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Internet Symposium: Legal Potholes along the Information Superhighway

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INTERNET SYMPOSIUM: LEGAL POTHOLES ALONG THE INFORMATION SUPERHIGHWAY

FOREWARD

On April 11, 1996, the *Loyola of Los Angeles Entertainment Law Journal* co-sponsored a symposium on the topic of new media law. Held at the Loyola Law School campus in Los Angeles, the seven member panel included practicing attorneys and a professor of law. The panelists were:

Mike Godwin, Esq.	Keynote Speaker; General Counsel, Electronic Frontier Foundation
Lionel Sobel, Esq.	Professor, Loyola Law School
Gregory Victoroff, Esq.	Partner, Rhode & Victoroff
Ken McGuire	Special Agent, White Collar Crime Division, F.B.I.
R. Scot Grierson, Esq.	Associate, Bruck & Perry
Jonathan Rosenoer, Esq.	Founder of Cyberlaw Website; Vice-President of Internet Services, North Communications
David L. Hayes, Esq.	Associate, O'Melveny & Myers

The transcript of the symposium follows.

I. INTRODUCTIONS

DEAN GERALD T. MCLAUGHLIN:

You're obviously all here tonight to discuss potholes, not in the streets of Los Angeles but along the fabled information superhighway. But before we proceed to do that, as Dean of the law school, I take the prerogative of introducing the law school to many of you, since not all of you are students or graduates of this law school.

One of the more interesting things that I've been trying to do in the last couple of weeks is write a history of this law school. We are the largest law school in California and have been in existence for seventy-five years. We opened on September 8th, 1920; ten students entered this law school on that date, and it was just an evening program. But when you actually start to look at a history of any

institution, particularly a law school, it's fascinating to see how the law school located itself in the history of Los Angeles.

On the 1st of October in 1910, a famous event took place here in Los Angeles: two of, I guess, my errant countrymen from some point, the MacNamara brothers, blew up the L.A. Times building; it was a monumental event in those days. The MacNamara brothers were labor organizers, members of the Communist Party, etc. This became a cause celebre for the liberal movement in this country. To their defense came the famous Clarence Darrow. Prosecuting them was a man named Joe Ford, who was a very flamboyant attorney who later became the first Dean of the law school in 1923. Ford, for example, would chew gum in the courtroom at the appropriate moments, etc., to show his disdain for something, whatever. It was a monumental case; many people would come to California to be seen sitting next to Darrow in the trial. Darrow ultimately pleaded the MacNamara brothers guilty and, as we would say in New York, they went up the river. However, Ford, who had successfully prosecuted and got this deal then turned on Darrow and prosecuted Darrow for allegedly trying to bribe two of the jurors in the MacNamara case. To the defense of Darrow came the second Dean, so you had this sort of anomaly here of Joe Ford, the first Dean of the law school—this is, of course, before Ford became the Dean—prosecuting Darrow and Joe Scott, the second Dean of the law school, defending Darrow. Darrow got off, which I don't know what that says, but this was the first trial of the century. In many ways it was a bigger event than the MacNamara prosecution. Joe Scott, the second Dean of the law school, was a towering figure here in Southern California and in the nation. While he was the Dean of this law school in 1932, it was Joe Scott who put the name of Herbert Hoover into nomination at the Republican national convention in Chicago. Scott traveled to the East to talk to Thomas Alva Edison about electrifying Southern California. Scott prosecuted Charlie Chaplin for paternity. Scott sued the *L.A. Times* in the famous libel suit and got a \$30,000 punitive damages award. That was unheard of in those days. He was a monumental figure. His son-in-law became the third Dean of the law school.

It's fascinating to watch the growth of a law school. During the war years the school barely survived. There was a graduating class of five in 1946, but the school had burgeoned after that and we have grown now into the largest law school in California. Presently, for example, I don't think too many law schools can say this: two

governors are graduates of this law school, the governor of Nevada and the governor of Hawaii. So we have a wonderful institution here, a large institution, one that traces its roots back seventy-five years to humble beginnings out at Normandie and Venice here in Southern California, but an institution that I'm very proud of as Dean, and I'm very glad to host you all here this evening.

I think I've said enough about the school, and I think I will let the members of the *Entertainment Law Journal* take over. I would ask Tom Kosakowski to come forward to take the podium, and I will return later to introduce our main speaker. Thank you very much, and again we are honored to have you here with us.

TOM KOSAKOWSKI:

Good evening. Welcome to the New Media Symposium: *The Internet and Beyond*, sponsored by the *Entertainment Law Journal* and the California Lawyers for the Arts, Loyola Chapter. The *Entertainment Law Journal* tries to sponsor annual symposiums of interest to the entertainment community, and we're especially glad to have the Loyola chapter of the California Lawyers for the Arts as a co-sponsor tonight. This year we decided to focus on that dynamic entertainment frontier known as the Internet, and the symposium is subtitled "Legal Potholes Along the Information Superhighway," to reflect the uncertainties facing entertainment attorneys and their clients.

