Chapter 24

Free Speech on the Internet

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§ 24:1 Free speech on the Internet

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .." First Amendment, United States Constitution

Although formally established by Act of Parliament almost 100 years after the First Amendment was drafted, Speakers' Corner of Hyde Park in London has been viewed as the embodiment of the concept that underlies the First Amendment—the idea that a society is better off if it permits robust, unfettered debate about the issues and topics of the day. Over the years, however, the speech and debate occurring in Speakers' Corner have increasingly been marginalized by the emergence of mass medium, radio, television, and large media conglomerates. The Internet offers an opportunity to reverse that trend, and to create a global Speakers' Corner at which people around the world can receive information, listen to debate, and express their views. But to ensure that the Internet can facilitate broad discourse and debate, the concepts and principles of the First Amendment must be applied to the new media of the Internet.

In the two hundred years of its history prior to the emergence of the Internet, the First Amendment underwent significant evolution and expansion of scope. There is very little from the debates in Congress in 1789 that explains what the words of the First Amendment mean. Scholars have concluded that the prevailing view of the Founders was likely the common law view expressed by Blackstone—that freedom of expression "consists in laying to previous restraint upon publications, and not in freedom from censure

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for criminal matter when published."[1] This approach was echoed in 1907 by Justice Holmes, who wrote that the main purpose of the First Amendment is "'to prevent all such previous restraints upon publications as had been practiced by other governments,' and [it does] not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[2]

Although the First Amendment may have started out primarily as a stricture against "prior restraint," by the time the Internet emerged the First Amendment afforded affirmative protection to a broad range of speech. Justice Holmes himself started the shift in approach, noting in 1919 that "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints . . .."[3] By the mid-1960s, the Supreme Court declared in a key First Amendment case that the issues presented there must be assessed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[4]

It is against this background of a far-reaching and speech-empowering First Amendment that the federal courts first began to grapple with the regulation of speech on the Internet.

And in the landmark decision *Reno v. American Civil Liberties Union*, the Court made clear that it understood the expression potential of the medium:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any person with a phone line can

[Section 24:1]

[1] 4 W. Blackstone's Commentaries on the Laws of England 151 (cited in Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 713–14, 51 S. Ct. 625, 75 L. Ed. 1357, 1 Media L. Rep. 1001 (1931)). *See generally* L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960).

[2] Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado, 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907).

[3] Schenck v. U.S., 249 U.S. 47, 51, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

[4] New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. 1527, 95 A.L.R.2d 1412 (1964).

> become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."[5]

The following seven sections provide a brief overview of the basic First Amendment principles and tests to be applied to the Internet. This overview does not attempt to trace the often uneven evolution of the legal theories, nor does it try to reconcile established First Amendment concepts that are at times in tension with one another. Its goal, instead, is to try to identify the critical tests and cases that will then in later sections be applied to the myriad of ways in which the First Amendment touches the Internet.

§ 24:2 —Overview of modern free expression analysis under the First Amendment

There is no single, mechanical way to apply the Supreme Court's First Amendment jurisprudence to any given case—the standards applicable to a particular case turn on a host of interrelated questions such as whether a prior restraint is found, whether a speech restriction is content-based or content-neutral, and whether a public forum is involved. Many of these concepts are overlapping and intersecting. The following sections discuss the key issues and questions that should be considered in assessing any dispute concerning free expression under the First Amendment.[1]

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[5]Reno v. American Civil Liberties Union, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997) (citing 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

[Section 24:2]

[1]This discussion focuses on the speech and press portions of the First Amendment, and does not consider the religion, association, or petition rights under the Amendment. The First Amendment is phrased in terms of "the freedom of speech, or of the press," but courts have generally held that there is no significant difference between the rights of the public and of the press. See below in § 24:16 for a discussion of this point in the context of defamation. At least one case has squarely raised the question of whether a free Internet-only newsletter produced by a single writer should be treated as part of the traditional press, *see* Schreibman v. Holmes, 1997 WL 527341 (D.D.C. 1997), judgment aff'd, 203 F.3d 53 (D.C. Cir. 1999), reh'g and reh'g en banc denied, (Nov. 3, 1999) and cert. denied, 528 U.S. 1179, 120 S. Ct. 1215, 145 L. Ed. 2d 1116 (2000), but that case

§ 24:3 — —Prior restraints

As noted above, the First Amendment was first conceived as a prohibition on prior restraints, in response to the seventeenth century English system that licensed all printing presses and prevented anything from being printed without prior permission from the governing authorities.[1] As the Supreme Court made clear in the leading modern prior restraint case, *Bantam Books, Inc. v. Sullivan*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[2] The government bears "a heavy burden of showing justification for the imposition of such a restraint."[3] As evidenced by the case involving the "Pentagon Papers," even a strongly asserted claim of national security may not overcome the presumption.[4]

The presumption against prior restraints is not limited to licensing schemes imposed by the government, but also extends to judicially imposed injunctions against future publication. In the Supreme Court's first significant prior restraint decision, *Near v. Minnesota ex rel. Olson*, the Court struck down a trial court's order "perpetually enjoin[ing]" the publication of material that had been shown to be "malicious, scandalous, and defamatory."[5] The Court has also set

was decided on grounds wholly unrelated to the First Amendment or the nature of the Internet newsletter.

[Section 24:3]

[1]*See* Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 713–14, 51 S. Ct. 625, 75 L. Ed. 1357, 1 Media L. Rep. 1001 (1931) (discussing original focus of the First Amendment).

[2]Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L. Ed. 2d 584, 1 Media L. Rep. 1116 (1963).

[3]Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d 1, 1 Media L. Rep. 1021 (1971) (implied overruling on other grounds recognized by, Cyr v. Tompkins, 1994 WL 110719 (Tex. App. Dallas 1994)).

[4]New York Times Co. v. U. S., 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, 1 Media L. Rep. 1031 (1971).

[5]Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357, 1 Media L. Rep. 1001 (1931).

aside judicial "gag orders" that limit publication of information about on-going criminal proceedings.[6]

Prior restraints have not been rejected in all areas. Probably because obscene content has been declared to be unprotected under the First Amendment (as discussed more fully below), the courts have allowed prior restraint of obscene material, so long as strict procedural safeguards are followed.[7] In cases of an injunction limiting types of protests at abortion clinics, the Supreme Court found the injunction to be based on conduct and not focused on expression, and thus not covered by the prior restraint doctrine.[8]

In the Internet context, the doctrine of prior restraint is at issue in the cases of *Zieper v. Reno* and *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, discussed more fully below in § 24:28 on "Threats of Violence and Incitement of Violence."

§ 24:4 — —Overbreadth, vagueness, and the chilling effect on speech

Two distinct but sometimes overlapping tests under the First Amendment look at the overbreadth and vagueness of a challenged law or governmental action. Although concepts of overbreadth and vagueness can be found in other areas of constitutional jurisprudence, those concepts take on special strength and significance in the First Amendment context. The justification for this heightened concern is the substantial chilling effect that overbroad or vague laws or regulations can have on speech—if a law is unclear or appears to reach constitutionally protected expression, then speakers may self-censor their own speech to ensure that they do not violate the law.

Under the overbreadth doctrine, courts will strike down a law that pursues a valid governmental objective (for example, stopping the distribution of obscene material) when the law reaches too broadly and also can be applied to constitutionally protected expression (for example, sexually

[6]Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683, 1 Media L. Rep. 1064 (1976).

[7]*See, e.g.,* Freedman v. State of Md., 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, 1 Media L. Rep. 1126 (1965).

[8]*See* Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 n.2, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

explicit but nonobscene material). As the Supreme Court has explained,

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[1]

In *Broadrick v. Oklahoma*, the Court made clear that to include a statute,"the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's . . . legitimate sweep."[2] In *New York v. Ferber*, the Court further explained:

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.[3]

The heightened First Amendment concern about vagueness stems from the same concern about the potential to chill protected expression—if a law or regulation is unclear so that speakers cannot determine whether their speech is or is not covered, speakers may self-censor themselves to avoid the risk of liability. As Justice Blackman observed, "in the First Amendment area 'government may regulate . . . only with narrow specificity,' avoiding the use of language that is so vague that 'men of common intelligence must necessarily guess at its meaning.'"[4] According to the Court, "stricter standards of permissible statutory vagueness may

[Section 24:4]

[1]Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) (footnotes omitted).

[2]Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

[3]New York v. Ferber, 458 U.S. 747, 772, 102 S. Ct. 3348, 73 L. Ed. 2d 1113, 8 Media L. Rep. 1809 (1982) (rejecting an overbreadth challenge).

[4]Young v. American Mini Theatres, Inc., 427 U.S. 50, 92, 96 S. Ct. 2440, 49 L. Ed. 2d 310, 1 Media L. Rep. 1151 (1976) (Blackmun, J., dissenting) (citing National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), and Connally v. General Const. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[5]

In addition to statutes that are themselves overbroad and/or vague, the overbreadth and vagueness doctrines have also been used to strike down laws that grant too much unguided discretion to a governmental decisionmaker. As the Supreme Court has explained, it "has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker . . . ."[6] In *City of Chicago v. Morales*, for example, the Court declined to find the challenged "loitering" statute to be overbroad, but did find it to be unconstitutionally vague because it gave police too much discretion in the application of the law.[7]

Concern about chill also motivates two procedural rules that permit prompt First Amendment challenges to laws or regulations that may infringe on protected expression. First, overbreadth and vagueness claims can be asserted in "facial" challenges to a law or regulation. Constitutional challenges are commonly raised in an "as applied" context, in which legal claims are asserted *after* a law or regulation has been applied to a particular individual or situation. Because of a concern about the chilling effect on expression that a law or regulation might have, First Amendment challenges can often be brought before a law or regulation has been specifically applied, or indeed in some cases before the law or regulation becomes effective.[8] "Proof of an abuse of power in the particular case has never been deemed a requisite for at-

[5]Smith v. People of the State of California, 361 U.S. 147, 151, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959).

[6]Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 129, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29, 20 Media L. Rep. 1265 (1992).

[7]City of Chicago v. Morales, 527 U.S. 41, 53, 64, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

[8]*See, e.g.,* Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392–93, 108 S. Ct. 636, 98 L. Ed. 2d 782, 14 Media L. Rep. 2145 (1988), certified question answered, 236 Va. 168, 372 S.E.2d 618, 15 Media L. Rep. 2078 (1988) (allowing facial challenge brought prior to effective date of statute).

tack on the constitutionality of a statute purporting to license the dissemination of ideas."[9] Fundamentally, the theory is that an overbroad or vague law *on its face* causes constitutional harm to the free flow of expression and ideas—the "alleged danger of [a] statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."[10]

A second procedural rule that permits prompt First Amendment challenge on overbreadth (but not necessarily vagueness[11]) grounds is the exception to the normal prohibition against a litigant raising the rights of others not before the court. Again, the courts permit such "third-party standing" out of a concern about the chilling effect of a challenged rule or law:

> [I]n the First Amendment context, '[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'[12]

In the Internet context, as discussed below, the Communications Decency Act of 1996 is a clear example of a law found—in a facial challenge in *Reno v. ACLU*—to be both vague and overbroad.

§ 24:5 — —Content-neutral "time, place, and manner" regulation of speech

A crucial question to be raised in almost any First Amendment free expression case is whether the governmental ac-

[9]Thornhill v. State of Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093, 6 L.R.R.M. 697, 2 Lab. Cas. (CCH) P 17059 (1940).

[10]Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782, 14 Media L. Rep. 2145 (1988), certified question answered, 236 Va. 168, 372 S.E.2d 618, 15 Media L. Rep. 2078 (1988).

[11]*See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 59–61, 96 S. Ct. 2440, 49 L. Ed. 2d 310, 1 Media L. Rep. 1151 (1976) (declining to reach vagueness claim where challenged statute clearly applied to party before the court).

[12]Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392–93, 108 S. Ct. 636, 98 L. Ed. 2d 782, 14 Media L. Rep. 2145 (1988), certified question answered, 236 Va. 168, 372 S.E.2d 618, 15 Media L. Rep. 2078 (1988) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)) (citation omitted).

tion at issue is "content-neutral" or "content-based." As discussed in following sections, "content-based" actions are subject to significantly higher constitutional scrutiny. Conversely, "so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[1] As the Supreme Court has explained,

> when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the Speakers' views." As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech irrespective of content." Governmental action that regulates speech on the basis of its subject matter "'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[2]

The Supreme Court's decision in *Boos v. Barry* illustrates the distinction between content-neutral and content-based regulation. That case involved two District of Columbia regulations, one that prohibited the carrying of signs critical of a foreign government within 500 feet of an embassy, and one that prohibited the congregation of three or more people within 500 feet of an embassy if the congregation posed a security threat. The first regulation (which turned on the content of the message) was subjected to heightened scrutiny and struck down, while the second (which focused on security regardless of message) was upheld.[3]

The answer to whether a given regulation or law is content-neutral or content-based, however, is not always obvious, and courts have at times appeared to strain to

[Section 24:5]

[1]City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. 1721 (1986).

[2]Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 536, 100 S. Ct. 2326, 65 L. Ed. 2d 319, 6 Media L. Rep. 1518, 34 Pub. Util. Rep. 4th (PUR) 208 (1980) (citations omitted).

[3]Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).

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characterize seemingly content-based rules as content-neutral.[4]

§ 24:6 — —Public forum doctrine

A distinct question that is often at issue in cases involving content-neutral regulations (and sometimes at issue in cases involving content-based laws) is whether the regulation affects a "public forum," or in some cases a "limited public forum" (also called a "public forum by government designation"). When speech takes place—or in some cases attempts to take place—on government property, the Supreme Court's level of scrutiny will turn in part on whether the government "forum" is one that has traditionally been used for public speech and discourse (and thus warranting a higher level of protection). As summarized by the Court, it has

> identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places which "by long tradition or by government fiat have been devoted to assembly and debate." Public streets and parks fall into this category. In addition to traditional public fora, a [limited] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. Of course, the government "is not required to indefinitely retain the open character of the facility."
>
> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. . . .
>
> Not every instrumentality used for communication, however, is a traditional public forum or a [limited] public forum by designation. . . . We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum

[4]*See, e.g.,* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. 1721 (1986) (finding zoning regulation aimed at adult theaters to be content-neutral because the justification for the regulation turned not on the impact of the speech on listeners, but on harmful "secondary effects" to the neighborhood).

when the nature of the property is inconsistent with expressive activity.[1]

In the Internet context, the public forum doctrine is implicated in the case of libraries, as discussed more fully below in § 24:24. In addition, as more governments at every level encourage their citizens to use the Internet to access government services and discuss issues of public concern, it is likely that limited public fora will be created.

