to see as a never-ending series of technologically enabled threats.

United States v. American Libraries Association: *filtering the public sphere*

The second case we have selected differs in critical ways from the other two because its fundamental conflict over cyberspace

technology pits public libraries against the federal government, and does not directly involve a struggle over exploitative rights.

In its long-term struggle to erect fences or technological barriers that would prevent children from gaining access to pornography or other dangerous content, the U.S. Congress sought to require libraries to install filters that would screen out objectionable material with the Children's Internet Protection Act 2000 (CIPA). The American Library Association (ALA) argued that the imposition of a filtering requirement was an unconstitutional limit on the rights of adult users of the library. While the ALA had been successful in convincing a District Court that internet access in a library was a public forum, and therefore entitled to substantial First Amendment protections, the Supreme Court majority was not so easily persuaded.

The metaphoric struggles in this case were focused on the characterization of a public library's activities with regard to the internet. The first, and perhaps most important, issue was the extent to which the provision of internet access for its clients was the same as, or equivalent to, the establishment of a public forum. The second issue was related to a comparison of filtering with other routine decisions about which books and periodicals the library would acquire for the benefit of its clients.

The majority argued that the provision of internet access did not create a designated public forum because libraries did not introduce internet terminals to "create a public forum for web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak" or to "encourage a diversity of views from private speakers." They agreed with Congress that the internet was "no more than a technological extension of the book stack" (*U.S. v. ALA, 2003: 206-7*).

With regard to petitioner's arguments about the lack of discretion over which

websites would be blocked or screened out, the majority focused on the rapidly evolving character of the internet, and the virtual impossibility of librarians making informed decisions about which content to block. What really mattered to the majority, however, was whether the use of blocking software could be equated with other decisions that libraries made about their collections. The majority held that “a library’s decision to use filtering software is a collection decision, not a restraint on private speech” (*U.S. v. ALA*, 2003: 209).

In their dissents, Justices Souter and Ginsburg engaged the distinction between decisions about which materials to acquire, and the blocking of content from all of the library’s public terminals. Their rejection of equivalence is explicit and extensive:

At every significant point, however, the internet blocking here defies comparison to the process of acquisition. ... deciding against buying a book means there is no book ... but blocking the internet is merely blocking access purchased in its entirety ... The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable “purpose,” or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.

(*U.S. v. ALA*, 2003: 236–7).

Although neither Souter nor Ginsburg credit any of the amici for the metaphors they use in their dissent, the core of their argument can be found in the brief submitted by the American Publishers Association:

CIPA takes such decisions away from libraries and delegates them to software filtering companies whose

proprietary criteria for blocking material are completely hidden from public scrutiny. This is in no way analogous to a decision by libraries to acquire a book on Mark Twain rather than one on rap music, for example. It is, instead, analogous to the scissoring by a government contractor of important articles from a magazine to which the library subscribes and to which library patrons expect full access.

(*APA*, 2003: 3)

The majority appears to have been convinced, or at least supported by the metaphoric constructions included in the brief submitted by the state of Texas, and from a group of legislators who had sponsored the original legislation.

As a counter to the criticism of the imprecision of available filters, the legislative supporters of CIPA suggested that: “The fundamental question presented, then, is whether public libraries, merely by providing internet access, are constitutionally required to relinquish all editorial discretion over what is permitted in the library ... simply because current technology does not permit them to exclude such material with mathematical precision” (Lott *et al.*, 2003: 4).

The court majority based its rejection of the public forum designation on an assumption about the kinds of discretion that librarians, like public broadcasters, have to exercise over what to acquire and make available to the public. The fact that requiring librarians to delegate that responsibility to third-party vendors of blocking software would have the same effect apparently did not give the majority pause. The majority also rejected the public forum designation because the internet, as a novel resource, could not be equated with public parks and sidewalks because “the doctrines surrounding traditional public forums may not be extended

to situations where such history is lacking” (*U.S. v. ALA*, 2003: 206).

The majority also appeared concerned that there was some risk involved in their application of the public forum doctrine to the internet so early in its development, because of the implications of such a doctrinal shift for future decisions. They expressed this concern early in the process through a series of pointed questions about other settings in which the public forum designation might or might not be applied. The response of the ALA’s representative, while on point, was apparently not sufficient to satisfy the court’s majority:

Well, Your Honor, if you allow the Government to define its forum as all content under the sun ... ever invented by mankind except the piece that they don’t like, then I submit that ... will be the end of the public forum doctrine because there will never be any situation in which the Government will be constrained in any way to censor out a particular piece of content ... from the public forum.