I'm not going to say much this evening but I'd like to thank some of the many people that contributed to making this event possible, especially the staff writers of the *Entertainment Law Journal*. I want to especially recognize Karen Parks in the development office, Vlasta Lebo in the Dean's office, and Dien Le, an Executive Editor of the Journal. This evening will start with a keynote address by Mike Godwin from the Electronic Frontier Foundation. Following that there will be shorter remarks by six experts in various fields and a roundtable discussion will take up the rest of the evening. You'll note on your agendas that there is not a break scheduled, but we'd like you to feel comfortable to go in and out as the need arises.

Among the materials you have are question cards and the roundtable discussion will be driven primarily by audience questions, so feel free to fill those cards out any time and pass them down to your right, and our staff writers will pick them up and bring them up for consideration by the panelists. Everyone is invited to stay for a reception at the conclusion, and I encourage you all to stay and

perhaps get a chance to meet and talk with our panelists in person. I'd like to thank our next speaker for her valuable insights and assistance in planning this event and simply introduce the Editor-In-Chief of the *Entertainment Law Journal*, Karen Rinehart.

KAREN RINEHART:

Thank you, Tom. I'd like to add my welcome to Tom's, and on behalf of the editors and the staff members of ELJ, we're very happy to have you here. This symposium, as you might well imagine, represents the culmination of a tremendous amount of work, and appreciation is due, in addition to the people whom Tom already mentioned would be Tom Kosakowski, of course, the Symposium Editor, who worked very hard; Dien Le, Shaun Clark and Veronica Toole of California Lawyers for the Arts. They've done an outstanding job. This is entirely their product. So please join with me in expressing our appreciation to them.

While you're assembled and captive, I just want to take a few minutes to familiarize you with the *Entertainment Law Journal*, to the extent that you're not already. We're in our sixteenth year of publication, which makes ELJ the longest established journal of its type. Volume 16 will be the largest, and it includes articles on such diverse issues as GATT, the freedom of religion being chilled by sports rules, media liability and tag-along journalism, and high technology. At least twice this year that we're aware of, the American Bar Association has acknowledged ELJ's preeminence in articles about entertainment law. Our faculty advisor, Mr. Lionel Sobel, from whom you'll be hearing more this evening as a moderator and a panelist, is featured in the current issue of the *ABA Journal*. Copies of that article are available on the table out there if you'd like to take one as you leave.

ELJ publishes articles from practitioners as well as students, and we're actively soliciting articles. If you have anything that you're interested in soliciting, we're very happy to take a look at it. Please contact any editor. We'll fill you in on the details. Dien Le's article on the fate of "Must-Carry" and Turner Broadcasting was recently picked up for publication in a national compendium, and that's not an unusual situation. A lot of articles are very, very widely read. You all have Volume 16, Issue 1; it was on your chairs when you came in and there are extra copies available in the room. This issue contains something that we're very proud to have sponsored, which is the new Media Citation Guide. It's at page 191, and you also have it at page

245 in your symposium materials. This is intended to supplement the Harvard Bluebook for citations to new media such as Web sites, chat rooms and electronic games. We hope that you'll all take this guide with you and use it when you refer to electronic media. The ABA and other people as well now have expressed an interest in reprinting it, and it presently is available online through both LEXIS and Westlaw. Another feature of ELJ is our annual business directory, which you have in front of you at page 211. It's been touted by the *ABA Student Lawyer* magazine as the definitive guide for those seeking employment as an entertainment lawyer, and it also provides a valuable resource for practitioners. If you are a practitioner and you're not in it, please let us know and we'll be happy to put you in the next one, which will be coming out in the fall of this year.

Issue 3, which we're working on right now, is a new media symposium issue, of which tonight's event is the capstone. Among the things featured will be an article by Scot Grierson, who's one of tonight's panelists; an article by two ELJ staffwriters on gambling on the Internet; and a comment on the V-chip. We're all very glad to see you here tonight and at this time I'd like to get down to the substantive part of tonight's program. And to do that I'd like to introduce Veronica Toole from California Lawyers for the Arts. Thank you.

VERONICA TOOLE:

Thank you. Actually, we'll get to the substantive bit in just a moment. I just wanted to talk about California Lawyers for the Arts, to fill in those that haven't heard of us yet. Actually, I want to talk about our mission, which is to bridge the gap between the arts community and the legal community, and this is of course so artists may gain greater confidence in handling the legal and business aspects of their careers and legal and business professionals can understand artists and their mediums more effectively.