§ 24:7 — —Strict scrutiny and content-based restrictions on speech

In sharp contrast to content-neutral restrictions on speech, "[c]ontent-based regulations are presumptively invalid."[1] As the Supreme Court recently summarized,

> a content-based speech restriction . . . can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.[2]

The Court's decision in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board* provides a clear example of an invalid content-based law—the state statute prohibited individuals convicted of a crime from receiving royalties from books they wrote *about the crime*. In that case, the law turned directly on the subject of the speech at issue; the law did not survive the Court's strict scrutiny.[3]

[Section 24:6]

[1]Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802–03, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (numerous citations omitted).

[Section 24:7]

[1]R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (citations omitted).

[2]U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865, 28 Media L. Rep. 1801 (2000) (citations omitted).

[3]Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476, 19 Media L. Rep. 1609 (1991).

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The First Amendment's prohibition against content-based regulations, however, is far from absolute. First, there are fairly infrequent cases in which the government succeeds in establishing that a challenged law is "narrowly tailored to promote a compelling Government interest." More commonly, however, a challenged content-based law or statute addresses one of a number of content-specific exceptions or limitations on the normal presumption against content-based laws. The Supreme Court has explained:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. . . . Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.[4]

§ 24:8 ———Disfavored categories of speech and varying degrees of scrutiny

Certain categories of speech have been "excluded" from the protection of the First Amendment, although the precise phrasing of the exclusions have shifted and the level of protection afforded to certain types of speech has changed. For example, at one time defamation was thought to be entirely outside the reach of the First Amendment, but now defamation is more accurately viewed as speech that has lesser—but still some—First Amendment protection. For some of the categories the level of protection is characterized as an "intermediate" level of scrutiny, and for other categories the courts have simply adopted one or more specific tests that do not attempt to quantify the level of scrutiny.

The following categories of speech receive essentially no protection under the First Amendment:

- obscenity,
- child pornography,

[4]R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–83, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (citations omitted).

- incitement of an imminent and likely-to-occur crime, and
- speech likely to cause imminent violence ("fighting words").[1]

The following categories of speech receive some protection under the First Amendment, but less than "strict scrutiny":

- defamation,
- commercial speech, and
- sexually oriented but not obscene speech that is "harmful to minors" (or sometimes termed "obscene as to minors").

Each of these categories is discussed more fully below in the context of specific applications of the First Amendment to the Internet.

§ 24:9 — —Varying standards for different communications media

Although judges at times attempt to divine the "original intent" of the drafters of the Constitution and its Amendments, the original drafters obviously had no "intent" whatsoever as to how the First Amendment should apply to telephones, radio, broadcast television, cable television, and now the Internet. The Supreme Court, however, has "long recognized that each medium of expression presents special First Amendment problems,"[1] and the Court has adapted the basic First Amendment jurisprudence to each new communications medium as it has emerged. The Court has stated that "differences in the characteristics of new media

[Section 24:8]

[1]To be clear, even speech that theoretically receives no protection could be restricted in an unconstitutional manner. In a theoretical debate among the Justices, Justice Scalia has noted that a government could not outlaw 'obscene speech that is critical of the government' but at the same time allow other obscene speech. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 384, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *see also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 406, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

[Section 24:9]

[1]F. C. C. v. Pacifica Foundation, 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073, 3 Media L. Rep. 2553 (1978).

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justify differences in the First Amendment standards applied to them."[2] As the Internet evolves and more Internet-related cases are litigated, it is important to understand how the courts have decided what level of constitutional protection a communications medium warrants.

The varying of First Amendment standards is seen most clearly in the context of the broadcast media of radio and television. For example, in a case that struck down a prohibition on editorializing on public television stations, the Supreme Court explained that the

> fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that "[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants." Thus, our cases have taught that, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting "those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves."[3]

In a different context—in a case upholding a restriction on the radio broadcast of George Carlin's "Seven Dirty Words" monologue—the Court looked to different characteristics of broadcast. In that case, *Federal Communications Commission v. Pacifica Foundation*, the Court justified a lower level of constitutional protection for broadcast because of two of broadcast's characteristics:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unex-

[2]Red Lion Broadcasting Co. v. F. C. C., 395 U.S. 367, 386, 89 S. Ct. 1794, 23 L. Ed. 2d 371, 1 Media L. Rep. 2053, 79 Pub. Util. Rep. 3d (PUR) 1 (1969).

[3]F.C.C. v. League of Women Voters of California, 468 U.S. 364, 377, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 10 Media L. Rep. 1937, 39 Fed. R. Serv. 2d 389 (1984) (citations omitted). In subsequent cases some on the Court have backed away from the "scarcity" justification for allowing government regulation of the broadcast media.

> pected program content. . . . Second, broadcasting is uniquely accessible to children, even those too young to read.[4]

In the context of regulating *cable* television, the Supreme Court has taken somewhat contradictory positions. In considering the "must carry" provisions applicable to cable television systems, the Court concluded in *Turner Broadcasting System, Inc., v. Federal Communications Commission* that the lower First Amendment protection applicable to broadcast television does not apply to cable television:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.[5]

In a later case dealing with indecent sexual content on cable television systems, however, the Court suggested that "cable and broadcast television differ little, if at all"—but the Court ultimately concluded that it did not need to decide whether cable television warranted full First Amendment protection in the case of indecent speech (because the challenged regulation failed under any standard).[6]

A final case is instructive in considering how the Supreme Court applies the First Amendment to different communications media. In *Sable Communications of California, Inc. v. Federal Communications Commission*, the Supreme Court held that the lower level of constitutional protection that the Court applied to broadcast indecent content in the *Pacifica* case did *not* apply in the case of sexually oriented "dial-a-porn" telephone services:

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[4] F. C. C. v. Pacifica Foundation, 438 U.S. 726, 748–49, 98 S. Ct. 3026, 57 L. Ed. 2d 1073, 3 Media L. Rep. 2553 (1978) (citations omitted).

[5] Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 638–39, 114 S. Ct. 2445, 129 L. Ed. 2d 497, 22 Media L. Rep. 1865 (1994).

[6] Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 748, 755, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), conformed to, 12 F.C.C.R. 6390, 12 FCC Rcd. 6390, 1997 WL 225468 (F.C.C. 1997).

> The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.[7]

More recently, in the context of sexual content delivered by satellite, the Supreme Court echoed the suggestion in *Sable* that the ability of the ordinary citizen to take steps to avoid or control unwanted content was important in the Court's decision to afford full constitutional protection to a communications medium.[8]

§ 24:10 —Application of the First Amendment to the Internet: The *Reno v. American Civil Liberties Union* decision

In light of the great array of First Amendment doctrines and the variable standards that the Supreme Court applies to different communications media, a crucial threshold question was what First Amendment standards would be applied to the Internet. Not surprisingly, that question was squarely presented in the first legal skirmish of the first significant First Amendment case pertaining to the Internet to reach the federal courts—the legal challenge to the Communications Decency Act of 1996 (the CDA). Discussed more fully in Section 23 below, *Reno v. American Civil Liberties Union* involved a facial challenge to a congressional act aimed at limiting the availability of sexual content on the Internet. In opposing a motion for a temporary restraining order against

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[7]Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 127–28, 109 S. Ct. 2829, 106 L. Ed. 2d 93, 16 Media L. Rep. 1961 (1989).

[8]*See* U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 814–15, 120 S. Ct. 1878, 146 L. Ed. 2d 865, 28 Media L. Rep. 1801 (2000).

the CDA—filed immediately after its passage in early 1996—the U.S. Department of Justice argued to the lower court that the case presented "compelling parallels" to the *Pacifica* decision that applied a lower level of constitutional protection to the broadcast medium.[1] The government argued that the Internet was pervasive and readily available to children (as the Supreme Court had noted about broadcast in *Pacifica*). On appeal to the Supreme Court in the CDA case, the government again argued that *Pacifica* should apply:

> The approach Congress enacted is constitutional under *Pacifica*. Like broadcast stations, the Internet is establishing an increasingly "pervasive presence" in the lives of Americans. . . . Like indecency presented on broadcast stations, indecent material presented over the Internet "confronts the citizen * * * in the privacy of the home." Like broadcast stations, the Internet "is uniquely accessible to children."[2]

Both the special three-judge panel of the district court, and the Supreme Court on direct appeal, rejected the government's arguments, and determined that the Internet was *not* like broadcast television, and that the Internet should receive the full protection of the First Amendment. The Supreme Court's decision in *Reno* expressly rejects reliance on *Pacifica*:

> Those factors [found in *Pacifica*] are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." . . . Finally, unlike the conditions that prevailed when Congress

[Section 24:10]

[1]Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order, ACLU v. Reno, No. 96-963 (E.D. Pa.) (brief filed Feb. 14, 1996) (available at http://www.eff.org//Legal/Cases/EFF_ACLU_v_DoJ/960214_doj_opposition.brief).

[2]Brief for the Appellants, Reno v. ACLU, No. 96-511 (U.S.) (brief filed Jan. 21, 1997) (available at http://www.ciec.org/SC_appeal/970121_DOJ_brief.html).

> first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds.[3]

Indeed, District Court Judge Stewart Dalzell expressed the view in the *Reno* case that the uniquely open and democratic characteristics of the Internet warranted the highest possible constitutional protection. Judge Dalzell identified what he viewed were four key characteristics of the Internet:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[4]

The Supreme Court did not address this aspect of Judge Dalzell's opinion, but the Court did conclude its opinion in *Reno* by noting the "dramatic expansion of this new marketplace of ideas" and observing that

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[5]

It is with this starting point that the state and federal courts in the United States have grappled with the application of the First Amendment to the Internet. In the vast majority of decisions to date, the courts have afforded the Internet the highest possible constitutional protection and have struck down efforts to burden or constrain the "new marketplace of ideas" that is the Internet.

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[3]Reno v. American Civil Liberties Union, 521 U.S. 844, 868–70, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997).

[4]American Civil Liberties Union v. Reno, 929 F. Supp. 824, 877 (E.D. Pa. 1996), judgment aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997) (Dalzell, J. concurring).

[5]Reno v. American Civil Liberties Union, 521 U.S. 844, 885, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997).

§ 24:11 —Two nonlegal threats to free speech on the Internet: Service provider decisions and technology evolution

In considering the scope of free expression available on the Internet, two additional points should be considered, both stemming from the essentially private ownership of the Internet.

First, the focus of the First Amendment is on *governmental* restrictions on free speech. Although the Internet had its origins in U.S. government funded research, today the Internet consists of a vast network of primarily privately owned networks. Barring the imposition of common carrier or similar obligations on the Internet Service Providers and network operators that make up the Internet, those private entities do *not* have any legal obligation to carry any particular speech. In other words, although the government may not be able to restrict certain speech on the Internet, private companies can. Indeed, it is likely that a court would conclude that an Internet Service Provider itself has a First Amendment right *not* to carry or permit access to a particular content.[1]

This reality—that ISPs and network providers could themselves censor content on the Internet—makes the statutory protection from liability that ISPs have received crucial for the goal of encouraging robust expression on the Internet. Ironically, one of the most important federal statutes affecting the Internet was contained in a different section of the same Communications Decency Act of 1996 than that which was struck down in *Reno v. ACLU*. Section 230(c)(1) of chapter 47 of the United States Code states that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." The effect of this statute is to declare that an ISP will not be held liable for content posted on the Internet by the ISP's customers. Critically, this statutory provision removes a significant incentive

[Section 24:11]

[1] *See* Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 737–53, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), conformed to, 12 F.C.C.R. 6390, 12 FCC Rcd. 6390, 1997 WL 225468 (F.C.C. 1997) (discussing right of cable operators not to carry indecent speech).

an ISP might otherwise have to censor the content of its customers. Section 230 and ISP liability in general are discussed extensively in Ch 3, and are noted here only to highlight the importance that such liability exclusions have for ensuring free expression on the Internet.

A second possible nonlegal threat to robust free speech on the Internet is the fact that the technology of the Internet is constantly evolving, and there are no guarantees that the technology will be as supportive of individual speech as it has to date. There are a number of ongoing technological developments that have the potential to change the open and democratic nature of the Internet, and to undermine some of the unique and speech-empowering characteristics that the courts identified in the *Reno v. ACLU* decision.[2] More than any other communications medium to date, the Internet is and will continue to be a dynamic and evolving environment.

§ 24:12 Limitations on free speech

Notwithstanding the seemingly absolute dictate that "Congress shall make no law," both common-law and statutory limitations are permitted. Such limits, however, must generally be narrowly drawn and further an important governmental or societal purpose. The precise contours of the permissible limitation varies with each category of speech discussed below.

§ 24:13 —Defamation

As the court in *ACLU v. Reno* noted, "it is no exaggeration to conclude that the Internet has achieved, and continues to

[2]For a discussion of technological changes that could affect the ability of small speakers to be heard on the Internet, see Morris & Berman, "The Broadband Internet: The End of the Equal Voice?," available at http://www.cfp2000.org/papers/morrisberman.pdf. For another example of the potential impact of technology development on public policy, see http://www.cdt.org/standards/bulletin/1.02.shtml.

achieve, the most participatory marketplace of mass speech that this country—indeed the world—has yet seen."[1]

This unprecedented ability to exchange information with people from around the world has engendered communication on virtually every topic imaginable. As the Supreme Court observed, the Internet provides instant access to information on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls."[2] In doing so, the Internet has erased many of the standard distinctions between publishers and private citizens. By allowing virtually infinite fora for the airing of views, cyberspace allows voices to be publicly heard that might not otherwise be heard through traditional media. At the same time, this opening of discourse also means that many of the standard editorial checks placed on speech by a conventional media operation prior to publication do not exist in cyberspace.

