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Law and the Internet

What are the dangers of putting the world at your fingertips?

By TROTTER HARDY

Unless you're living in a cave, you will have seen a lot of articles in the popular press about the Internet, and some about the legal issues arising from this new technology. This article is an overview that will not focus on particular legal questions, many of which are discussed elsewhere in this issue. Rather it is on the more general question of how and why a technology like the Internet can create interesting new legal quandaries.

It's hard to get a handle on what the Internet is, because it is not a single "thing" at all. It is really just a lot of computers that are able to talk to each other because they all follow a common technical standard for communicating. Computer owners around the world, from universities to businesses to charities to individuals, have chosen to have their computers follow this standard.

As a result, they can communicate with other computers — some two to three million of them by current estimates. Any time a new computer is programmed to follow that same standard, and is given a link (telephone wire, satellite signal, etc.) to other such computers, the new computer becomes part of the Internet. There is no

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central "Internet computer." Rather, every communication from one point to a destination point is routed "on the fly" through whatever intermediary computers happen to be least busy at that moment. Most such communications, whether e-mail messages or files or anything else, will be broken up into small "packets;" each packet may take a different path across the network.

That's why the Internet seems so amorphous: Computers can come and go — though these days they mostly do the former. The Internet's power and flexibility grow from its decentralization. People often think that decentralization means the Internet is "chaotic" or out of control, but it's no more nor less out of control than a million retail stores or a million individuals or a million libraries. Each of the Internet's millions of computers is under the control of its particular owner.

With this many computers connected together, lots of things are possible. At first, Internet users had access to technology that would let them "log in" to any

Internet computer set up to allow access. The users could then use the logged-into computer as if they were a local user at a terminal — even though they might be thousands of miles away.

More recently, a newer technique allows a user to connect to an Internet computer without the necessity of logging in. The whole process of connecting is done automatically and, when network traffic isn't too heavy, quite quickly.

This technique means that a document residing on an Internet computer can contain links to documents on other computers — and these computers can be located anywhere in the world. The links typically appear on screen to the user as a phrase of text highlighted in blue. The user reading the first such document can point with a mouse to a piece of blue-highlighted text and click. When that happens, the computer automatically fetches the "linked to" document from the other computer and displays it.

In this way it is possible for an Internet user to "jump" from document to document on different computers. The collection of Internet computers that follow this new linking technique, which is simply a more sophisticated access method than the Internet initially provided, is called the "World Wide Web."

The special software that understands how to make use of the linking feature is called "browser" software; the most popular "brows-

Is an on-line service like a bookstore?

er" program is called Netscape, by a company of the same name. Browser software also offers access to Internet facilities besides document linking, and does so in a much more "user friendly" way than previously available. The World Wide Web (or "Web" for short) and browser software make

up such a convenient and clever way to use the Internet that before long, we can expect that nearly all Internet comput-

ers will follow the Web standard. When that happens, the terms "Internet" and "World Wide Web" will be synonymous.

With any major new technology like the Internet, there is always a debate over how the technology affects the law. On the one hand are those who say, "What's the big deal about the Internet? Whenever anybody talks about it, they're talking about defamation, copyright, contracts, invasion of privacy, negotiable instruments, etc. We've had all those legal concepts a long time — so there's nothing new here."

On the other hand are those who say, "Oh, no: The sky is falling! Everything about this new medium is brand new, unexplored territory, where none of the old concepts and analogies work, and we have to build a new legal system from scratch."

Neither viewpoint is helpful, for the truth is that some legal issues on the Internet are not new, but others are; we need to sort them out. Let's start by defining a "new" legal issue to mean nothing more than an issue that is "worth think-

ing about afresh because greater certainty would be helpful."

In this sense, legal issues arising from a new technology can be "new" for several reasons. I will discuss five such reasons:

- new roles for new players;
- changing factual assumptions;
- quantitative changes that make a qualitative difference;
- the need for "comfort"; and
- the "big" issue of self-governance.

New roles for new players:

Technology may lead to people acting in roles that are analogous to other well-understood roles, but because of the technology those roles now have different policy implications. The most controversial "new role" on the Internet today is that of the on-line service provider — a role filled by large companies like America Online, Prodigy, CompuServe, Delphi and others less well known, and by hundreds of thousands of smaller, often nonprofit, "bulletin board systems" run out of private homes.