The proliferation of multimedia and online services brings previously unforeseen legal and regulatory arrangements to the works of art, entertainment, communication and publishing businesses. Our aim is to provide up-to-date legal services and business information to those businesses that strive to ensure that the law is responsive to the needs of the multimedia community. To meet this goal, California Lawyers for the Arts provides a lawyer referral service, an arts arbitration and mediation service, a copyright clinic, and workshops and seminars which are open to both artists and to attorneys.

California Lawyers for the Arts is also going to be presenting a full day seminar on multimedia issues, and that is on Friday, June 14th, here at Loyola Law School, and if you'd like additional information on that seminar or any other information about California Lawyers for the Arts, you can call their office in Santa Monica or pick up the flyers that were on the table as you entered. I'd like to bring, at this time, the Dean back up to introduce our substantive portion of this event. Thank you.

DEAN MCLAUGHLIN:

It's my pleasure to introduce our keynote speaker tonight. Mike Godwin is staff counsel for the Electronic Frontier Foundation. He advises users of electronic networks about their legal rights and responsibilities and provides counsel concerning civil liberties in electronic communications. Mr. Godwin has published and lectured extensively on topics such as electronic searches and seizures, the First Amendment and electronic publications, and the application of international law to computer communications. His book, *Cyber Rights: Free Speech in the Digital Age*, will be published by Random House books this fall. Mr. Godwin is a graduate of the University of Texas, both undergraduate, where he was Phi Beta Kappa, and the law school. Everyone is entitled to make one mistake, and I know Mr. Godwin would have preferred to have come here, had he lived in California. Please join me in wishing Mr. Godwin welcome to Loyola Law School, and he will begin the substantive part of tonight's proceedings. Mike.

II. KEYNOTE ADDRESS

MIKE GODWIN:

Well, you know, I heard the word "substantive" used many times in reference to what I'm about to tell you, and whenever I hear the word substantive used in reference to me, I start thinking Weight Watchers time again. I was recently reflecting as part of the production of my book on how far we've come over the last five or six years in framing the legal issues that will shape cyberspace. The very fact that we can say cyberspace without a wink and a nod tells you how much things have changed. I remember back when I first began working for the Electronic Frontier Foundation in 1990, I had debates with a self-styled computer ethicist, a computer science professor at Purdue, who actually argued with me. He said maybe the

First Amendment doesn't apply in cyberspace. That was one of his arguments. And he said how do we even know this is speech under the First Amendment? How do we even know it's the press? How do we know whether it's the speech or the press? I said to him, "Gene, it doesn't matter, you know. It covers both speech and the press, so even if you can't figure out which it is, it's covered." And then I thought about it and I said, "Well, you know, Gene, what exactly are your objections?" and he sent me e-mail. I sent him a reply back. I said, "Gene, you know, I can't understand this. This is not speech. Give me a call." He took the point.

And then I thought I would enumerate—back then, I thought I would sit down and try to enumerate all the First Amendment interests that apply in cyberspace, and speech and the press I thought were clearly applicable. But one of the things I also knew from participating in online forums was that sometimes you had a sense of communing with other people, of assembling in a place. So it seemed to me that the right of the people peaceably to assemble was also implicated in cyberspace, and of course nowadays, now that all government officials from the President on down seem to have electronic mail addresses, certainly it's possible to petition the government for a redress of grievances. And I thought that was an exhaustive list for a while until a moment of revelation occurred to me when I was reading *Usenet* one day and I realized as I looked at it—there was a big debate going on between people who preferred the Macintosh and people who preferred the IBM PC—and then I realized that free exercise of religion was implicated as well. So I think the First Amendment is continuously implicated, or I should say continually implicated in cyberspace legal issues, no matter what they are, because the communicative element of what happens in cyberspace is almost inextricable from anything else that happens there.

I thought about this recently. The question I think that comes to mind for those of us who are in this weird transitional generation between the lawyers who've never had access to this technology and the lawyers who will have grown up with it is "How real is it?" And I thought about this recently in the course of the lawsuit that my organization and several other organizations are mounting to challenge the Communications Decency Act. As you may know, that's an ongoing case in Philadelphia, and the odd procedure for the preliminary injunction in that case involves bringing the witnesses in, having them file affidavits for their direct testimony.

The very fact that an affidavit could be direct testimony is a little tricky to a non-lawyer, and then they're cross-examined, and then they will be cross-examined in the courtroom. So we had our witnesses file their affidavits, and then the Government lawyers got to cross-examine them, and one lawyer, I thought, for the Government did very well in terms of cross-examining Howard Reingold, who's the author of *Virtual Communities*, who helped sort of make the term "virtual communities" commonplace. She started quizzing him not about places like the Well or Echo, but about multi-user dungeons and MU's and these sort of fanciful "*Dungeons and Dragons*" type environments that exist online, and I think the purpose of that cross-examination was to give the judges the impression that the world of cyberspace is sort of fanciful, fictional, not real.