(Smith, 2003: 35–6)

The metaphors and analogies that dominated the discussion in the *U.S. v. ALA* case were almost entirely internal, reflecting the views of internet users. Although there was some attention paid to the mechanics of blocking, the fact that this technology was proprietary served to limit discussion to the consequences, rather than the details of its use, and the fact that no one had “presented any clearly superior or better fitting alternative” (*U.S. v. ALA*, 2003: 219).

MGM v. Grokster: safe havens and the engineer’s crystal ball

This final case involved a set of decisions with the potential to shape the future of

network technology. The U.S. Supreme Court rejected the decision of a lower court and created great uncertainty about the extent to which software distributors could be held liable for contributory infringement, despite the fact that their network resources could be used for substantial and socially important non-infringing uses (*MGM v. Grokster*, 2005). The case was seen as challenging an earlier and more liberal doctrine established by the *Sony* court (*Sony v. Universal City*, 1984). Without the benefit of the doubt previously granted to new information technology by *Sony*, many saw the future for technological innovation as far more unsettled and uncertain.

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 percent) 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 U.S. government submitted a brief in support of MGM. A coalition of 39 state governments, excluding California, also supported the copyright interests. They were joined by a group of high-profile economists including Kenneth Arrow, Gary Becker, William Landes, and Steven Levitt who charged the lower courts with encouraging inefficiency in markets (*Arrow et al.*, 2005: 7–8).

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 in the future without a favorable decision by the court.

Grokster amici frequently challenged the accuracy of the doomsday scenarios 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).

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 the use peer-to-peer (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 about how this technology actually worked. They argued that the current 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 Corp., 2005: 22). In the oral arguments phase of the case, *Grokster*'s representative, Richard Taranto, suggested that nearly every component of the infrastructure, and nearly every participant in the process of internet communication make digital copies. He concluded 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 Corp., 2005: 16-17).

The antidote to uncertainty among innovators and entrepreneurs was thought to reside in the *safe harbor* that *Sony*, "the 'Magna Carta' of the information technology industry" had established (Intellectual Property Professors, 2005: 10). Although the motion picture and copyright industry petitioners argued for a revision of the *Sony* safe harbor, with a standard more in line with that established by the Digital Millennium Copyright Act (DMCA) (MGM Reply Brief, 2005: 12), the Court was not yet ready to take that step. Although Justices Ginsburg and Breyer joined their colleagues in reversing the lower court's decision on the basis of evident criminal intent, they divided their colleagues with regard to the nature of the evidence that there was, or could be substantial non-infringing usage of P2P technology. Justices Breyer, Stevens, and O'Connor expressed support for the more forward looking meaning of "capable," while the conservative majority

seemed ready to condemn the technology on the basis of its early troublesome use (*MGM v. Grokster*, 2005).

Conclusion

In 1997, the Supreme Court rejected the Communications Decency Act as a tenable solution of the problem of children gaining access to pornography (*Reno v. ACLU*, 1997) in part because its survival also depended upon compelling demonstrations of awareness and intent on the part of likely defendants. More critically, the barriers to access that it would establish threatened the future of cyberspace. Indeed, the court expressed the belief that if the CDA were allowed to stand, they would be doing more than “burning the house to roast the pig”; their inaction would threaten to “torch a large segment of the internet community” (*Reno v. ACLU*, 1997: 882). The internet was too new, and potentially too important to the emerging information economy for the Court to allow it to be placed at risk in this way.

In 2003, however, the court approved the government’s alternative (CIPA), despite the obvious flaws in its technology. They did so in part because of the identity and character of its behavioral target: the nation’s public librarians. Despite charges of imprecision by amici and dissenting justices, the majority offered a tortured definition of informed choice to justify the installation of a technological fence. In claiming that a decision to use filtering technology was a collection decision, the court majority engaged in strategic misdirection: first by ignoring the fact that the use of filters was a requirement of funding, and a delegation of decision-making to the providers of filtering software, and second, by limiting the definition of speech to expression, ignoring the public’s interest in access to information.