In addition to the opportunity provided by the availability of this diversity of thought and opinion, concern has arisen about the accuracy and, sometimes, the lawfulness of speech posted on the Internet. Increasingly, both individuals and corporations are monitoring what is said about them on the Internet, and suing over cyberdefamation.[3]

As with many other legal issues, questions arise about how to apply law developed in a pre-Internet world to issues arising on the Web. Some of these questions—such as the distinction between public and private figures—are "pure" defamation issues that take on added complexity in the context of cyberspace. Many issues, however—such as which court has jurisdiction over a speaker on the Internet—arise more broadly in the Internet context, but apply with particular force in cases involving defamation.

[Section 24:13]

[1]American Civil Liberties Union v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996), judgment aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997) (three-judge court).

[2]Reno v. American Civil Liberties Union, 521 U.S. 844, 851–52, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997) (*quoting* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996), judgment aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997)).

[3]Lyrissa Barnett Lidsky, Silencing John Doe: Defamation and Discourse in Cyberspace, 49 Duke L.J. 855 (2000).

§ 24:14 — —Overview of defamation law

"It must be confessed . . . that there is a great deal of the law of defamation which makes no sense."[1] Although the elements of a defamation claim appear straightforward, that appearance is deceptive. The basic elements are:

(1) a false and defamatory statement;
(2) publication of the statement;
(3) a level of fault at least reaching negligence; and
(4) for most categories of defamation, a specific harm caused by the statement.[2]

Because of the obvious First Amendment issues raised by imposing liability on speech, the tort of defamation has been increasingly constitutionalized. Largely for this reason, the proof required to satisfy each element may vary depending on factors including the identity of the plaintiff and the identity of the defendant.

As a general matter, defamatory statements are those that tend to harm the reputation of the plaintiff so as to lower him or her in the estimation of the community.[3] Mere statements of opinion, however, are constitutionally protected. Moreover, truth is an absolute defense to defamation: no matter how damaging, a true statement can never be defamatory. And although historically falsity was presumed, and truth was available as an affirmative defense, the Supreme Court has concluded that in cases involving public figures or matters of public interest, the First Amendment requires that the plaintiff bear the burden of proof on the issue of falsity.[4]

The Court has also incorporated First Amendment protections into the tort of defamation in the "fault" element. Historically, the level of fault imposed by the common law was mere negligence. In *New York Times v. Sullivan*,

[Section 24:14]

[1]Prosser and Keeton on the Law of Torts (5th ed.) p 771 § 111.

[2]*See generally* Restatement of Torts § 558 (1938).

[3]Restatement (Second) of Torts, § 559.

[4]*See* New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. 1527, 95 A.L.R.2d 1412 (1964); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783, 12 Media L. Rep. 1977 (1986).

however, the court held that if the plaintiff is a public official, the requisite level of fault is "actual malice."[5] Under this standard, in order for a public figure to prove defamation, he or she must show that the defendant published the false statement either knowing that it was false or with reckless disregard for whether or not it was false.

§ 24:15 — —The public figure-private figure dichotomy in cyberspace

As noted above, the Supreme Court has taken steps to ensure that discussions about matters of public concern are not chilled by the threat of liability for defamation in part by requiring a higher degree of fault to be proven when the discussion concerns a public official or a public figure. In *Gertz v. Robert Welch*, the Court defined public figures generally as those who "occupy position of such persuasive power and influence that they are deemed public figures for all purposes," or those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[1] This test has proven somewhat difficult to apply even outside the context of cyberspace. The Internet poses even more definitional challenges. Because individuals can now easily thrust themselves into public debate by setting up their own sites, participating in discussions in chat rooms or posting messages on bulleting boards, it would appear easier to assume limited public figure status. Nonetheless, this issue remains largely untested in the courts.

§ 24:16 — —Non-media defendants

Although the Supreme Court has never squarely answered the question whether the protections articulated in *New York Times v. Sullivan* and its progeny apply to non-media defendants, it appears that they do. In *Dun & Bradstreet,*

[5]New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. 1527, 95 A.L.R.2d 1412 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. 1633 (1974) (applying actual malice standard to all public figures).

[Section 24:15]

[1]Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. 1633 (1974).

Inc. v. Greenmoss Builders, Inc., the Court upheld a state court decision that did not apply the actual malice standard to a non-media defendant, but did not reach that issue, instead affirming on other grounds.[1] In dissent, Justice Brennan noted that six Justices "agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."[2] In a subsequent plurality opinion, however, the Court expressly refused to resolve the question whether the rules regarding falsity established in *New York Times v. Sullivan* apply equally to media and non-media defendants.[3]

The Internet, of course, highlights why any distinction between media and non-media defendants is not only troubling but unworkable. Indeed, one of the most significant aspects of the Internet is that it dims the distinction between media and non-media content, allowing individuals with online access to reach audiences previously available only to more traditional media speakers. Because courts have thus far been attentive to the unique qualities of cyberspace and have carefully scrutinized laws that restrict speech in cyberspace, there is reason for optimism that a media/non-media distinction will never find its way into an analysis of speech on the Internet.

§ 24:17 — —Defining "harm" on the Internet—What is the extent of distribution?

In awarding damages in a defamation case, a jury may take a number of factors into account, including the seriousness of the statement, the prominence of the plaintiff in the

[Section 24:16]

[1]Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593, 11 Media L. Rep. 2417 (1985).

[2]Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784, 105 S. Ct. 2939, 86 L. Ed. 2d 593, 11 Media L. Rep. 2417 (1985) (Brennan, J. dissenting); *accord* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773, 105 S. Ct. 2939, 86 L. Ed. 2d 593, 11 Media L. Rep. 2417 (1985) (noting that "the Court has rejected" a distinction between media and non-media defendants "at every turn") (White, J. dissenting).

[3]*See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783, 12 Media L. Rep. 1977 (1986).

community and the resulting loss of reputation suffered, and the extent of distribution of the defamatory statement.

As with many other issues, courts have not yet grappled fully with how to determine the "extent of distribution" when calculating damages for defamatory statements. The Ontario Superior Court of Justice, however, recently concluded that the Internet reaches a worldwide audience and thus significant damages awards may be justified on the ground that a libelous Internet communication was distributed globally.[1]

§ 24:18 —Political speech

Given the extremely high value accorded political speech in the United States, one would expect to find very few, if any, limitations on political speech. And, indeed, there are few. In fact, most developments in this area relate to using the Internet to expand political speech. For instance, in England, local jurisdictions are experimenting with online voting. In addition, the Internet abounds with sites for political parties and causes of all persuasions, making grassroots efforts and fund-raising both easier and more prone to fraud. Candidates who cannot afford to purchase television or radio time can nevertheless present their views to thousands of people rather than the 20 or 30 that may gather around a soap box. Activists who want to encourage communication on an issue with a congressional representative or senator can make it as easy as a click of a mouse.

One political speech issue that is likely to re-emerge in the Internet context relates to online "vote swapping" sites, where voters in one state trade votes (for example, in the 2000 Presidential election) with voters in other states in order to increase the impact of their vote. The State of California sought to shut down such sites and legal challenges where filed, but no published opinion resulted.[1] Historically, courts have at times been willing to lessen First Amendment protections of speech in the face of a claimed need to protect the integrity of the voting process, which is also viewed as a core constitutional value.

[Section 24:17]

[1]Under Canadian law, the extent of distribution is a critical factor in calculating damages.

[Section 24:18]

[1]*See* "Judge rejects request to stop vote-swap crackdown," CNET News, http://news.com.com/2100-1023-248208.html (Nov. 6, 2000).

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As discussed more fully below in § 24:28, when political speech on controversial topics bleeds over into inciting people to imminent violence or into defamation, liability may follow. Thus, when a Web site called the Nuremberg Files featured pictures, names, and addresses of doctors who performed abortions, and struck through their names after they were murdered by antiabortion activists, those responsible for the Web site were held liable for making threats. The court found that in the context of the Web site postings and the assassinations that followed them, the speech had crossed the line from political to "threats,"[2] and that imposing liability for those threats did not violate the First Amendment.

§ 24:19 —Commercial speech

Although commercial speech such as advertising is typically afforded somewhat less protection than other speech in the First Amendment hierarchy, it is nevertheless entitled to significant protection both online and off. Generally, the test by which the Supreme Court evaluates whether commercial speech infringements are constitutionally acceptable are these four questions: Is the speech false and misleading? If so, the government may prohibit it. If not, is there a substantial governmental interest? Does the infringement directly advance the asserted interest, and finally, is it more extensive than necessary to serve that interest?[1]

As with other categories of speech, the on-line limits on commercial speech mimic those in the off-line world. Thus, false and fraudulent advertising is illegal in most states and under federal law. Additionally, particular limits may apply to specific industries, especially alcohol and tobacco industries because of the nature of their industry or product. But there are some Internet-specific issues. The biggest one, of course, is spam, also known as unsolicited emails, either commercial or not. Several states and the Federal Government have tried to regulate spam. California has enacted antispam regulations that require the subject header of

[2] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

[Section 24:19]

[1] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980).

unsolicited email to begin with the tag "ADV" for advertisement and "ADLT" for adult, sexually oriented material. Although a trial court in California struck that statute on the ground that it violated the Commerce Clause, the appellate court overturned that decision and held that because the statute affected California residents transmitting messages via equipment located in California, it was valid. At least 27 states have some sort of spam regulation, ranging from labeling requirements like California's, to forbidding false or misleading routing information, to requiring opt-out information.[2] Many provide that such spam is illegal only if it violates a service provider's policies. And several have been found unconstitutional, such as the *ACLU v. Miller* case in Georgia, discussed in Section 31 below. Further, in *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, the court found that a statute that banned unsolicited commercial faxes violated the sender's right to commercial speech because the government failed to demonstrate that its interest in sparing recipients the cost and the time of receiving an unsolicited fax was a substantial interest, and because even if it were, the ban on commercial speech was more extensive than necessary to address that interest.[3]

Finally, the Supreme Court case upholding the rights of Jehovah's Witnesses to go door-to-door to talk about their faith without registering with the town first may also suggest that states and the Federal Government may be limited in controlling spam, at least spam that is noncommercial.[4]

§ 24:20 —Sexually oriented speech

Although very successful in the United States marketplace, sexually oriented speech is also a frequent target of state and federal legislative efforts. As a result, First Amendment case law has developed related to sexual content in almost

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[2]Those states include Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

[3]Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002).

[4]Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (U.S. 2002).

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every mainstream communications medium to emerge in the past century, including telephones, radio, broadcast television, cable television, and satellite television. The Internet is no exception.

§ 24:21 — —Obscenity

The Supreme Court has long held that obscenity is not protected speech. An early obscenity decision, *Roth v. United States*, indicated that speech is obscene if "the average person, applying contemporary community standards," determines that "the dominant theme of the material taken as a whole appeals to the prurient interest."[1] Perhaps unsurprisingly, *Roth* proved difficult in application. As Justice Stewart famously observed in a statement that exemplifies the difficulties courts face in identifying material that is outside constitutional protection, "I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ."[2]

In an effort to render the definition of obscenity more objective, in 1973 the Court in *Miller v. California* articulated a three-part test. Under *Miller*, material is obscene if each of the following criteria are satisfied:

1. "'the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest";
2. "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and"

[Section 24:21]

[1]Roth v. U. S., 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1 Media L. Rep. 1375 (1957).

[2]Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

3. "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[3]

Thus, the Court purported to introduce an objective prong—whether the material has value—into what was otherwise a subjective test. The Court also made clear that the community standards prong was determined by reference to the local community, thus obviating disputes about whether a jury correctly had its finger on the pulse of the contemporary "national" community. The First Amendment does not, the Court concluded, require that the "people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[4] Nor, conversely, are the people of Las Vegas and New York City required to limit their speech to that which is acceptable in Maine or Mississippi.

This does not answer the question, however, of how to judge sexually oriented speech that travels across community lines. In *Hamling v. United States*—a case involving material mailed from one state to another—the Supreme Court confirmed that the relevant community standards are typically those of the community to which the material in question was mailed.[5] If a publisher has any doubt as to how a given community would react to certain material, it is thus the publisher's burden to refrain from sending the material into a given community. Similarly, in *Sable Communications of California, Inc. v. Federal Communications Commission*, the obscenity of recorded telephone messages was measured by the community standards of the community in which the messages were made available.[6] Again, the publisher can determine (by reference to area codes) which community is being called; a publisher that communicates with a given community that is conservative and might thus deem certain communications obscene does so at his or her risk. In the context of the Internet, of course, it is frequently difficult—if

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[3]Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419, 1 Media L. Rep. 1441 (1973) (citation omitted).

[4]Miller v. California, 413 U.S. 15, 32, 93 S. Ct. 2607, 37 L. Ed. 2d 419, 1 Media L. Rep. 1441 (1973).

[5]Hamling v. U.S., 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590, 1 Media L. Rep. 1479 (1974).

[6]Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93, 16 Media L. Rep. 1961 (1989).

not impossible—to prevent a communication from going into every community in the United States and, indeed, every community throughout the world.[7]

Despite its infirmities—some of which are clearly exacerbated in the context of online speech—the *Miller* obscenity test has long been with us, and it does not appear that the Court intends to revisit the basic parameters of *Miller* in the near future.

§ 24:22 — —Indecent speech and speech that is harmful to minors

Although obscenity is outside the scope of First Amendment protection, speech which is merely "indecent" remains protected. Nonetheless, the Court has concluded that sufficiently compelling state interests can justify regulation of indecent speech. The question of what speech is "indecent" is somewhat difficult to determine. In *Federal Communications Commission v. Pacifica Foundation*, for example, (discussed above in § 24:9) the Court held that material is indecent if it is "patently offensive."[1] The Court rejected a claim that, for material to be indecent, it must also appeal to the prurient interest, noting that the dictionary definition of indecency only refers to material that does not conform to "accepted standards of morality." The Court went on to uphold the FCC's characterization of the broadcast as indecent, and further upheld its regulation of the broadcast on the ground that the unique circumstances of broadcasting allowed regulation in the public interest.

A second justification for the regulation of indecency in *Pacifica* was the accessibility of the radio broadcast to minors. In justifying the regulation of indecency on these grounds, the Court relied on jurisprudence that made regulable speech which is harmful or obscene as to minors. Generally, as discussed above, sexually oriented material that does not meet the *Miller v. California* criteria remains protected. In *Ginsberg v. New York*, however, the Supreme

[7]Although the issue of community standards on the Internet has never been addressed by the Court in the obscenity context, it has recently been addressed in the "harmful to minors" context. *See* § 24:23.