As a strategy I think it wasn't a bad strategy given the Government's burden in that case, but then I thought about and I said, you know, lawyers really shouldn't really ever take the position that fanciful entities are not real. Any fanciful entity that begins with the word "constructive" we know from law school is not terribly real. I mean constructive trust, we know constructive trust is not really a trust. Constructive notice, well, we don't care whether they had notice or not, right? The notion that fanciful entities somehow have less effect in the real world is sort of bogus. But then I thought about it a little deeper and I said, you know, virtually everything we do as lawyers involves these created entities that for all that they are intangible are nevertheless real, and they nevertheless have profound impact on what we think of as the real world.

Virtual entities, virtual communities, virtual speech, virtual this and virtual that in cyberspace is just as real as anything else, and lawyers ought to recognize that because the Bill of Rights is virtual. The First Amendment is virtual. How do you know? Because if you destroyed every single copy of the First Amendment, you would not have destroyed the First Amendment. What the First Amendment is is not its instantiation of forty-five words on a material object or on any set of material objects. It is a principle, and the very fact that we've created it makes it no less real. You wouldn't repeal the First Amendment by destroying every copy. Similarly, you don't make communities go away by destroying the words that describe those communities. Law students know and lawyers know that what we call the First Amendment, what we mean when we use the code phrase, the First Amendment, is not just the forty-five words, right? We know that in fact the words "the First Amendment" represent a

collection of fundamental principles plus a whole slew of corollary doctrines. These doctrines themselves have arisen as the result of an interaction between the virtual entity of the First Amendment and the real world of cases, what Article III calls "cases or controversies."

So lawyers, I think, should never put themselves in the position of deriding virtual entities or else they'll find themselves out of a job. And I don't think the First Amendment is the only virtual entity we ever deal with, and it's not even just something that lawyers do. The other virtual entity that came to mind was the rules of baseball. No one ever learned the rules of baseball by reading them, and if you destroyed every copy of the rules of baseball, let's face it, three strikes—you'd still be out. There are higher notions, I think, that are virtual notions that we also recognize as being very real, and I think it's particularly acute here in Los Angeles. I think that one of the things that we understand from the Los Angeles riots in the aftermath of the Rodney King beating case was that justice was real and injustice is real, and the fact of injustice has real effects on people that amount to and have the same emotional impact sometimes as a physical blow. Human beings are essentially virtual because we exist in a world of language, in a world of social mores. We exist in a world that is largely created by us, in whose creation we constantly participate, and lawyers are merely a very extreme example of that.

Now given that the world of cyberspace is real and the legal problems are real, and it's not fanciful and it shouldn't be dismissed, how do we explain the current backlash that's represented in countless legal arenas against communications in cyberspace, in that world. How do you know there's a backlash? Well, I know how I know. I have a home page. Is there anyone who doesn't know what a home page is? Okay, I have a home page, and one of the things that you do when somebody gives you a home page is you try to figure out what to put on it. I had no idea. I knew that every picture of myself that I'd ever seen was terrible. I had absolutely no interest in putting any of those pictures up, but I also knew, as a father, that I would love to put my baby pictures up. So we scanned the baby pictures and we put them up, and a friend of mine asked me, "Well, you know Mike, are you sure you should put your baby pictures up? Because you know, there are a lot of child molesters on the Internet and they may target your child, based on the fact that your pictures are there on your home page." And I thought how interesting it is that this is the first thing the guy said to me when he heard about my baby pictures. It is a measure of how much the backlash is in progress to

see how the rhetoric has changed in the media in discussion of the so-called information superhighway.

In 1993, the information superhighway got cover stories in *Time* magazine. There was a lot of puffery. They thought of it as the Year of the Internet. I think of it as the Year of Internet hype. They said there would be 500 channels, the equivalent of 500 channels. Now that very phrase itself seems sort of passé, but there would be 500 channels; every library, school, hospital and home would be connected; everybody would be a publisher; this would be very exciting. Now only last year, 1995, and this year certainly, we've seen the rhetoric change. The information superhighway is a threat. Now why is it a threat? Because there will be 500 channels of this stuff; and it'll be connected to every library, school, and home and hospital; and everyone will be a publisher. Some of those people will not have been to journalism school.

But the hype on the positive side, in its defense I can say that some of the hype was justified. There really is something that's very new happening here. Partly the medium has a different character. It's many-to-many communication. It's not one-to-one, not one-to-many, but many-to-many. It's the first mass medium to combine the intimacy and connectedness of one-to-one communication on the telephone with the range and reach of one-to-many communications like broadcasting and newspapers. Although it does put us in the odd position of thinking that when you're participating in a telephone call or when you're sending e-mail, you are now a content producer. You should remind someone next time they complain about a phone call that you're sharing your content with them.