We observed greater consistency in the appellate courts when the contending interests could be defined more clearly. The battle of good against evil set the copyright industry against pirates and those who would assist them. In its defense of copyright interests, the Court of Appeals upheld a lower court’s decision to ban the direct and indirect provision of software that could be used to gain unauthorized access to commercial media content. While there was considerable academic interest surrounding the extent to which computer software was speech, and therefore entitled to greater protection, the courts’ decisions were primarily based on the ways in which this speech actually functioned in cyberspace.

The courts’ commitment to defending copyright interests, however, would not be well served by an emphasis on an engineer’s understanding of hypertext. Instead, the Court of Appeals focused on the ways in which either users, or the content of interest to users, could be transported around the globe well before the publishers or legitimate content distributors could act to defend their property interests. In the *Reimerdes* case, the courts were little swayed by the efforts of amici to define the court’s ruling as imprecise, and a threat to the future of cyberspace. The court was willing to risk weakening the central infrastructure of global network in order to reinforce the links in copyrights’ virtual fence.

In the *Grokster* case, the determination of the court to defend copyright interests against the threat of cyberspace technology led them not only to overturn the decision of a lower court, but also to invite a frontal assault on established precedent at the highest level. In one sense, we might understand the driving force behind the challenge to P2P technology as an attempt to mine the safe harbor for innovators that *Sony* had provided.

Rather than rejecting *Sony* directly, however, the *Grokster* court argued that the lower court misunderstood its meaning. Future courts will determine the meaning of *Sony's* safe harbor unless a revision of the DMCA by the legislature provides a more agreeable solution to the conflict between the copyright industries and the developers of cyberspace.

On the horizon, battles over the commoditization of personal, especially transaction-generated, information will be fought using some of the metaphors that have been field tested in the cases we have reviewed in this chapter. More will be required.

Given the role of the legal fiction of property in protecting personal privacy in the course of U.S. history, it is still worth attending to the concept of property in the hopes of affecting some form of course correction within the courts. Approaches to privacy that construct it as an ongoing process of boundary negotiation rather than a stable condition or social good to be conserved (Margulis, 2003) have not gained much traction within political economy or surveillance studies. At the same time as communication and social practice increasingly shift to the electronic, networked world, people lose both the legal and physical affordances of privacy that have been associated with real property. Yet, as Balganesch (2006) has shown, the courts have been reluctant to create any new doctrines of online territoriality that would extend the concept of real property and the private spaces it affords to the internet.

It will not be easy to construct a new language of the online boundary, yet we cannot ignore a growing sense that we have somehow lost our ability to negotiate our personal boundaries. The resources we once had, in particular the walls, windows, doors, and fences of our private spaces, no longer hold sway, as it were, in

cyberspace. This is a problem desperately in need of scholarly attention.

Guide to further reading

For those interested in further exploring the nature of metaphor and analogy from a range of disciplinary perspectives, Ortony's (1993) edited book is a good start. Within cognitive science, Fauconnier and Turner's (2003) work on conceptual blending offers a rigorous theoretical model that explains how the juxtaposition of dissimilar concepts can generate powerful insights and fuel the evolution of language.

Blavin and Cohen (2002) provide a useful chronological overview of three dominant internet metaphors: information superhighway, internet as novel space (cyberspace), and internet as real space. Work by Hunter (2003) and Lemley (2003) provide important and oft-cited critiques of the use of spatial metaphors in internet law, in particular how the cyberspace as place metaphor and its application to trespass to chattels doctrine has enabled a second enclosure movement, a period of expanding property interests that Heller (1988) has called an "anti-commons." Benoliel (2005) takes a different approach to the issue of space and property online, suggesting the construction of online locales as a legal fiction could more easily facilitate the translation of territorial privacy rights to the internet. Cohen (2007) moves beyond the debates about what cyberspace is, and instead focuses on the social construction of the term and the emergent, contested relationship between embodied space and networked space.

Lessig's (1999, 2001, 2004) series of books provides the most thorough introduction to the dangers of the copyright regime and the increasing proprietization and commoditization of information, in particular its negative impact on creativity,

innovation, and culture. Benkler (2006) offers a detailed picture of the emerging structure of the “networked information economy” and demonstrates how its productivity and value can and does flourish without proprietary rights in the information it produces. While technically not

a metaphor, Zittrain’s (2006) new turn of phrase, the “generative internet,” is rife with linguistic entailments that challenge well-established assumptions about the open architecture of the internet and its support for the production and diffusion of innovations.

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