[Section 24:22]

[1]F. C. C. v. Pacifica Foundation, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073, 3 Media L. Rep. 2553 (1978).

Court identified another category of speech that, although it cannot be banned altogether, may be legally regulated—speech that is "harmful to minors."[2] In that case, a New York statute proscribed the distribution of material to minors—"girlie magazines"—that was not *per se* obscene. Reasoning that the State had a compelling interest in the "well-being of its children" the Court upheld the statute. The Court recognized that the material was generally protected by the First Amendment, but concluded that the State's interest in protecting children justified "accord[ing] a more restricted right to children than that assured to adults." Quoting the New York court, the Supreme Court explained that:

> Material which is protected for distribution to adults is not necessarily protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the material is directed or from whom it is quarantined.[3]

Thus, in determining whether material is obscene as to minors, the three-part obscenity test is employed, with the added consideration of suitability for minors. For this reason, the harmful to minors test tends to suffer from the same indeterminacy as the general obscenity rule. Criteria such as community standards and artistic value inevitably raise questions of perspective: what is the relevant community, and how is value to be assessed?

§ 24:23 ———Obscenity, indecency, harmful to minors, and their particular application to the Internet

In many ways, *Pacifica* and *Sable* anticipate the concerns about children's access to controversial material that the Internet raises. The unparalleled accessibility of information is perhaps the most remarkable feature of the Internet. This openness has, however, caused children's access to controversial material to become a focus of regulators.

The first Congressional foray into this arena was the Com-

[2]Ginsberg v. State of N. Y., 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195, 1 Media L. Rep. 1424 (1968).

[3]Ginsberg v. State of N. Y., 390 U.S. 629, 636, 88 S. Ct. 1274, 20 L. Ed. 2d 195, 1 Media L. Rep. 1424 (1968) (citation omitted).

munications Decency Act (CDA). Passed in 1996, the CDA criminalized the dissemination of indecent material in a way that rendered such material accessible to minors.

The constitutionality of the CDA was challenged immediately. In *Reno v. ACLU*, the Supreme Court held that the statute was unconstitutional. As discussed above (see § 24:10), the *Reno* Court declined to extend the *Pacifica* doctrine to the Internet. Instead, drawing a sharp distinction between the Internet and broadcast media, the Court held that content-based regulation of the "vast democratic forums of the Internet" warranted the highest level of First Amendment scrutiny.[1] Although protecting children from inappropriate images was an important governmental interest, the "indecent" material banned by the CDA was clearly protected, and the statute's broad reach thus threatened to reduce all speech on the Internet to that which was appropriate only for children. As the Court explained: "The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so."[2]

The Court in *Reno v. ACLU* noted another factor that increased the breadth of CDA's reach—"the 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message."[3] In doing so, the Court identified an important distinction between Internet content and content published in traditional media. Content published on the Internet in one jurisdiction is immediately available in virtually every part of the world. If the legality of Internet content is measured against the standards of the most restrictive communities, the chilling effect on Internet content would be profound; the only way to avoid potential liability would be to tailor content to those most restrictive standards, and permissive communities would be deprived of

[Section 24:23]

[1]Reno v. American Civil Liberties Union, 521 U.S. 844, 868–69, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997).

[2]Reno v. American Civil Liberties Union, 521 U.S. 844, 879, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997).

[3]Reno v. American Civil Liberties Union, 521 U.S. 844, 877–78, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997).

their speech of choice. Although courts have recognized the difficulties raised by this issue, it has not yet been resolved. Indeed, the most that can be said is that the law is in flux.

In an early case involving obscenity, for example, the Sixth Circuit Court of Appeals applied *Hamling* and *Sable* to an obscenity prosecution brought based on material distributed online. In *United States v. Thomas*, the operators of an online bulletin board that distributed pornographic computer files from their home in California were convicted in Tennessee after a postal inspector in that state accessed the material.[4] According to the Court of Appeals, allowing subscribers in Tennessee to access the bulletin board rendered the operators subject to the Tennessee community standard, even if the material was not obscene as measured by the standards of their home state, California.

Thomas, however, does not squarely address the more troubling questions posed by the community standards issue, because in *Thomas* the bulletin board operators retained the ability to decline to accept subscribers from states in which the material might be considered objectionable (subscribers were required to register and provide information which included their state of residence). In this sense, it is arguable that the defendants in *Thomas* were no differently situated than publishers of printed material who make decisions about whether or not to ship a given magazine to individuals in particularly conservative states. Similar restrictions are not, however, available for material published on the World Wide Web, arguably the Internet's most widely used method of communication.

The Supreme Court recently addressed the issue without resolving it in any satisfactory way in its recent decision in *Ashcroft v. ACLU*.[5] That decision does suggest, however, that the Court is not prepared to abandon altogether the framework governing obscenity and related categories of speech, even if their application on the Web is difficult. In *Ashcroft*, the Court reviewed a Third Circuit decision invalidating the Child Online Protection Act (COPA), which imposed limitations on the posting of material that is not

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[4]U.S. v. Thomas, 74 F.3d 701, 24 Media L. Rep. 1321, 43 Fed. R. Evid. Serv. 969, 1996 FED App. 32P (6th Cir. 1996).

[5]Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002).

obscene as to adults, but may be harmful to minors. Representing "congressional efforts to remedy the constitutional defects in the CDA,"[6] COPA was more focused than the CDA. In particular, COPA prohibited commercial sites from posting material that is harmful to minors; publishers could raise an affirmative defense, however, if they put such material behind a screen which required access via credit card or similar mechanism (on the theory that only adults possess credit cards).

Publishers and others immediately challenged the law, claiming that it did not satisfy strict scrutiny. Although protecting children is a compelling governmental interest, the plaintiffs contended that COPA is not the most restrictive means of achieving that goal. First, COPA could not prevent material that is harmful to children from being put on the Internet because the law was limited in reach to U.S. companies. A large portion of the sexually oriented material contained on the Internet, however, comes from other countries. The challengers also contended that the statute had a severe chilling effect on such speech—which is protected as to adults. Users would be unlikely to access material if they were first required to provide identifying information such as a credit card. Moreover, setting up such screens is time consuming and costly, leading many publishers to simply remove any questionable material altogether. Finally, other alternatives—such as promoting "user-empowerment" tools that allow parents to determine for themselves what material is appropriate for their children and block or screen material that the parents deem objectionable is more effective, and less burdensome on protected speech. The district court agreed, issuing a preliminary injunction against enforcement of the law.

The Third Circuit upheld the injunction, but on different grounds entirely. That court held that because publishers cannot restrict by geographical location the dissemination of material they post on the Web, COPA was constitutionally deficient. The Supreme Court accepted review and, in a patchwork opinion, the Supreme Court reversed the Third

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[6] American Civil Liberties Union v. Reno, 31 F. Supp. 2d 473, 477, 27 Media L. Rep. 1449 (E.D. Pa. 1999), aff'd, 217 F.3d 162, 28 Media L. Rep. 1897 (3d Cir. 2000), cert. granted, 532 U.S. 1037, 121 S. Ct. 1997, 149 L. Ed. 2d 1001 (2001) and vacated and remanded on other grounds, 122 S. Ct. 1700, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002).

Circuit's opinion. The Court held—in an opinion that it described as "quite limited"—that the community standards criterion *does not alone* render the statute unconstitutional.[7] But there was a sharp division among the justices as to the appropriate analysis.

For example, Justice Thomas' conclusion that the Internet's "'unique characteristics' [do not] justify adopting a different approach than that set forth in *Hamling* and *Sable*,"[8] did not attract a majority of the Court. Nor did a majority of the Court agree with Justice Thomas' purported solution to the community standards conundrum—Justice Thomas counseled publishers seeking to avoid being held to the standards of the most restrictive communities to keep their material off the Internet: "If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities."[9]

Indeed, a majority of justices expressly disagreed on both fronts. Justice O'Connor, joined by Justices Breyer and Kennedy, wrote separately to emphasize the need for a national standard that would avoid the chilling effect of applying the local standards of the most restrictive communities to all Internet speech. Justice Kennedy, joined by Justices Souter and Ginsburg, also suggested that the *Hamling* approach was not feasible in the context of the Internet, and while he agreed that the Third Circuit's exclusive focus on the community standards criterion was premature, he made clear that the Third Circuit *had* identified the central issue: "[T]he Court of Appeals was correct to focus on COPA's incorporation of varying community standards; and it may have been correct as well to conclude that in practical effect COPA imposes the most puritanical community standard on the entire country. . . . [I]t is 'neither realistic nor beyond constitutional doubt for Congress, in effect, to impose the

[7]Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700, 1713, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002).

[8]Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700, 1712, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002) (Thomas, J.).

[9]Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700, 1712, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002) (Thomas, J.).

community standards of Maine or Mississippi on Las Vegas and New York City.'"[10]

Thus, there is grave doubt as to whether COPA will ultimately be upheld. Indeed, when these concurrences are added to Justice Stevens' unreserved approval of the Third Circuit's holding, it appears that a majority of the Court may well find that, taken together, the various arguments render COPA unconstitutional and perhaps that a new community standard for the Internet must be developed. What the Court will ultimately do, however, and what any such standard might look like, remains unclear.

§ 24:24 ———Mandatory filtering

Yet another attempt by Congress to control material on the Internet that may be harmful to minors is contained in the Child Internet Protection Act (CIPA). Among other things, CIPA required all public libraries that received federal funding to install filtering software on any computers that provided access to the Internet. In the spring of 2002, a three-judge federal district court in Pennsylvania heard a challenge to CIPA in *American Library Association v. United States*, asserting that forced censorship in libraries violates the First Amendment. The court agreed, entering a preliminary injunction against the enforcement of CIPA.[1]

The decision is notable in several respects. The first is the court's general observations about the nature of the Internet and the nature of the First Amendment protection which it attracts. As discussed above, federal courts have been generally inclined to afford the Internet the highest level of First Amendment protection, and the court in *American Library Association* certainly adopted this view. The CIPA court's analysis in the context of libraries evinced great concern for protecting the Internet as a medium of free expression. And because access to the Internet in public libraries was implicated, the court viewed the First Amendment protections as even more critical yet.

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[10]Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700, 1719, 152 L. Ed. 2d 771, 30 Media L. Rep. 1801 (U.S. 2002) (Kennedy, J. concurring) (citation omitted).

[Section 24:24]

[1]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002).

Indeed, given that the Internet access in question was made available in public libraries, for Judge Becker the appropriate analogical context was not medium-specific First Amendment analysis, but rather public forum doctrine. Providing Internet access in public libraries, the court concluded, amounted to the creation of a designated public forum in which the government cannot restrict speech based on its content absent a compelling governmental interest in doing so and a showing by the government that it has employed the least restrictive means for accomplishing its goal. Indeed, the court seemed to suggest that the most apposite analogy for First Amendment purposes was decidedly pre-technological:

> We acknowledge that the provision of Internet access in a public library does not enjoy the historical pedigree of streets, sidewalks, and parks as a vehicle of free expression. Nonetheless, we believe that it shares many of the characteristics of these traditional public fora that uniquely promote First Amendment values and accordingly warrant application of strict scrutiny to any content-based restriction on speech in these fora. Regulation of speech in streets, sidewalks, and parks is subject to the highest scrutiny not simply by virtue of history and tradition, but also because the speech-facilitating character of sidewalks and parks makes them distinctly deserving of First Amendment protection. Many of these same speech-promoting features of the traditional public forum appear in libraries' provision of Internet access.[2]

Reinforcing the idea that the Internet, unlike, for example, radio broadcasting, attracted the highest level of scrutiny, the court quoted approvingly Professor Lawrence Lessig's suggestion that the strict scrutiny for the Internet has a sort of originalist logic: "The 'press' in 1791 was not the *New York Times* or the *Wall Street Journal*. . . . When the Constitution speaks of the rights of the 'press,' the architecture it has in mind is the architecture of the Internet."[3]

This understanding of the Internet, at least in libraries, led the court to apply strict scrutiny to the provisions of CIPA. The court recognized that many of the interests as-

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[2]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 466 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002).

[3]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 468 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002) (quoting L. Lessig, Code and Other Laws of Cyberspace 183 (1999)).

serted in support of CIPA, such as the protection of minors from harmful material, were valid and, in some cases, compelling. Nonetheless, the court emphasized, the burdens on speech were substantial. Existing filtering technologies "erroneously block a huge amount of speech that is protected by the First Amendment."[4] In addition to this "overblocking," "underblocking"—allowing access to Web sites that *should*, according to the filtering criteria, be blocked—was also inevitable with existing filtering technologies. Even if it were reasonably effective in achieving its stated purpose, then, the filtering methods mandated by CIPA cut too deeply into areas of protected speech to remain in place. Moreover, while the statute did provide for the deactivation of the filters in certain circumstances—upon request and for bona fide research purposes—the court found these provisions insufficient to remedy the overbreadth of CIPA's restrictions. Given that much blocked material is likely to be controversial, the burden of requesting access constituted an impermissible chill on the exercise of First Amendment rights. The Court also noted the wide availability of less restrictive alternatives, such as acceptable-use policies reinforced by sanctions such as suspension of library privileges. Thus, the court concluded, the statute did not meet the "narrowly tailored" dimension of strict scrutiny analysis. Until filtering technologies are demonstrably more precise, it seems that courts will continue to favor the "tap on the shoulder" that libraries have traditionally relied upon to discourage unacceptable conduct.[5]

The public forum doctrine also provided the basis for the court's rejection of the government's contention that Internet filtering is akin to the editorial discretion that libraries necessarily exercise in the acquisition of print sources. Reasoning that libraries are not required to make all printed speech available to patrons, the government argued that they were therefore not required to make all Internet speech available. The court agreed that under the First Amendment content-based decisions about the acquisition of print materials were subject only to rational basis review. Again, however, the

[4]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 448 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002).

[5]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 481 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002).

court stressed that the Internet is different. Characterizing the Internet as a "vast, democratic forum," the court held that once access to such a forum is afforded, disfavored speech cannot be selectively excluded. For the court, then, the question of the nature of the Internet as a forum for speech proceeds from a default position of absolute openness, against which only compelling, narrowly tailored restrictions on content can be asserted. A print collection, in contrast, proceeds from a presumption of selectiveness, against which further restrictions need only be supported by a rational basis.