Another very important way that the medium is different is cost, and I cannot overstress how significant this is socially. It used to be that in order to reach mass audiences you had to be highly capitalized. You had to have printing presses or a radio station or a TV station. You had to get a license if you were a broadcaster. There's a high barrier to entry, a high cost to entry into the market. Now it is possible to reach large audiences with minimal cost at the beginning. You can spend less than a thousand dollars, certainly much less than a thousand dollars, and the price for entry keeps dropping, especially now that people are throwing away their first and second generation computers. People are actually prowling the dumpsters to pick up discarded equipment.

A third aspect that I think is socially very significant and very exciting is the fact that the National Information Infrastructure,

in whatever form it ultimately takes, makes it possible to reach your audience without editorial intermediation. This is what theorists like to call "disintermediated communication." I wish I could think of a better word, say "no editor." There's no editor. To those of you who've had to deal with editors, it seems kind of inviting, doesn't it? Let's think about what this means, though, in terms of society. It means that the old order has changed in this way: If you used to be a novelist or a poet, the way you reached your audience, that audience, that unspecified subset of individuals in your market who would understand the message that you wanted to send, was that in addition to the literary skills you acquired, you had to acquire a separate set of skills that involved marketing, that involved presenting yourself to publishers, that involved perhaps getting an agent. And if you were not able to master that wholly discrete and second set of skills, you were silent. You were a mute and glorious Milton. How many of you recognize that? Lawyers. The thing about it is you are now able to be literary or are now able to be expressive without having to acquire this extraneous set of skills that has nothing to do with the message that you're trying to convey. And you may think, well, I have to learn computers, but that is increasingly easy, unlike acquiring an agent, which is increasingly difficult.

The fear of the medium, which is not wholly unforeseen, has expressed itself in a number of ways. We saw in 1994 the beginning of the use of flames, flame wars, nasty speech, unpleasant speech on the Net, and obscenity or pornography as the thin entering wedge for regulation, for calls for regulation of the Net. Shouldn't there be regulations? I would get a lot of press calls, people who say, "Shouldn't there be a regulation?" Reporters often think, by the way, that if they identify a problem and someone passes a law, they've been a successful journalist, I hear. I'm not making this up. In fact, there was a very famous case, a California case, involving a bulletin board system specializing in adult material that was prosecuted successfully on obscenity accounts, Federal obscenity counts in Tennessee, *United States v. Robert and Carlene Thomas*. If anything, that illustrated that it was possible to apply the old common law principle of adapting your existing laws to new situations but, nevertheless, that seemed not to quiet the panic about obscenity on the Net. It seemed to stir it up.

And of course now we have the Communications Decency Act which, sadly, is not about obscenity. It is about a much broader category of speech, and I'll talk about that a bit in a minute. And we

also have fear about so-called “dangerous information,” the very fact that you can acquire information about explosives or bomb-making from the Internet. It’s perceived as somehow making the Internet more of a threat. I actually ask people about this. I get calls from reporters all the time. The reporters will say, “Doesn’t it make it more dangerous to have the information about making a pipe bomb on the Internet somewhere?” And I said, “Well you know, that information is available in any library.” And they said, “Well but, Mike, nobody goes to libraries.”

We also see the fear—and I predict some of these issues will be on the agenda in the next year or two—we see the fear of the Net express itself in still other ways. The issues I think we’re going to see are privacy issues; encryption-related issues, the use of computer technology to encode your communications and data; and anonymity. There will be some calls to prevent anonymous posting of messages and anonymous remailing of messages.

We will also see, and what we’re seeing this year, is a call for amendments to the Copyright Act. I know none of you cares about copyright. However, I will share a little bit with you and that’s that I’m a copyright holder myself. I’m not wholly unbiased in these interests. It is the case that every time a new technology of reproduction arises, copyright holders as a group tend to panic. There was litigation about photocopiers. Many of you know about this. It was thought that photocopiers would pose a grave threat to those of us who have an interest in printed material and published material. In fact, people are still able to publish magazines, newsletters and books, even though we are now three or four decades into the world of photocopying. So that doesn’t seem to have worked out.

Videotapes—the piracy of videotapes—was perceived as a major threat, or the use of VCRs to home tape broadcast programming was perceived as a threat to the copyright interests of Hollywood. Amazingly enough, piracy does occur with VCRs, but even more amazingly, it seems to have actually created; that technology not only did not diminish the value of the copyrights in Hollywood, it actually created a lucrative ancillary market for the production of Hollywood content. And the result is that when you go to Blockbuster, many movies that would never have made it in the multi-theaters are still available for renting on a dull Saturday night. Movies tend to recover their cost now, thanks to that secondary market.

We also saw it in the software industry, and one of the things that I think is worth pointing out is that the software industry almost totally abandoned fear of private copying as a threat to their commercial interests. They did this by abandoning copy protection for software. Nowadays Microsoft focuses its anti-infringement efforts on commercial infringers and not on individuals. Individuals are not perceived as a threat, and, in fact, the reality of it is that a certain amount of individual low level infringement, seems to create markets or make them healthy and not diminish them. Who would've thought?