We have older analogies to the new role of service provider: bookstores, newspapers, lecture hall owners, telephone companies, mail order catalogs, etc. One problem, though, is that it is not obvious which of these is the most suitable analogy. Let's take the bookstore analogy, with defamation as the problem. Should an on-line service like Prodigy be liable in a defamation action for the statements posted by its users? Bookstores are not liable for defamatory material contained in the books they stock unless they know or have reason to know of the defamatory nature of the material. Partly this is because book stores cannot review every book they carry for defamatory content.

But in back of the rule for bookstores may well be two underlying — perhaps hidden — policy concerns: first, that we are familiar with bookstores and their value to society. Second is a "policy" that can be recognized whether one

approves it or not, namely, that book publishers have deep enough pockets to satisfy defamation judgments. Holding bookstores liable would therefore not significantly increase the likelihood that a plaintiff could recover damages for defamation. If bookstores were to be held liable, they would undoubtedly reach indemnity agreements with the publishers anyway.

Now the question arises: Should on-line services like CompuServe and Prodigy be treated "like bookstores?" In some ways they are — they serve as the means for hundreds of thousands of words to be communicated from one "author" to other "readers." It is as impractical for them to screen every message posted on their discussion areas as it is for a bookstore to read every book it carries.

But "on-line services" are not all like CompuServe or Prodigy; they come in an enormous variety of sizes and purposes, not all of which will be familiar to judges and juries in terms of their value to society. In addition, the typical user of on-line services is an individual, not a deep-pocket publisher. Will courts be as charitably disposed toward the on-line "bookstore" when it provides unusual or controversial information, or when there is no solvent publisher behind every message? Perhaps they should be; but it would be foolish not to notice the difference or to realize that the difference might in some instances be persuasive to a court.

Changing factual assumptions:

Many laws rest on unstated factual assumptions. These laws may make less sense when the underlying factual setting changes — even though the wording of the law can still be applied to the new factual setting. The Internet has reduced communication cost dramatically; it speeds up the volume, extent and frequency of communications. Not all these changes necessitate new laws, but legal the-

orists are often surprised at the public's perceptions of the need for new laws — and public perceptions are a force that means more to legislators than to theorists.

The agitation in Congress to ban bomb-making information from the Internet, for example, has died down as of this writing, but this sort of concern — over pornography, lewdness, “mayhem manuals,” etc. — will surface again. First Amendment advocates are often appalled that Congress would consider different rules for information on the Internet than already

apply to the print medium. If Congress cannot prohibit a certain book, goes the argu-

ment, why should it be able to prohibit the same book when it appears in electronic form?

One quick but unsatisfactory answer is that the Supreme Court has said that for First Amendment purposes, the medium of communication does make a difference. The limited spectrum of the broadcast medium, and its “intrusiveness” into homes, caused the court to grant broadcasting less First Amendment protection than the print medium. That is why the court was deferential to the First Amendment interests of newspapers in the *Miami Herald v. Tornillo* case, and deferential to government interests in regulating the media in the *FCC v. Red Lion* case. The court, then, might apply different rules to the Internet, which is yet a different type of medium. If for no other reason, this court-sanctioned distinction should give rise to some new First Amendment cases dealing with the Internet.

By itself, this line of thinking argues that the Internet should be

even more free of speech restrictions than the print medium. After all, there is practically an unlimited opportunity for all to “speak” and “publish” on the Internet — more so than is true for publishing in print (because the Internet is cheaper), and far more so than is true for publishing over the medium of broadcasting (because the Internet is *far* cheaper). When all can speak, and there is no scarcity of spectrum band width, why shouldn't an unfettered marketplace of ideas flourish as never before?

This view is unsatisfactory, though, because it does not account for the interest by the public and Congress in regulating speech on the Internet. That interest arises because of the very drop in the cost of communicating that the Internet has brought.

It works this way. Suppose someone — a teen-ager, a member of a radical group — wants to get certain information, say pornography or bomb recipes. In the pre-Internet world, such persons might have had to expend significant time and money to find and obtain that information, or at least expose their desires to the view of others. Perhaps a library visit would have been necessary, including a face-to-face meeting with a librarian. Or actual research would be entailed. These things are impediments — costs — in the way of acquiring the desired information.

With the Internet, however, access to any information is nearly instantaneous. The “cost” of acquiring information over the Internet is substantially less than it has been.