Generally, then, the *American Library Association* decision indicates that content-based restrictions on the Internet will continue to be viewed with considerable suspicion by the courts. But perhaps the most striking feature of the long and very detailed unanimous decision is the strong endorsement it gives to the Internet as a forum for speech that is particularly worthy of First Amendment protection. Not only, the court suggests, does the Internet attract a high level of protection, it also stands as a particularly cogent example of the values behind the First Amendment itself. In particular, the court emphasized the "equalizing" nature of the Internet, and the vital role that public access plays in this regard: "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access."[6] More generally, the court displayed a distinct willingness to view the Internet not as a First Amendment problem, but a First Amendment opportunity: "[J]ust as the development of new media 'presents unique problems . . . which may justify restrictions that would be acceptable in other contexts,' the development of new media, such as the Internet, also presents unique possibilities for promoting First Amendment values."[7]

The *American Library Association* decision was foreshadowed by a decision rendered by a federal district court in Virginia, invalidating a local library board policy that

[6]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 467 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002).

[7]American Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401, 470 (E.D. Pa. 2002), U.S. S.Ct. appeal filed (U.S. Sept. 6, 2002) (citation omitted).

required libraries to install mandatory filtering software on library Internet terminals.[8] The court accepted the plaintiff's argument that the library is a limited public forum, and thus applied strict scrutiny to restrictions, the content-based regulation. The court then concluded that the regulation failed to meet strict scrutiny because it was not sufficiently narrowly tailored. The court also held that the policy was overinclusive, because it blocked adults from accessing speech simply because the speech may be inappropriate for minors. "It has long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment. . . ."[9]

§ 24:25 — —Child pornography

Yet another area of sexually oriented speech that has attracted a great deal of congressional attention is child pornography which, as with obscenity, is outside the protection of the First Amendment and can be banned outright.

Child pornography has historically been defined as images of children engaging in sexually explicit activity. As the Supreme Court explained in *New York v. Ferber*, the state need not show, as it must in the obscenity context, that the work is patently offensive or that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value:

> [T]he question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production . . . It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.[1]

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[8]*See* Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp. 2d 552, 27 Media L. Rep. 1065 (E.D. Va. 1998).

[9]Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp. 2d 552, 567, 27 Media L. Rep. 1065 (E.D. Va. 1998).

[Section 24:25]

[1]New York v. Ferber, 458 U.S. 747, 761, 102 S. Ct. 3348, 73 L. Ed. 2d 1113, 8 Media L. Rep. 1809 (1982) (internal quotation marks and citation omitted); *see also* New York v. Ferber, 458 U.S. 747, 774–75, 102 S. Ct.

In an effort to address what it perceived as unique problems with child pornography on the Internet, Congress enacted the Child Pornography Prevention Act (CPPA) on September 30, 1996. CPPA expanded the federal definition of "child pornography," criminalizing expressive material that "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct. The broader definition targets so-called "virtual child pornography," which, unlike traditional child pornography, includes sexually explicit images that were not created with, and do not depict, actual minors.

Specifically, the CPPA defines "child pornography" as:

> any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct[2] where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[3]

CPPA was challenged by several plaintiffs who feared prosecution under the sections of the statute that banned any depiction that "appears to be" of a minor engaging in sexually explicit conduct, and the section that criminalized

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3348, 73 L. Ed. 2d 1113, 8 Media L. Rep. 1809 (1982) (O'Connor, J., concurring) ("[A] 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to [the government's] asserted interest in protecting children from psychological, emotional, and mental harm.").

[2]The Act defines "sexually explicit conduct" as "actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2).

[3]18 U.S.C. § 2256(8) (emphasis added).

advertising or promoting material in a way that "conveys the impression" that a minor is involved. Thus, no party challenged the ban on sexually explicit images involving real children.

On April 16, 2002, the Supreme Court issued a decision in *Ashcroft v. Free Speech Coalition*, striking down each of the challenged provisions.[4] The Court first noted that the statute could not be sustained on the ground that the First Amendment does not protect material that is obscene, because it expressly reaches beyond speech that is obscene. Indeed, the Court found, the plain language of the statute would reach psychology manuals, movies depicting the horrors of sexual abuse, and even mainstream movies such as *Traffic* and *American Beauty*.

Nor could the ban be sustained on the ground that it bans speech that is similar to "real" child pornography. Such speech can be banned without reference to its offensiveness or literary merit, the Court explained, because real children are harmed in the production and distribution of such material. Because the challenged portions of the CPPA do not involve real children, it imposes no such harm.

In response to the Court's decision, the House and the Senate introduced almost identical bills which attempt to implement the substantive provisions of CPPA in a way that will survive constitutional scrutiny. The Child Obscenity and Pornography Prevention Act of 2002 has passed the House, and is currently pending before the Senate Judiciary Committee.

In the new bill, congress changed the phrase "appears to be" of a minor engaging in sexually explicit conduct to any "computer image or computer-generated image that is, or is indistinguishable" from a conventional image of child pornography.[5] Similarly, in the provisions relating to pandering, the new legislation replaces the "conveys the impression" that the material contains a visual depiction of a minor engaging in sexually explicit conduct language with an intent

[4]Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 152 L. Ed. 2d 403, 30 Media L. Rep. 1673 (U.S. 2002).

[5]H.R. 4623 § 3(a). Note that the Senate bill is caught somewhere in between the existing language and that of the House version: prohibited is any "computer image or computer-generated image that is, or appears virtually indistinguishable from" child pornography. S. 2511, § 2(a).

requirement, making it an offense to advertise or promote material "with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct."[6]

Finally, Congress included a number of "findings" in an attempt to bolster the constitutionality of the proposed legislation. Section 2 of the bill details at length the potential for virtual child pornography to frustrate meritorious prosecutions, and asserts that, since the invalidation of CPPA, there has been a "significant adverse effect on prosecutions" in the Ninth Circuit,[7] a phenomenon that threatens to spread with the Supreme Court's affirmation of the Ninth Circuit's decision. These findings are plainly aimed at Justice Thomas' concurrence, in which he suggested that a demonstration that prosecutions have actually been hindered by the existence of child pornography might provide the government with the compelling interest necessary to justify the regulation.[8]

Nonetheless, a number of the infirmities identified by the Court in the *Free Speech Coalition* case remain. Thus, despite the Congressional changes and the attempt to bolster the underlying rationale with the insertion of purported findings, there is serious doubt as to whether the proposed legislation will survive constitutional scrutiny if it is passed and signed into law.

§ 24:26 —Violence

Unlike certain sexual content deemed to be obscene (and thus outside of the protection of the First Amendment), the Supreme Court has never declared that violent expressive content should be excluded from the reach of the First Amendment. Concern about violent content has been increasing in the United States, however, and courts have increasingly been asked to consider restrictions on, or penalties for, violent content. To date, none of the cases have squarely addressed any governmental attempt to regulate violent content *on the Internet*, but cases involving violent video games and cases seeking damage for violent content (includ-

[6]H.R. 4623 § 4(b).

[7]H.R. 4623 § 2(9).

[8]*See* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406–07, 152 L. Ed. 2d 403, 30 Media L. Rep. 1673 (U.S. 2002) (Thomas, J., concurring).

ing violent content on the Internet) will be relevant to any legal analysis of violent content on the Internet.

§ 24:27 — —Depictions of violence

In a case focused on crime story magazines, the U.S. Supreme Court concluded that depictions of violence in the magazines are "as much entitled to the protection of free speech as the best of literature."[1] Consistent with that conclusion, courts have rejected attempts to characterize violent content as "obscene": "Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene."[2]

Two recent cases have assessed local ordinances that sought to regulate minors access to video arcade games with violent content; the cases reached conflicting results. In *American Amusement Machine Association v. Kendrick*, Judge Posner reversed the denial of a preliminary injunction against such an ordinance. Noting that "[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial,"[3] Judge Posner concluded that violent content was protected under the First Amendment and that violent, interactive videogames were expressive and thus protected content. More recently, the district court in *Interactive Digital Software Association v. St. Louis County, Missouri* reached the opposite conclusion, holding that interactive videogames were *not* sufficiently expressive to qualify as

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[1]Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

[2]Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688, 20 Media L. Rep. 1384 (8th Cir. 1992). *See also* James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) ("We decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material."); Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63, 66, 26 Media L. Rep. 1097 (2d Cir. 1997) ("We decline any invitation to expand these narrow categories of [unprotected] speech to include depictions of violence.").

[3]American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 575, 29 Media L. Rep. 1577 (7th Cir. 2001), reh'g and reh'g en banc denied, (May 25, 2001) and cert. denied, 122 S. Ct. 462, 151 L. Ed. 2d 379 (U.S. 2001).

"speech" for First Amendment purposes.[4] That court further concluded that even if videogames were covered by the First Amendment, the municipal ordinance restricting minors' access to violent videogames was narrowly tailored to serve a compelling governmental interest. The decisions in both *American Amusement Machine Association v. Kendrick* and *Interactive Digital Software Association* focus on the application of municipal ordinances on minors' access to videogames in arcades and other public places, and thus neither addressed additional constitutional questions (such as Commerce Clause concerns) that would be raised by the application of such ordinances to the Internet. The conflicting First Amendment analyses of the two decisions, however, would likely apply to interactive violent content delivered over the Internet.

A number of courts have recently been confronted with—and rejected—claims for damages arising out of deadly attacks committed by minors against classmates and teachers, based on the theory that the viewing of violent videogames and other violent content caused or contributed to the minors' violent attacks.[5] The courts that considered the issue have concluded that videogames are protected expression under the First Amendment.[6] In *James v. Meow Media, Inc.*, the U.S. Court of Appeals for the Sixth Circuit carefully analyzed—and rejected on First Amendment grounds (among others)—an effort to impose tort liability based on the claimed impact of violent videogames and sexual Internet sites.[7]

There exists governmental concern about the possible harmful impact of violent content, especially the possible

[4]Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1132–35 (E.D. Mo. 2002).

[5]*See, e.g.,* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, Prod. Liab. Rep. (CCH) ¶ 16314 (D. Conn. 2002); Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264, 163 Ed. Law Rep. 224, Prod. Liab. Rep. (CCH) ¶ 16310 (D. Colo. 2002); James v. Meow Media, Inc., 90 F. Supp. 2d 798, 143 Ed. Law Rep. 500, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9874 (W.D. Ky. 2000), aff'd, 300 F.3d 683 (6th Cir. 2002).

[6]*See, e.g.,* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 178–82, Prod. Liab. Rep. (CCH) ¶ 16314 (D. Conn. 2002); Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264, 1279–81, 163 Ed. Law Rep. 224, Prod. Liab. Rep. (CCH) ¶ 16310 (D. Colo. 2002).

[7]James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002), affirming James v. Meow Media, Inc., 90 F. Supp. 2d 798, 143 Ed. Law Rep. 500,

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impact of such content on minors. The U.S. Federal Trade Commission regularly issues reviews and updates following up on its September 2000 report to the U.S. Congress entitled "Marketing Violent Entertainment to Children."[8] Although most of the focus has been on violent videogames, as interactive entertainment over the Internet becomes more widespread, concern over violent content is likely to be directed at the Internet.

§ 24:28 — —Threats of violence and incitement of violence

In *Brandenburg v. Ohio*, the Supreme Court held that the First Amendment protects speech that advocates violence, as long as the speech is not directed at producing imminent violence and is not likely to produce such violence.[1] The Court has also held, however, that threatening a person with violence is not protected, concluding that "true threats" fall outside of the protection of the First Amendment.[2]

Only a few reported cases have addressed the use of the Internet in the incitement of or threat of violence. In *United States v. Harrell*, the defendant was convicted of posting a terrorist threat to an Internet chat site on the day following the September 11, 2001, terrorist attacks on the United States; the defendant apparently did not raise, and the court did not address, any First Amendment issues concerning the incident.[3] In *Zieper v. Reno*, the court addressed a bizarre case in which an FBI Special Agent and an Assistant United States Attorney attempted (with some brief success in November 1999) to suppress the display on a Web site of a video film "which depicted a planned military takeover of

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R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9874 (W.D. Ky. 2000), aff'd, 300 F.3d 683 (6th Cir. 2002).

[8] *See., e.g.,* "FTC Issues Third Follow-Up Report on the Marketing of Violent Entertainment to Children," http://www.ftc.gov/opa/2002/06/mvec0602.htm (dated June 28, 2002).

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[1] Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). *See also* Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (speech of antiwar protestor not intended to incite violence).

[2] Watts v. U.S., 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

[3] U.S. v. Harrell, 207 F. Supp. 2d 158 (S.D. N.Y. 2002).

New York City's Times Square during the millennial New Year's Eve."[4] According to allegations made in a later action for damages and injunctive relief against a number of federal officials, the Special Agent and Assistant U.S. Attorney contacted the filmmaker, the Web site owner, and the Web hosting company seeking to block public access to the film; the Web site owner removed the film from the Internet, but later restored it and the federal officials took no further action. In denying a motion to dismiss the damages action against the FBI agent and the AUSA, the district court concluded that the plaintiffs had adequately pleaded a First Amendment violation.

The most significant—and vigorously contested—case concerning violence or threats of violence over the Internet involves the "Nuremberg Files" antiabortion Web site and the Federal Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248. In *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the plaintiffs are four doctors and two health clinics that provide medical services including abortions to women. The defendant organizations and individuals published over the Internet "Wanted" style posters, and maintained a Web site (the "Nuremberg Files"), identifying the plaintiffs as abortion providers. As discussed by the courts, a number of other doctors identified with "Wanted" posters and on the Nuremberg Files Web site had been murdered. The plaintiffs brought suit seeking damages and injunctive relief. The U.S. District Court for the District of Oregon denied the defendants' motion to dismiss[5] and later motion for summary judgment.[6] A jury awarded damages in favor of the doctors and clinics, and the district court enjoined the defendants from publishing the posters and other material at issue in the case.[7] A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed the

[4]Zieper v. Reno, 2002 WL 1380003 (S.D. N.Y. 2002). *See also* Zieper v. Reno, 111 F. Supp. 2d 484 (D.N.J. 2000).