So the previous predictions of the threat to copyrights seem not to have generated the parade of horrors—I love that phrase—the parade of horrors that had been predicted. And so it would be easy, I think, to be blasé about copyright in the era of the Internet. But I do want to say as a copyright holder, I think probably the outcome, assuming that the current copyright amendments are not passed and something more reasonable and sane is passed, will be a new balance that will be struck that accommodates, as in all these other instances, that accommodates a certain amount of infringement but in which the copyright scheme remains pretty much the same and pretty vital. But there is the possibility that it won't, and the reason is for the very reason that everybody is a publisher, the incremental cost of making new copies approaches zero, sort of asymptotically, and that strikes fear into the hearts of intellectual property holders everywhere. And that is why we have Bruce Lehman of the Patent and Trade Office promoting reforms to the Copyright Act that are Draconian in their creation of new offenses and their cutbacks on provisions for things like fair use and the failure to acknowledge the First Amendment interest that must be balanced with the Copyright Act. Fear and greed, I think, are the primary motivations behind the Lehman report. That said, I tend to believe that the strength of the common law—here we are in a common law country—I think the strength of the common law is what Justice Holmes said it was, which is that the life of the law is not logic. It is experience. And we ought to wait until the problems begin to happen, rather than prospectively legislate against all the terrors that we can imagine.

I want to talk briefly about dangerous information. Just to give you an idea about how people react to new technologies, you remember Tim McVeigh and the Oklahoma City bombing—you haven't forgotten—within a week after the Oklahoma City bombing I received a lot of press calls. People were asking about bomb-

making information on the Internet, and I couldn't figure out why they were asking it because there seems to be no evidence that anyone involved with the Oklahoma City bombing actually ever used a computer. So why was that the follow-up story? I think it goes something like this, and this sort of tells you how journalists sometimes think. They knew that the Oklahoma City bombing might be associated with militia groups, and they knew that militia groups sometimes used computer bulletin board systems to communicate with each other, and they knew that computer BBSs are something like the Internet. Therefore, Senator Dianne Feinstein calls for restrictions on bomb-making information on the Internet, not for restrictions on bomb-making information in libraries. Our Senator, our leader, followed the same logic of the journalists in writing those stories. By the way, there seems to be at least one possible connection between Tim McVeigh and computer technology. It was rumored that he believed that when he served in the Gulf War, he had a computer chip implanted—well, I don't want to go into it.

There's a tendency whenever there's a new technology for people to fear it and also there is a lesser tendency but still there for people to exploit that fear. And one of the things that we've seen happen this year with the Communications Decency Act and which we will also see with the reforms or amendments that are being proposed to the Copyright Act is the tendency to exploit that fear in service of an agenda. And we will hear in the context of the Communications Decency Act, myths about what the Net is really about. One myth is the child who logs on and finds hard core pornography in thirty seconds. Mom was just out of the room for a minute and the hard core pornography just popped right up. Now, I'm a pretty experienced user. I can't find anything in thirty seconds. I can't even find my home page in thirty seconds. The fact is, one of the things that they're exploiting is not just fear of the new technology but also the fear that all yuppie parents like me have, which is that we're not protecting our children adequately, and also the fear that the American public has had for years, which is that there's something sexual happening out there and it's pretty frightening. And they take these three fears and mix them together, and pretty soon everybody's in a panic.

The religious right has used these fears because they are troubled by the direction that American public life and American social life and American private life have taken over the last half century, and because of that they hope to use these fears to turn back

the clock, and the thin entering wedge that they're using here, the tactic they are using is to take broadcasting regulation and somehow use it to expand general governmental authority to regulate non-obscene communications, First Amendment protected communications. I could talk, and I think we'll talk at some length perhaps in the discussion, about what cases are using and what their analysis is, to the extent that there is analysis, but I think one of the things that as lawyers I hope you take with you from this discussion is this question. I hope you take this question with you: Why shouldn't what's legal in Barnes & Noble or what's legal in the public library be legal on the Net? Why shouldn't it? How can we harmonize that with the First Amendment as we understand it? How can we harmonize that distinction?

We know what the rationales for broadcasting regulation are. There are two: the scarcity of the medium—the purported scarcity of the broadcasting spectrum—and the purported pervasiveness of broadcasting. It comes into the home in a very tricky way according to Justice Stevens in *Pacifica*. You turn on the radio, you might have missed the warning about adult content at the beginning and, surprise, George Carlin, and you're deeply offended and your child is exposed to language that he or she never encounters in the school yard. But even if you accept the analyses supporting the regulation of broadcasting, the fact is they don't apply to the Internet. The Internet is not scarce. Every time you add a node to the Internet, you've increased its size and capacity. It's not pervasive. The choices of content are user-driven. This reminds me, by the way, of another friend who comes and asks me, "How many hours do you spend on the Internet per day?" I said, "Well, you know, I'm online six or even eight hours a day." He said, "Boy, I bet that pornography just floods right over." I said, "I never see pornography on the Internet." He said, "Never?" He couldn't believe that anyone could spend that much time online and not see pornography. The reason he believed that, as a person who wasn't online, is that the religious right and the media have unwittingly contrived this image—well, wittingly on the part of the right—that it's something like television, that there's something intrusive about the Internet, but in fact it is the most user-driven technology since the book.