Economics teaches us that falling costs produce a rise in demand. We should therefore expect that cheaper information access on the Internet means that more people will seek out information — including information that previously would have been more costly to obtain. Many citizens instinctively sense this change and are justifiably uneasy about it; this

uneasiness partly accounts for the legislative efforts already being undertaken to control the Internet. Many First Amendment theorists do not sense it and so cannot understand the resulting public impulse to regulate. In any event, the matter of pornography, bomb-making information, “mayhem manuals,” and the like on the Internet, and the ease with which they can be obtained, make up one large area of constitutional controversy with which we must wrestle in the years ahead.

The same principles of falling costs and changing factual assumptions apply to many other areas of the law besides the First Amendment. Worldwide digital communications make preserving copyrights extra difficult, for example. Would-be Internet publishers worry about the new ease of copying electronic materials.

Already these worries have prompted the creation of a government task force to recommend changes to the Copyright Act. The recommended changes are designed to account for this growing ease of copying by strengthening the author's copyright protections.

They would add, among other things, a new author's right: to control the “transmission” of information. But this change, if enacted, may have the incidental effect of allowing information publishers to charge readers for every “page” or screenful of digital information that they read — because each such “page” might be a separately recordable “transmission.” Whether that's bad or good, it is controversial in some quarters and results in new tensions in the copyright community between information producers and consumers.

Sometimes factual assumptions behind legislation are quite explicit, and Congress does not realize that matters have changed. In the early stages of a radical new technology like the Internet, it is almost

Easier access means more will be looking.

inevitable that some legislation will be enacted that is premised on incorrect or missing information about the nature of the technology.

An early version of one Senate bill, for example, proposed to make it a criminal offense for anyone to "make available" pornographic, lewd or indecent information on the Internet. The use of the phrase "make available" betrays an ignorance of the Internet's actual operation: scores — perhaps even hundreds — of computers may handle any given unit of information sent from a single user or site. Do the operators of each of these computers make the information "available?"

Other versions of the bill added a scienter requirement: liability extended to those who "knowingly" made the information available. But does that mean that a service like CompuServe or America Online "knowingly" makes pornography "available" when it offers its customers access to the gigantic library that the Internet has become, pornography and all?

All these are problems that can be resolved, of course. The point here is that it will take our lawmakers a while to catch up to the technology (if indeed they can ever do so for something so rapidly evolving), and that in the mean-

time, public pressure for new legislation cannot always be resisted. The "lag time" before Congress can appreciate dramatic factual changes, then, can easily lead to inappropriate statutory language that will inevitably cause problems when good-faith users attempt to comply.

Quantitative changes making a qualitative difference: Laws that are vague and unpredictable may be tolerated when they are only rarely invoked, but intolerable if they become invoked more frequently. Some of the best examples of this effect from Internet technology come from the areas of choice of law and jurisdiction.

When courts have to choose which law to apply, they have little more than a few, often conflicting, principles to go by: the place of the wrong, the law of the forum, the law of the state most interested in the parties' welfare. That can leave choice-of-law questions in an unpredictable muddle. Yet we live with this muddled state of affairs.

The law of personal jurisdiction, though better developed than choice-of-law law, has never been clear on basic issues like the precise state of mind necessary to charge defendants with having availed themselves of the benefits of another jurisdiction's laws. In

the international arena, the issue of which nation retains jurisdiction over a case is even less clear and rests on an even less developed body of case law.

A major reason that we have never clarified the law in these areas is that choice-of-law questions and jurisdiction questions — especially international jurisdiction questions — do not arise very often relative to other questions. Repeat players who do business across borders can sidestep some of the problems through the use of choice-of-law clauses in contracts. In a sense, we can "afford" not to clarify these vexing issues because their ambiguity does not cost us very much.

But one huge effect of the Internet is to collapse geographic borders and drop the cost of transactions across those borders. This implies two things: first, that the sheer number of cross-border transactions will increase, both within the United States and internationally; and second, that the number of ordinary, legally unsophisticated, citizens participating in such transactions will increase. Ordinary citizens may not be repeat players and may not catch on to the notion of contractually specifying an applicable body of law to their trans-border dealings.

For both these reasons — potentially huge increases in cross-border dealings of all kinds, and in dealings between legally unsophisticated, nonrepeat players — the existence of the Internet will put pressure on the development of both choice-of-law and jurisdictional law. In that sense, then, these issues, if not literally "new," are at least going to acquire a much-renewed interest.

The need for "comfort": It is quite possible that some issues surrounding a new technology can be satisfactorily handled with existing laws. Yet, many people do not trust either themselves or the courts to generalize from the principles of a particular law to a new setting.