[5]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 945 F. Supp. 1355, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9221 (D. Or. 1996).

[6]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998).

[7]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999), vacated, 244 F.3d 1007, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 10042 (9th Cir. 2001), reh'g en

district court, and held that the speech at issue did not authorize or directly threaten harm against the plaintiffs, and thus was speech protected under the First Amendment.[8]

By a 6-5 vote, an en banc panel of the full Ninth Circuit Court of Appeals rejected the earlier three-judge panel ruling, and upheld the damage award and injunction of the district court.[9] The majority opinion concluded that the "Wanted" posters and the "Nuremberg Files" Web site did constitute a "true threat" and thus were not protected under the First Amendment. Under the court's analysis, although the posters and the Web site did not contain language that alone constituted a threat, the content conveyed when taken in the context of the murder of other providers of abortion services after those providers' names were "posted" was sufficient to constitute an unprotected "true threat." The court concluded that because the injunction against the Web site "was not issued because of the content of [the] expression, but because of prior unlawful conduct" and was "finely tuned and exceedingly narrow," the injunction did not constitute an unlawful prior restraint of speech.[10] Rehearing of the En Banc decision has been denied, with a petition to the U.S. Supreme Court likely.

§ 24:29 Other significant First Amendment issues on the Internet—The right to speak anonymously

The First Amendment protects not only the right to speak

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banc granted, 268 F.3d 908 (9th Cir. 2001) and on reh'g en banc, 290 F.3d 1058 (9th Cir. 2002), reh'g en banc denied, (July 10, 2002) and as amended, (July 10, 2002) and aff'd in part, rev'd in part, 290 F.3d 1058 (9th Cir. 2002) supra.

[8]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 10042 (9th Cir. 2001), on reh'g en banc, 290 F.3d 1058 (9th Cir. 2002), reh'g en banc denied, (July 10, 2002) and as amended, (July 10, 2002).

[9]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002), as amended, (July 10, 2002). Because of an intervening decision that the district court had not had an opportunity to consider, the appeals court did vacate an award of punitive damages to the plaintiffs. Id. at 1086.

[10]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1087–88 (9th Cir. 2002), as amended, (July 10, 2002).

freely, but also the right to speak anonymously. In cases involving door-to-door solicitations, handbills, and political literature, the Supreme Court has repeatedly and recently upheld this right.[1] And speech on the Internet is no less protected—in the absence of an allegation of wrongdoing, neither the government nor anyone else has the right to pierce that anonymity. However, because the technology of the Internet not only allows, but favors anonymity or pseudonymity, and because the Internet can carry so much information to so many, anonymous Internet speech that is alleged to cause harm raises specific legal issues about when the right to speak anonymously can be abridged. As the court that deals with most subpoenas to America Online observed: "In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions."[2]

There are many reasons to protect anonymous and pseudonymous speech online. First, such protection encourages more speech. Authors may be willing to publish material anonymously that contributes to public discourse that they would not publish under their own names. "The decision in

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[1]*See* Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (U.S. 2002) (municipal ordinance requiring individuals to obtain a permits with their name on them before engaging in door-to-door political advocacy and to produce them upon demand violates First Amendment anonymous speech rights); Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (state statute requiring individuals circulating initiative petitioners to wear identification badges violates First Amendment); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 23 Media L. Rep. 1577 (1995) (state statute prohibiting distribution of political literature without distributor's name and address violates First Amendment); Talley v. California, 362 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (striking down a state statute prohibiting any distribution of handbills without preparer's name and address).

[2]In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372 at *6 (2000), order rev'd on other grounds, 261 Va. 350, 542 S.E.2d 377, 29 Media L. Rep. 1442 (2001).

favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[3] Historically, "[c]ontroversial and thought-provoking speech has frequently been issued from under the cover of anonymity by writers who feared prosecution or worse if their identities were known."[4] Many of the political essays instrumental in shaping and critiquing the United States Constitution were published anonymously.[5]

Second, authors may feel that their message will be affected by the authors' identity. "On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[6] Pseudonymity may be the only way for certain speakers to be heard, especially those "stigmatized by prior political speech or association."[7] For example, during the McCarthy era, blacklisted writers relied upon pseudonyms simply in order to continue working.[8]

Third, individuals might wish to provide or obtain access to sensitive information without revealing their identity. Anonymity "permits persons to obtain information relevant to a

[3]McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 341–42, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 23 Media L. Rep. 1577 (1995).

[4]Jonathan D. Wallace, Nameless in Cyberspace: Anonymity on the Internet, Cato Institute Briefing Papers No. 54 at 2 (Dec. 8, 1999).

[5]In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372 at *6 (2000), order rev'd on other grounds, 261 Va. 350, 542 S.E.2d 377, 29 Media L. Rep. 1442 (2001) (noting that the right to speak anonymously "arises from a long tradition of American advocates speaking anonymously through pseudonyms, such as James Madison, Alexander Hamilton, and John Jay, who authored the Federalist Papers but signed them only as 'Publius.'"). Numerous Anti-Federalists likewise wrote under various pseudonyms, and Thomas Paine initially signed his *Common Sense* simply as "An Englishman."

[6]McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 342, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 23 Media L. Rep. 1577 (1995).

[7]Jonathan D. Wallace, Nameless in Cyberspace: Anonymity on the Internet, Cato Institute Briefing Papers No. 54 at 3 (Dec. 8, 1999).

[8]Jonathan D. Wallace, Nameless in Cyberspace: Anonymity on the Internet, Cato Institute Briefing Papers No. 54 at 3 (Dec. 8, 1999) (citing Margaret Blanchard, Revolutionary Sparks 237 (Oxford 1992)).

sensitive or intimate condition without fear of embarrassment."[9] Whether the speaker or the listener is seeking or offering medical, political, or other information, anonymous access ensures that more information is available.

§ 24:30 —Statutory restrictions on anonymous Internet speech

Federal courts have invalidated state statutes prohibiting the use of anonymous or pseudonymous identities on the Internet. In *ACLU v. Miller*, the District Court enjoined enforcement of a Georgia statute making it a crime to "transmit any data through a computer network . . . for the purpose of . . . exchanging data with . . . any electronic information storage bank or point of access to electronic information if such data uses any individual name . . . to falsely identify the person . . ..."[1] The court concluded that one's name is content like any other content that could be included or not at the author's choice, and that the statute was a presumptively invalid content-based restriction. Since the statute was not narrowly tailored to accomplish the putative purpose of fraud prevention, it violated the First Amendment and its enforcement was enjoined.

§ 24:31 —Tort restrictions on anonymous speech

Where anonymous speech is libelous or otherwise damaging and gives rise to a cause of action, however, the right of anonymous speech cannot shield a wrongdoer. Plaintiffs are entitled to bring suits against those who breach contractual or fiduciary obligations, or engage in defamatory attacks. Plaintiffs in these situations must have some way of determining the Speakers' identity so that they can service notice on the defendant. Thus, the Speakers' right to ano-

[9]Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578, 51 U.S.P.Q.2d 1130 (N.D. Cal. 1999).

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[1]American Civil Liberties Union of Georgia v. Miller, 977 F. Supp. 1228, 1230, 25 Media L. Rep. 1978, 43 U.S.P.Q.2d 1356 (N.D. Ga. 1997) (citing Act No. 1029, Ga. Laws 1996, p. 1505, codified at O.C.G.A. § 16-9-93.1).

nymity in some circumstances must be defeasible, or at least admit differing levels of stringency.[1]

On the other hand, "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."[2] The challenge has been to develop standards permitting plaintiffs to overcome the defendant's First Amendment right to speak anonymously only in those cases where the speech actually resulted in an actionable claim. Many courts have struggled to articulate standards designed to "ensure that this unusual procedure [using discovery to uncover the identity of a defendant] will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent use of this method to harass or intimidate."[3] In general, two standards have emerged—one for defendants, and one for witnesses.

§ 24:32 —The standard where the anonymous/pseudonymous speakers are not participants in the litigation

In *2TheMart.Com*, shareholders whose stock was devalued sued the company, its officers, and its directors for fraud.[1] The defendants argued that the cause of the injuries were the extremely critical comments that 23 speakers had posted

[Section 24:31]

[1]Anne Wells Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace, 104 Yale L. J. 1639, 1675 (1995) ("Questions about the propriety of anonymity in the cyberspaces must be evaluated along a continuum. Anonymity should not be outlawed as a general principle; there are varying levels of anonymity, or at least pseudonymity, that are rational and justifiable.").

[2]Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578, 51 U.S.P.Q.2d 1130 (N.D. Cal. 1999).

[3]Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578, 51 U.S.P.Q.2d 1130 (N.D. Cal. 1999). Although the First Amendment is not usually implicated in speech among private parties, the state subpoena power used to uncover anonymous speakers constitutes state action; therefore, its use is constrained by the First Amendment.

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[1]Doe v. 2TheMart.Com Inc., 140 F. Supp. 2d 1088, 29 Media L. Rep. 1970, 49 Fed. R. Serv. 3d 404 (W.D. Wash. 2001).

to an online bulletin board about the company. The defendants subpoenaed the records from the Internet Service Provider to identify the 23 individuals in question. The ISP informed the affected users that their identities were being sought through subpoena, and they filed a motion to quash the subpoena.

Relying on two earlier cases[2] in which plaintiffs sought the identity of a speaker in order to make them a party to the litigation, the *2TheMart.Com* Court concluded:

> The Court will consider four factors in determining whether the subpoena should issue. These are whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.[3]

The four different factors are to be weighted "as the court determines is appropriate under the circumstances of each case."[4] Thus, where the request was overly broad, though perhaps not in bad faith, that fact weighed against breaching anonymity. Second, the court held that because this defense was only one of 27 affirmative defenses, it was not a core defense. Third, because the anonymous speakers were not directly involved in the litigation, their identity was not necessary for the litigation to proceed. Finally, the court found that because the posted messages themselves could be submitted in court, the defendant could still make use of its defense without knowing the identity of the anonymous posters.

The role that the anonymous speaker plays in the litigation is significant. Earlier cases focused almost exclusively upon anonymous *defendants*. In *2TheMart.Com*, the anonymous speakers were not parties to the litigation. Because discovering their identities was not critical for the litigation

[2]Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 51 U.S.P.Q.2d 1130 (N.D. Cal. 1999); In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372 at *6 (2000), order rev'd on othr grounds, 261 Va. 350, 542 S.E.2d 377, 29 Media L. Rep. 1442 (2001).

[3]Doe v. 2TheMart.Com Inc., 140 F. Supp. 2d 1088, 1095, 29 Media L. Rep. 1970, 49 Fed. R. Serv. 3d 404 (W.D. Wash. 2001).

[4]Doe v. 2TheMart.Com Inc., 140 F. Supp. 2d 1088, 1095, 29 Media L. Rep. 1970, 49 Fed. R. Serv. 3d 404 (W.D. Wash. 2001).

to proceed, the test for compelling disclosure "was more stringent . . . [because] the need for the information had to be not only compelling, but also to outweigh First Amendment rights. This test makes disclosure unlikely when the person to be identified is a nonparty witness."[5]

§ 24:33 —The standard when the anonymous/pseudonymous individuals are direct participants in the litigation

In *Columbia Ins. Co. v. seescandy.com* and *In re Subpoena Duces Tecum to America Online*—both used to develop the *2TheMart.Com* standard—the anonymous speakers were sued directly as John Does. In http://*seescandy.com*,[1] the court articulated a very different four-part test. First, plaintiff must be able to identify the missing person sufficiently for the court to determine that the party is a real person amenable to suit. Second, plaintiff must describe his or her past attempts to unsuccessfully identify the defendant. Third, plaintiff must show that the case would withstand a motion to dismiss (which both guarantees that the plaintiff has standing and prevents abuse of discovery to remove anonymity). Fourth, plaintiff must file a discovery request to justify the need for the information. In that trademark case, the court held that because the plaintiff had met these requirements, and in particular because the court could compare the trademark used by the anonymous Web-site operator and because the Web-site operator had offered to sell the domain name to the trademark owner, discovery of the anonymous speaker was justified.

One year later, in *America Online, Inc.*,[2] an anonymous company sought discovery of five John Does who had made allegedly defamatory comments online concerning the company. AOL was unwilling to comply with the subpoena and filed a motion to quash. The Virginia Circuit Court

[5]16 No. 7 Fed. Litigator 174, 176, Anonymous Internet Users—Identity—Compelled Disclosure.

[Section 24:33]

[1]Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 51 U.S.P.Q.2d 1130 (N.D. Cal. 1999).

[2]In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 2000 WL 1210372 at *6 (2000), order rev'd on other grounds, 261 Va. 350, 542 S.E.2d 377, 29 Media L. Rep. 1442 (2001).

recognized the protection for anonymous speech and required a party seeking to discovery the identity of an Internet speaker to show by pleadings or evidence that (1) the party seeking the information has a legitimate good faith basis to contend that it has been harmed by actionable conduct, and (2) the identity information is "centrally needed" to advance that claim.

And finally, in *Dendrite International, Inc. v. Doe No. 3*,[3] the appellate court affirmed the granddaddy of the Internet anonymous speech cases. Again, the allegations related to defamation. The New Jersey court established yet another four steps: (1) the plaintiff must undertake steps to notify the anonymous poster that he or she is the subject of a subpoena, such as posting a message of notification to the pertinent message board; (2) the plaintiff shall set forth the exact statements alleged to be actionable; (3) the plaintiff must set forth a prima facie case against the anonymous speaker; and (4) the court must balance the free speech rights against the strength of the prima facie case and the necessity for disclosure to allow the plaintiff to proceed.