I had a debate not too long ago with Bob Peters of Morality in Media, and I actually made this argument. I said, "Bob, why should anything that's legal in Barnes & Noble be illegal on the Net?" He said, "Well, Mike, computers come into our home." I said,

“Bob, you know, books come into my home, but I don’t think that’s a sufficient predicate for regulation of indecent content in books.” He got very huffy about whether books came into his home or not.

Is this real? I think you all think it’s real. You know it’s real in the abstract. You sort of know the lawyer arguments that it’s real. I think another way to understand it is personally. In my own life, virtual communities were real enough to me to save me, to help me, at a very bad time. When I moved from Cambridge to Washington, D.C. a few years ago, the moving van that carried my household goods caught fire, and I lost eighty to ninety percent of my household goods, including a good chunk of my library, which I’d been building for decades. By the way, the trick to keeping your books in alphabetical order by author is that you start when you’re nine and you have ten books. Just add them. That was my trick. So I had this library that was damaged and I was in shock when the moving company called me. And sort of to vent this, I went and posted to the Well, a system based in Northern California about my experience, and just said, “I don’t know what’s been lost, it’s pretty terrible, I just feel in shock.” And a person who’s on the Well posted, “Mike, if you put a list of the books up, I’m willing to bet that some of us have copies and some of us might be willing to give those copies to you to help you rebuild your library.” After I went to look for the warehouse and look through the ashes and see what remained, I actually was able to compile a partial list of the books that I’d lost and I posted it to the Well, and I thought maybe I’d get a few books. Over the next six months not a week went by in which people I had never met did not send me books. I received boxes of books, not just from California but from all over the country. It is real. That was real. It affected me really. And if you want to know where the passion to protect this medium comes from, it comes from the fact that it’s real and when we hear from the religious right that we don’t care about children, that the First Amendment or this medium stands as opposed to the interests of children, I think to myself, “I’m a parent and the last thing I’d want to do is to let these people take this medium away from my child who will grow up with the Internet.” Thank you.

LIONEL SOBEL:

That was a wonderful opening talk, and the Electronic Frontier Foundation does so much for those of us who would like to

see the Internet protected. I'll talk later about whether copyright should be diminished.

Maybe we should take a couple of questions for Mike—or something you'd like to hear more about before we move on to the panel discussion?

AUDIENCE MEMEBER QUESTION:

Mike, you mentioned that you kept talking about the fact that why shouldn't things available in Barnes & Noble not be available on the Internet. Why shouldn't it be? You also mentioned that the Internet is very equalized because none of the checks and balances that prevents the things from getting into Barnes & Noble . . . they are disintermediating communications. So what do you do about the disintermediating?

GODWIN:

I think it's important to recognize that the First Amendment is not an absolute protection, and even the most extreme among us civil libertarians acknowledges that there are exceptions to the First Amendment. You can't broadcast threats, you can't engage in a criminal conspiracy, you can't infringe on copyright. There are things that you can do that will have penalties, civil or criminal penalties. Each one of those, I think, represents sort of a nuanced set of balances between the social interests and First Amendment interests. Certainly the Copyright Act does. Certainly the Federal Threat Statute which was implicated last year in the Baker case does. I'm not saying that this rule that the creation of this disintermediated medium removes all the checks. It certainly does not remove legal sanctions. You certainly could not argue that you had not really engaged in a criminal conspiracy because it was by e-mail. So I think that the question is not whether there are limits on free speech on the Net or not. There certainly are. The question is whether the rules should be different for the medium, and I think that if the common law principle of learning from experience applies, we ought to wait until we identify unique problems that require regulation rather than anticipate the worst case scenarios. You know, if we had approached the telephone that way, potentially every person in this room could make anonymous, obscene, or harassing phone calls to anyone. Even with caller I.D., you just use a pay phone, right? And you could send poison pen letters without using a return address. We have a lot of potential to do harm in both mail and telephony, but the fact is most

people don't use it in that harmful way, and we have narrowly crafted statutes that aim at the particular harms rather than broad statutes that anticipate general harms, and I think that's the right approach.

SOBEL:

Mike, one more question that we got in writing, in fact even before you began speaking, so let me ask you this and then we'll go to the panel. You mentioned the case of *United States v. Thomas* in which the Thomases were prosecuted in one state on account of material that was on their computer in another state, and you remember from constitutional law that the obscenity standard that we operate under in this country today allows the prosecutor to ask the jury to rule on the basis of local community standards. What is the current procedural status of the prosecution, and are you willing to hazard a prediction as to the ultimate outcome?