An on-line source

Readers interested in a more in-depth look at some of the questions raised by the Internet might want to subscribe to the *Journal of Online Law*. It's currently free and distributed electronically. Not quite a law review, but more detailed than *Business Law Today*, the *Journal* is available for downloading from <<http://www.wm.edu/law/publications/jol>>. Or subscribe by sending a message to this address: <listserv@listserv.cc.wm.edu>. Have the body of the message read: "subscribe jol Marion Smith" where you omit the quotes and use your own name in place of Marion Smith. Or contact the *Journal's* editor at <editor@jol.law.wm.edu>. Recent essays have touched on anonymity, encryption, the First Amendment, and other topics.

— Trotter Hardy

Virtual communities will supplement real life.

They will not be happy unless they see a specific law that spells out their rights and duties.

For example, the Copyright Act contains a specific provision allowing the purchaser of computer software to make a "copy" of the software in a computer's memory, if the copy is an essential step in the use of the program. Such a "copy" is indeed an essential step: All software must be loaded into a

computer's memory if it is to run at all. This statutory provision is therefore unnecessary. Does

anyone seriously imagine that a seller of software would sue its buyers for using the software they bought? Yet, apparently such a provision provided comfort for somebody, so it occasioned lobbying efforts and congressional action.

We are likely to see occasional legislation relating to the Internet for the same reasons. Watch in particular for proposals to amend the Copyright Act to permit computer "caching" — the temporary storage on an intermediate computer of information downloaded from a distant computer to save time if a user calls for that information again. Technically this short-term information storage might constitute a "copy" of the information and hence be a copyright infringement. More likely a court would say it is a fair use.

In either event, information providers who are trying to provide access to their information have little incentive to sue others who facilitate that access by caching. But obscure scenarios might arise, and the desire for safe harbors is strong, so we may see proposals for specific exemptions along these lines.

The big issue of self-governance: In one sense, the Internet is simply a better means of communicating than we had before. But it is much more than that. The cost of communicating over the Internet across vast distances enables conversation and interaction that could never have taken place before. Quite commonly today people "meet" and chat on the Internet, becoming friends and colleagues for extended periods without ever having met face to face.

One need not be a utopian visionary to understand that the Internet is causing the formation of new, on-line communities. That those communities will ever replace physical communities seems unlikely, but it certainly seems likely that these "virtual communities" will supplement real life, at least for particular purposes.

A recurring theme of conversations about the legal problems of the Internet is the issue of whether and how these on-line communities should be governed. On the one hand, U.S. citizens, no matter how "virtual" they may be in some respects, are U.S. citizens — subject to all the laws of their federal and state governments. The same is true of course for the citizens and residents of other countries and their laws.

On the other hand, never before has it been so easy to join, leave and rejoin communities on a purely voluntary basis, or to form one's own community. Moreover, on-line communities, though not free of hostility, pettiness and other human foibles, are free of direct physical coercion.

Many individuals who consider themselves members of such communities wonder why they need external governance for many day-to-day issues. They ask why, if, say, all community members agree not to care about "telemarketing fraud," the Federal Trade Commission should care on their behalf. Or if they expressly agree that one of their members should serve as a

repository for electronically transmitted IOU's on terms mutually agreed to by all, why that member should be subject to additional regulations the same way a bank is.

Obviously there is a strong libertarian thread to these wonderings, with which one may be philosophically inclined to agree or disagree. But in the past it has not been so easily possible to bind a group of people to an express contractual relationship as a part of their self-definition as a community.

We may see in the future, then, the formation of communities that plausibly assert a claim to the right of self-governance, at least as limited to the purposes for which the community was formed and continues to exist. These claims may amount to nothing, of course. But it is also possible that they will amount to a laboratory of independent constitutional conventions and a corresponding opportunity to re-explore the nature of self-governance for us all. We'll see.

The Internet is a decentralized collection of millions of computers, each under the control of its owner but not under any central organization. Its vast geographic reach, along with its low cost for communication, means that people are doing more communicating, and doing it in different ways than before. Some of these new ways will raise new legal issues such as the liability of on-line service providers. Some of the sheer increase in communications means that certain issues like choice of law and jurisdiction, which are not really "new" to the Internet, will nonetheless be severely tested and undoubtedly altered in the process.

To some Internet users, the new technology offers a chance to set up their own communities with their own governance. The friction between existing geographically based governments and these would-be self-governing "virtual communities" will produce some interesting sparks.