§ 24:34 —The right to speak privately

The technology of the Internet that allows nearly instant communication also is susceptible to interception, like most other telecommunication processes. While privacy of data is covered in another section of this Treatise, a note here about the ability of the government to intercept content is necessary. In the United States, the FBI has created its own software interception program called Carnivore. The program works in two modes. In one, it can capture the date, time, source and destination addressing information of electronic messages—information that is legally and historically entitled to little or no protection on a written communication like a piece of mail. In the other, it can capture the content of messages—information legally and historically entitled to significant protection under federal mail statutes. In either event, the software is "a little black box installed on an Ethernet link at the Internet service provider that can watch

[3] Dendrite Intern., Inc. v. Doe No. 3, 342 N.J. Super. 134, 775 A.2d 756, 17 I.E.R. Cas. 1336, 29 Media L. Rep. 2265 (App. Div. 2001).

all of the traffic in and out of the mail server."[1] Collection of either kind of information is permitted only upon a court order, although one of the concerns about Carnivore is how easy it is for an agent to collect that information without a court order, and to erase the evidence showing that he or she did it.[2] Nevertheless, government intrusion in the United States is perhaps the most constrained. In Britain, for example, like many other countries, the British Intelligence Service is directly connected to all ISPs in the country, and has significantly broader authority to examine content at will.

Since the September 11 terrorist attacks on the United States, Congress has increased governmental monitoring capabilities. Under Section 215 of the Patriot Act, for instance, the government can obtain library records of patrons, including records of any Internet activity. Moreover, the law forbids librarians from disclosing the fact that law enforcement has sought the information.

§ 24:35 —Rights of ISPs and network access providers

In the short history of the Internet, First Amendment issues relating to sexually oriented content have already been extensively litigated. In other areas, however, the First Amendment issues are developing far more slowly, in large part because of the government's hesitance to impose significant regulation on the Internet. One area where the law is developing slowly is the area of the First Amendment rights of ISPs and network access providers. One district court decision has looked at the First Amendment in the context of regulation of Internet access providers, and cases addressing other modern communications technologies also illustrate the issues raised.

[Section 24:34]

[1] Smith, Internet Privacy: Who Makes the Rules?, 4 Yale Symp. L. & Tech. 2 (2001).

[2] ITT Research Institute, Independent Review of the Carnivore System: Final Report, Contract No. 00-C-3028, IITRI CR-030-216 p.xiv 8 Dec. 2000 (available at http://www.epic.org/privacy/carnivore/carniv_final.pdf).

§ 24:36 — —open access to service providers' networks

An early significant policy debate relating to the Internet has centered on the question whether cable service providers that provide high speed Internet access over their cable networks should be forced to allow competing Internet Service Providers access to the cable networks. The debate is over open access (in the language of proponents of such access) or "forced access" (in the language of opponents).[1]

A few courts have addressed aspects of the open access debate, but only one has focused on the asserted First Amendment rights of cable systems *not* to carry the speech of other (competing) ISPs. In *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, the district court ruled that a local ordinance that requires open access is unconstitutional whether the ordinance is viewed as "content neutral" or not.[2] The *Comcast* decision is heavily based on the court's conclusion that cable systems do not operate as a "bottleneck" over broadband access to the Internet. A different conception of the Internet access industry might lead to a different result. Moreover, the court's conclusions are in some tension with the U.S. Supreme Court's analysis of "must carry" requirements imposed on cable systems to require that such systems carry certain unaffiliated cable channels (on the video portion of their cable network). In *Turner Broadcasting System, Inc., v. Federal Communications Commission ("Turner II")*, the Court applied an intermediate level of scrutiny and concluded that the First Amendment rights of cable operators were not violated.[3] Under the *Turner II* analysis, forced access for ISPs would seem to raise fewer First Amendment concerns because there is less chance that customers would attribute

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[1]For an overview of the open access/forced access issues, and others surrounding the deployment of broadband technology, see "Broadband Backgrounder: Public Policy Issues Raised by Broadband Technology," Dec. 2000, available at http://www.cdt.org/digi_infra/broadband/backgrounder.shtml.

[2]Comcast Cablevision of Broward County, Inc. v. Broward County, Fla., 124 F. Supp. 2d 685 (S.D. Fla. 2000).

[3]Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369, 25 Media L. Rep. 1449 (1997).

responsibility for the content of the Internet to the cable operator (while in the cable channel context, there was such a risk).[4]

§ 24:37 — —Service providers' right to use information about customers

Although not an Internet case, the decision by the U.S. Court of Appeals for the Tenth Circuit, in *U.S. West, Inc. v. Federal Communications Commission*, raises some significant potential First Amendment concerns about legislative efforts to impose privacy restrictions on the ability of service providers to use information about their customers' usage patterns.[1] In that case, the court declared that U.S. West's First Amendment rights were violated by an FCC rule barring the use of information about customers' telephone calling patterns in marketing efforts to those customers. The Tenth Circuit's analysis, if adopted broadly, could raise constitutional concerns about Internet privacy legislation.

§ 24:38 The intractable problem of Internet jurisdiction

Perhaps no aspect of legal doctrine has been as unsettled by cyberspace as jurisdiction. Courts all over the world have grappled with where cyberspace activity happens, and what connection with a particular forum suffices for a court to find that it has jurisdiction over a cyberdispute.

The jurisdictional issue arises both in disputes involving plaintiffs and defendants in different states within the United States, and disputes involving plaintiffs and defendants physically located in different countries. Both raise important issues and both threaten the viability of the Internet as a forum for open communications. These concerns are most pronounced, however, when the disputes involve

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[4]Also relevant to the First Amendment rights of cable system operators is Time Warner Entertainment Co., L.P. v. F.C.C., 240 F.3d 1126, 29 Media L. Rep. 1658 (D.C. Cir. 2001), reh'g en banc denied, (May 4, 2001) and cert. denied, 122 S. Ct. 644, 151 L. Ed. 2d 562 (U.S. 2001), in which the court ruled that FCC limitations on quantity of ownership of cable systems violated the First Amendment rights of the cable owners.

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[1]U.S. West, Inc. v. F.C.C., 182 F.3d 1224 (10th Cir. 1999), cert. denied, 530 U.S. 1213, 120 S. Ct. 2215, 147 L. Ed. 2d 248 (2000).

actors in different countries. Because the First Amendment gives American speakers some of the broadest speech protections available anywhere in the world, speech that is absolutely protected by the Constitution may be forbidden in many other countries. Examples range from Britain's notoriously plaintiff-friendly libel laws to France's laws criminalizing hate speech.

§ 24:39 —The approach of United States courts

In early cases involving questions of what Internet activity sufficed to allow a court to exercise jurisdiction, courts applied an *ad hoc* approach to analyzing jurisdictional issues, and tended to apply jurisdictional concepts broadly. Thus, courts found jurisdiction based on a company's mere advertising presence on the Internet,[1] and on a company's Web site which "actively solicited" users.[2]

In 1997, the court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, established what has come to be known as the "Zippo sliding scale" test for determining jurisdiction based on Internet activity. In *Zippo*, the court held that "[t]he likelihood that personal jurisdiction can constitutionally be exercised is directly proportionate to the nature and quality of commercial activity than an entity conducts on the Internet."[3] The answer to the question depends on the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[4] Under the *Zippo* test, it is relatively clear that mere maintenance of a "passive Web site" is not enough to confer jurisdiction. On the other end of the scale, jurisdiction will almost always be found over companies that enter into contract that contemplate continued business with the forum state or who knowingly and repeatedly transmit information over the Internet to the forum state. A wide gap obviously exists between the two; most recent cases concern this gap.

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[1] *See, e.g.,* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 155 A.L.R. Fed. 745 (D. Conn. 1996).

[2] Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 40 U.S.P.Q.2d 1729 (E.D. Mo. 1996).

[3] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124, 42 U.S.P.Q.2d 1062 (W.D. Pa. 1997).

[4] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124, 42 U.S.P.Q.2d 1062 (W.D. Pa. 1997).

Before turning to that body of case law, however, it is important to note that some U.S. courts continue to take an expansive view, exercising jurisdiction even in the absence of meaningful contacts in a jurisdiction. The most recent example is *Young v. New Haven Advocate*, in which the U.S. District Court for the Western District of Virginia exercised jurisdiction over two Connecticut newspapers.[5] Those papers had written articles about the treatment of Connecticut inmates who had been transferred to a prison in Virginia. The articles were, in turn, posted on the newspapers' passive Web sites. Those newspapers—The New Haven Advocate and The Hartford Courant—are not national in scope and appear to be targeted to Connecticut audiences. Nonetheless, the Virginia court exercised jurisdiction on the theory that when "information is posted on the Internet, the product is offered to a worldwide audience . . .." Thus, the court held, a newspaper article can be "subjected to multi-state jurisdiction." The newspapers have recently appealed that decision; the appeal is currently pending in the United States Court of Appeals for the Fourth Circuit.

In deciding whether to exercise jurisdiction based on Internet activity, the factors commonly considered by U.S. courts include:

- **Use of the Internet to Establish Binding Business Relationships**. Courts have generally found that using the Internet to establish business relationships in another state is sufficient to confer jurisdiction in that state. Thus, for example, in *Gorman v. Ameritrade Holding Corporation*, the U.S. Court of Appeals for the D.C. Circuit upheld the exercise of personal jurisdiction over a Nebraska company where the company operated a Web site over which it conducted business, as a result of which the company and its District of Columbia customers entered into binding contracts.[6]
- **Use of the Internet to Conduct Marketing that Results in Sales in the Forum.** In *The Sports Authority*

[5]Young v. New Haven Advocate, 184 F. Supp. 2d 498, 29 Media L. Rep. 2609 (W.D. Va. 2001).

[6]Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 52 Fed. R. Serv. 3d 869 (D.C. Cir. 2002). *See also* Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074 (C.D. Cal. 1999) (finding jurisdiction over Connecticut company in California federal court where Connecticut company's Web site served as "virtual store" for consumers to purchase products).

Michigan, Inc. v. Justballs, Inc., the court exercised jurisdiction over the defendant because its Web site allowed customers to view a product list and pricing guide, to order products over the Internet, and to contact the company via email.[7] Similarly, in *Standard Knitting, Ltd. v. Outside Design, Inc.*, the court deemed it appropriate to exercise jurisdiction over the defendant based on the Internet marketing that occurred on the defendant's its Web site, combined with catalogue sales made by the defendant into the forum state.[8]

• **Combination of Internet Activity and Non-Internet Based Contacts.** In several cases, courts have "combined" Internet contacts with non-Internet based activity to find that together, contacts sufficient to confer jurisdiction exist. Thus, in *Rio Props., Inc. v. Rio International Interlink*, the court exercised jurisdiction over the defendant based on the combination of the defendant's passive Web site which was operated outside the forum state and the defendant's marketing activities through radio and print advertising within the forum state.[9] In *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, the court similarly exercised jurisdiction based on a combination of contacts including the defendant's Web site that permitted viewers to order a product and download order forms to serve as an "independent affiliate" for the product, the contacts of several independent affiliates who lived in the forum state, and the contacts of company representatives who appeared in trade shows there.[10]

• **Intending Harmful Effects in the Forum State.** In *Panavision International, L.P. v. Toeppen*, the Court affirmed the exercise of jurisdiction over an Illinois defendant in a California court, based on the effects in Califor-

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[7]The Sports Authority Michigan, Inc. v. Justballs, Inc., 97 F. Supp. 2d 806 (E.D. Mich. 2000).

[8]Standard Knitting, Ltd. v. Outside Design, Inc., 2000 WL 804434 (E.D. Pa. 2000).

[9]Rio Properties, Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 62 U.S.P.Q.2d 1161, 52 Fed. R. Serv. 3d 239 (9th Cir. 2002).

[10]Hsin Ten Enterprise USA, Inc. v. Clark Enterprises, 138 F. Supp. 2d 449 (S.D. N.Y. 2000).

nia of the defendant's actions in Illinois.[11] The Illinois defendant was "cybersquatting" by operating a Web site at "http://panavision.com" which used the plaintiff's trademark. The defendant sent letters to the defendant company's headquarters in California offering to sell the domain name to them. Although the defendant's Wbsite was entirely passive, because it was aimed at causing harm to Panavision in California, the California court held that the exercise of jurisdiction over the Illinois defendant was appropriate.

§ 24:40 —Obtaining jurisdiction over a foreign party in a U.S. court

The jurisdictional test does not differ substantially in determining whether a given U.S. court has jurisdiction over a foreign defendant. The main difference in the analysis is the determination whether the exercise of jurisdiction over the foreign defendant could be considered reasonable based on the circumstances. Resolution of these cases is necessarily fact specific. That said, courts will exercise jurisdiction over foreign defendants who meet the *Zippo* test in circumstances the courts deem appropriate. In *MacConnell v. Schwamm*, for example, the court exercised personal jurisdiction over a Japanese defendant accused of cybersquatting a domain name using an American company's trademark.[1] The court took into account the fact of the Japanese defendant's residency, but concluded that minimum contacts were met, and the court's interest in protecting California companies outweighed any inconvenience that litigating in a foreign forum caused.[2]

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[11]Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 46 U.S.P.Q.2d 1511 (9th Cir. 1998).

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[1]MacConnell v. Schwamm, 2000 WL 1409758 (S.D. Cal. 2000).

[2]In contrast, in Foster v. Arletty 3 Sarl, 278 F.3d 409, 52 Fed. R. Serv. 3d 470 (4th Cir. 2002), the court concluded that exercise of personal jurisdiction over a French company in a contract dispute over license for entertainment programs that were promoted over the Internet would be unreasonable.

§ 24:41 —The approach of foreign courts, and a U.S. court's reaction

Of significant concern to U.S. individuals and businesses is the exercise of jurisdiction, based on Internet activity, by foreign courts. Such cases have increasingly made headlines, as courts across the world have exercised jurisdiction over U.S. companies for their Internet-based activity. The case that to date has raised the most significant First Amendment concerns is that involving the French government's prosecution of Yahoo! Inc.—a U.S. company whose English language Web site targets U.S. audiences. At issue in the Yahoo! case was the auction of Nazi memorabilia on Yahoo!'s Web site. Such activity is clearly lawful, and indeed constitutionally protected, in the U.S. In France, however, *any* display of Nazi memorabilia is unlawful. Although Yahoo!, Inc. has a separately incorporated French subsidiary that hosts a Web site in French and complies with French law, the French court nonetheless exercised jurisdiction over the U.S.-based Yahoo!, Inc. on the ground that French users could access the U.S. Web site if they chose and thus "the damage was suffered in France."[1] The French court ordered Yahoo! to render its site inaccessible to French users, or face a daily fine.

In response to the French court's order, Yahoo!, Inc. filed suit in federal district court in Northern California, seeking a declaration that the French court order is unenforceable in the U.S.. The court issued the declaration, holding that

> the French order's content and viewpoint-based regulation of the Web pages and auction site on http://Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders. . . . Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate

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[1]Union of French Jewish Students & League Against Racism v. Yahoo! Inc., Tribunal de Grande Instance de Paris, May 22, 2000.

> treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.[2]

The federal district court decision is now on appeal to the U.S. Court of Appeals for the Ninth Circuit. In the meantime, the French authorities have initiated criminal proceedings against Yahoo!, Inc. and its former Chief Executive Officer.[3]

Cases raising issues similar to that in the Yahoo!, Inc. litigation are emerging in other various parts of the world as well. In *Gutnick v. Dow Jones & Co., Inc.*, for example, an Australian businessman sued the U.S. company in Australia based on an article that appeared both in the print and Internet versions of *Barron's*.[4] Dow Jones argued that the article was written by an American for an American publication and intended for an American audience, and that jurisdiction was thus improper in Australian courts. The High Court of Australia recently disagreed, concluding that the article was in fact "published in the State of Victoria when downloaded by Dow Jones subscribers," allowing Australian courts to exercise jurisdiction.

§ 24:42 The global nature of speech on the Internet

Every nation in the world restricts some speech in books and newspapers, on radio, television, or movies, and even in general conversation between citizens. These restrictions are imposed within geographic borders to accomplish various political, moral, social, legal, or religious purposes. But it is the very nature of the Internet that those geographic borders are invisible, and, even if visible, quite easy to jump. Thus, the traditional restrictions—and the legal liability that follows them—within other countries take on a new significance when worldwide speech is suddenly widely available through a computer and a modem. It is critical to realize

[2] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192–93, 30 Media L. Rep. 1001 (N.D. Cal. 2001).

[3] "Yahoo case taken to criminal court," Feb. 26, 2002, available at http://news.com.com/2100-1023-845698.html.

[4] Gutnick v Dow Jones & Co., Inc., [2001] VSC 305 (Sup. Ct. of Victoria, Australia Aug. 28, 2001) (decision available at http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html).

that international law can and does affect even speech by a speaker in the United States to a United States audience.

§ 24:43 —Who is liable for illegal content?

Content on the Internet is most often provided by the person or group that creates a Web site, often called the host. However, users—those who access the Internet from their computers at home, work, or cybercafe—may also provide content if they participate in chat rooms or discussion groups. Finally, Internet Service Providers who provide the telephone lines and servers which allow the connections between users and Web sites or users and chat rooms, generally act simply as conduits, and not providers of content, although some may also provide some content as part of their service. All three groups are affected by content regulation.

The question of who may be held liable for illegal content is often the critical question in a content regulation framework, since imposing liability on more kinds of participants tends to lessen the amount of material generally available, and imposing liability on fewer types of participants tends to increase the amount of material generally available. So, in countries like the United States and Canada, where freedom of speech and information are highly valued, liability tends to follow the content provider. In contrast, in countries like China and Korea, where the centralized control of information is highly valued, liability tends to be imposed on all levels of Internet participation.

§ 24:44 —What laws regulate content?

Like other forms of communication, Internet content is most often regulated by the laws of individual countries. But many countries and groups of countries have created laws that apply specifically to the Internet. Some countries have imposed codes of conduct on Internet Service Providers, and some providers have voluntarily agreed to create and cooperate with their own. Some coalitions of countries have banded together to address the issues. And finally, several international treaties contain provisions about regulation of expression that affect the Internet.

§ 24:45 —Individual country regulations

Just as most countries regulate speech, to some degree, on

the airwaves, newspapers, and on the street, they also regulate speech on the Internet. Many of these laws simply impose on Internet speech the same restrictions that apply to other media: defamation on the Internet is as illegal as defamation in the newspaper or on the radio or on a street corner. But there is little uniformity among and between different countries as to what is illegal speech. Although speech referring to or inciting racial hatred cannot be prohibited in the United States, many European countries prohibit such speech. Indeed, the Council of Europe recently drafted a hate speech protocol to its Cybercrime Convention that sets a standard for European hate speech criminal law provisions. Germany actively polices speech that glorifies Nazism (although it largely protects other forms of political speech) and advertising that compares one product to another. Britain forbids speech relating to on-going court cases. Singapore prohibits sexually explicit speech (as well as many other types of speech). France requires that any written information about a French business or institution include a French language version. And both state and federal laws in the U.S. outlaw obscenity, child pornography, false or fraudulent commercial speech, and fighting words.

Because traditional law enforcement techniques have limited effect where users can post content anonymously from a variety of locations, many countries have enacted laws that affect access to the Internet, so as to lessen the likelihood that citizens will be exposed to illegal content. This kind of access control can be grouped into three categories.

§ 24:46 — —Unrestricted access

Countries that rely on voluntary industry self-regulation and voluntary end-user use of filtering/blocking technologies generally want to encourage access to the Internet. The United States, Canada, the United Kingdom, and most Western European countries have taken this approach. In April 2002, the European Parliament deputies voted 460-0 against mandatory Internet content blocking and in favor of self-regulation by the industry. In these countries, general civil and criminal liability apply to content providers. Safe harbor provisions apply to Internet Service Providers who act only as conduits; sometimes voluntary compliance with industry codes of conduct also precludes liability.

§ 24:47 — —Limited access

Countries with stricter controls on information and expression often mandate blocking access to content deemed unsuitable for their citizens through mandatory filtering or blocking software, or requiring all traffic to be routed through a government server equipped with a filter. For example, in Saudi Arabia, government proxy servers filter all traffic to filter out unwanted material defined as "material contravening a fundamental principle or legislation, or infringing the sanctity of Islam or breaching public decency," anything "contrary to the state or its system," and "anything damaging to the dignity of heads of state or heads of credited diplomatic missions in the Kingdom." In China, all service providers and access providers like Internet cafes, such cafes are required by law to install software to block restricted Web sites (those deemed subversive or pornographic) and to record user activities. In May 2002, police seized 965 computers and shut down nearly 200 bars that failed to install the required software. Singapore and the United Arab Emirates use similar methods.

§ 24:48 — —Prohibition of public access

Finally, some countries where control of information is considered paramount have instituted virtual bans on the general public's access to the Internet, though permitting access by license or with special permission for academics, scientists, and government officials. Saudi Arabia banned such public access until 1999, as did the Taliban leaders in Afghanistan and as does Burma.

§ 24:49 —ISP codes of conduct

Because content can be stopped at the server level, some countries have focused on Internet Service Providers in the regulation of content. Numerous ISP associations have drafted codes of conduct to address some Internet content issues by setting out rules, procedures and best practices for the various participants. The codes may deal with a wide range of issues, including the rights and responsibilities of relevant parties regarding providing and accessing content, the minimum age of subscribers, privacy and data protection, fair trading, advertising and promotional material.

For example, the Hong Kong Internet Association has is-

sued a "Code of Practice Statement on Regulation of Obscene and Indecent Material" that requires its members to "take reasonable steps to prevent users of their services from placing on the Internet material likely to be classified as obscene." Those steps are defined to include informing users and content providers about the kinds of materials at issue, age restrictions, and appropriate warnings for material "likely" to be considered obscene or indecent. The Practice Statement also requires members to promptly block access to Web sites of offending material and to cancel accounts of subscribers who repeat offending conduct. The Code of Conduct of the Canadian Association of Internet Providers (CAIP) provides that members will "not knowingly host illegal content," and that they will share information about "material that has been evaluated as illegal" in order to prevent routing around blockages. However, the CAIP provides that because monitoring the content available on the Web is impractical, their reasonable efforts are confined to investigating complaints.

Although these codes obviously can differ widely, although they are not mandatory as a matter of law, and although compliance with them does not establish compliance with the law, it is nevertheless clear that many countries and international associations are looking to such codes to define ISP responsibilities as an alternative to Internet-specific legislation. Indeed, the influential Organization for Economic Cooperation and Development (OECD) is considering an Agreement on International Co-operation with regard to the Internet which specifically encourages development of these voluntary national and perhaps international codes. Thus, although participation may be voluntary, compliance with such a code may prove persuasive in determining whether efforts in a particular country to comply with particular laws were "reasonable."

§ 24:50 —International treaties and conventions

Numerous international treaties explicitly protect freedom of expression. Countries that have ratified these treaties or others like them must consider the principles of these treaties before enacting laws relating to content on the Internet. Some of these treaties are briefly described below:

• **The Universal Declaration of Human Rights.**[1] Propounded by the members of the United Nations in 1948, Article 19 of this Declaration recognizes the right to "freedom of opinion and expression," including the right to "seek, receive, and impart information and ideas through any media and regardless of frontiers." The Declaration is an aspirational document, not an enforceable one.

• **The European Convention for Protection of Human Rights and Fundamental Freedoms.**[2] Article 10 of the Convention provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights is responsible for enforcing the European Convention, and has construed Article 10 broadly to cover virtually every kind of expression: artistic, advertising, political, journalistic, commercial, and religious.

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[1] Available at http://www.hrWeb.org/legal/udhr.html.

[2] Entered into force Sept. 3, 1953; available at http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

- **The International Covenant on Civil and Political Rights.**[3] Article 19 provides:

  1. Everyone shall have the right to hold opinions without interference.

  2. Everyone shall have the right to freedom of expression; this right shall include the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing or in print, in the form of art, or through any media of his choice.

The Article goes on to restrict the right as authorized by law to the extent necessary to protect the rights and reputations of others, and to protect national security, public order, public health, and morals.

- **The American Declaration of the Rights and Duties of Man.**[4] The Declaration is enforceable through the Inter-American Commission on Human Rights. Article IV provides: "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." Article XIII states that "[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discovery."
- **The American Convention on Human Rights.**[5] Ratified by many members of the Organization of American States, and enforced by the Inter-American Court on Human Rights. Article 13 provides:

  1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

The Article specifically precludes prior censorship, but

[3]Entered into force March 23, 1976, available at http://www.hrWeb.org/legal/cpr.html.

[4]Adopted by the Ninth International Conference of American States in Bogota Columbia in 1948, available at http://www.worldpolicy.org/americas/treaties/adrdm.html.

[5]Entered into force July 18, 1978, available at http://fletcher.tufts.edu/multi/texts/BH547.txt.

restricts the right as authorized by law to the extent necessary to protect the rights and reputations of others, and to protect national security, public order, public health, and morals.

- **The African Charter on Human and People's Rights.**[6] Article 9 provides:

  1. Every individual shall have the right to receive information.

  2. Every individual shall have the right to express and disseminate his opinions within the law.

§ 24:51 — —Trade treaties

Various trade treaties between countries and/or groups of countries may affect regulations relating to the Internet, particularly commercial enterprises on the Internet. Article 30 of the Treaty of Rome, for example, which created the European Community, prohibits trade restrictions between members of the European Community. Similarly, the GATT Agreement (and the NAFTA, which incorporates it) includes a most-favored nation clause, requiring every signatory to treat all other signatories equally. Thus, at least where commerce and trade are concerned, already existing treaties may require that laws cannot discriminate, even as to content, as between different countries.

§ 24:52 —What kind of speech is most likely to be regulated?

Regulation of content on the Internet generally either flows directly from, or mirrors, already existing regulations of speech categories in the non-Internet arena. Broadly grouped, these categories include political speech, protection of reputation, protection of minors/moral values, protection of human dignity, and national security.

- **Political Speech**. In general, political speech relates to laws, regulations, or policies, or to the people who make them. It also includes speech related to political processes, such as how, when, where, and why people come to positions of power, and what they do with those positions once

[6]Entered into force October 21, 1986, available at http://home.earthlink.net/~apronto/treaties/trindex.htm.

there. Because in many areas the political leaders are also religious leaders, speech about religion may also be political. Some examples of political speech might include contact with citizens of other nations, comments relating to existing or proposed government policies or laws, or comments relating to governmental leaders. In addition, some countries, such as France and Canada, have regulations designed to encourage national pride by requiring Internet content to be in a particular language within their own country, and relating to the proportion of cyberspace made available to content originating from the home country. Finally, some countries try for political reasons to limit the amount of material from outside the country that is available to citizens. China, for example, requires all Web sites to use news only from state-controlled media, and forbids posting news from foreign sources without express permission. It also bans any content that is subversive, that supports cults, that harms the reputation of China, or that hurts reunification efforts with Taiwan. Similarly, Burma bans content deemed by the government to be harmful, directly or indirectly to its policies or security.

- **Protection of Reputation.** Many countries already prohibit or regulate defamation, libel, slander, and possibly unlawful comparative advertising. These already existing regulations usually apply to materials received or generated on the Internet.

- **Protection of Minors/Moral Values.** With the stated goals of protecting minors or protecting morals of minors and adults, some countries regulate and/or prohibit content on or off the Internet depicting or relating to sexual matters, such as obscenity, indecency, and child pornography. Other examples of content regulation aimed at protecting morality may include regulations relating to gambling or to some religious or anti-religious speech such as blasphemy or insults to religious figures. For example, Malaysia has warned that Internet surfers who insult the Prophet Mohammed and the Koran face fines and jail terms under traditional Muslim laws that apply to non-Internet communications.

- **Protection of Human Dignity.** Some countries prohibit or regulate speech that encourages or promotes racial discrimination or enmity based on ethnic background. For

example, many European countries have criminalized hate speech. France, Germany, and Australia, among others, have made it illegal to deny or to glorify the Nazi holocaust on the ground that it incites hatred and denigrates Jewish people. Indeed, in a recent court case in France, the French court held the United States company Yahoo!, Inc. liable for allowing persons in France to access its online auctions which contained some items of Nazi memorabilia. For its part, a federal court in the United States held that the French plaintiffs could not enforce their judgment in the United States, because it would offend the First Amendment.[1] In other countries, like the United States, the law generally protects expressing such thoughts, in the belief that such speech is best addressed by opposing speech.

- **National Security.** Speech that imminently threatens violence, or relates to violence, such as terrorist activities, instructions on bomb-making, illegal drug production and distribution, and political incitement are examples of content that might be regulated as a matter of national security. Some countries also regulate contact with citizens of enemy nations. As with all these categories, there may be significant overlap between political speech and speech that impacts national security.

[Section 24:52]

[1] *See* § 24:41.