GODWIN:

The procedural status is that the Thomases lost their appeal, and although I believe their attorney may have decided to take it up, I don't think the Supreme Court will hear it. It's not a good case for raising the issues, partly because you have a commercial pornography vendor. As it turns out, the courts are not normally sympathetic to this class of defendants. What I anticipate is that there will be cases, not this case, but there will be cases that raise really two sets of issues: one a constitutional law issue, a direct constitutional law issue, and one a sort of very traditional criminal law issue. The constitutional law issue, as you said, is the community standards issue, and, incidentally, one of the reasons that the right is promoting the indecency standard is that the community standards there are national. It's sort of an oxymoronic concept from broadcasting. But the other issue is an issue about criminal intent. Can you commit a crime when you're asleep? In every other distribution of obscenity prosecution, either the defendant or the defendant's agent willfully and knowingly made a decision to put the vended material into interstate commerce and create federal jurisdiction, right? Here you have people setting up either sites on the Internet or sites at bulletin board systems that can be called when you're asleep or out of town or out of the country from any jurisdiction. Can it be said that you've made out the intent element as part of a substantive criminal law prosecution? I think that there really is an open question there, and I look forward to seeing a case that raises it pretty squarely.

III. PANEL DISCUSSION

SOBEL:

Good. Thanks. Let's do this. We're going to go now to the panel, and the way that the evening has been organized is that each of us on the panel have been given about ten minutes or so to make some remarks on the topic that is ours, and then we're going to take more questions from the group or maybe exchange questions amongst those of us who are on the panel. So let me introduce the members of the panel to you because we'll be talking from our chairs and just moving right on down the line. Remember, since we're not going to take a formal intermission if you want to wander out to get a drink of water or whatever, none of us will be offended.

Seated right next to Mike Godwin is Greg Victoroff, who is a lawyer here in Los Angeles, a partner in the Century City firm of Rohde & Victoroff. He specializes in First Amendment and constitutional issues, and he's going to talk about these kinds of constitutional concerns for artists and lawyers. To Greg's left is Ken McGuire, who's a special agent with the Federal Bureau of Investigation. He is assigned to pursuing and prosecuting computer criminals and, in fact, was involved, I understand, in connection with the pursuit of hacker Kevin Mitnick. To Mr. McGuire's left is Jonathan Rosenoer, who is Vice President of Internet Services for North Communications and is the founder of one of the best known Web sites that concern law, Cyberlaw. And to Mr. Rosenoer's left is Scot Grierson, who's a tax lawyer with the firm of Bruck & Perry and is the author of the tax article in the issue of the *Entertainment Law Journal*. It deals with state taxation of online transactions. To his left is David Hayes, who is a corporate and entertainment attorney with the law firm of O'Melveny & Myers down in their Newport Beach office, and among his many clients is the third largest Internet provider in the United States.

So why don't we start with Greg, and then we'll all kind of keep an eye on our watches and we'll move on down the line.

GREG VICTOROFF:

Thank you, Lon. I wanted to thank Dean McLaughlin, Veronica Toole, and Tom Kosakowski for inviting me to come and speak to you today. Usually I'm called on to explain Byzantine aspects of copyright law and I have a very dry presentation, but today

I've been asked to talk about the constitutional aspects, which is liberating for me, so I'm looking forward to digressing into the more touchy-feely and humanistic areas of the law and even some political and social issues. I guess in the agenda it says that I'm going to talk about constitutional issues concerning artists and lawyers. Well, what I really put together is a kind of a potpourri of current legal issues involving the Internet that are of interest to me, and most of them are constitutional and in that way they are of interest and importance to all people, and being as artists and even some lawyers fall into the class of "people," it should be of interest to everyone here.

When I'm asked to speak to groups, I find the audiences generally break down into three subsections: the first group is intensely interested in the subject matter, and they're usually sitting in the front row keeping copious notes. And the second group is late for dinner, and they're sitting in the back row wishing they could get out of here. And the third group is deeply absorbed in sexual fantasy. I will try not to disturb the third group, but for the rest of us in the time remaining, just kind of a hit parade of issues, and maybe we can flesh them out more later.

Last February, U.S. District Court Judge Ron Bruckhalter issued a TRO against enforcement of aspects of the Communication Decency Act, which are located in your materials that you have, at the behest of the ACLU and Planned Parenthood and a number of other plaintiffs in that action brought in Philadelphia, enjoining the portion of the Act against display and transmissions of indecent material, but he upheld a section making it a felony to display in a way accessible to minors patently offensive material. So this left everyone wondering what will happen next.

In your materials I have provided excerpts at page 200 from *Stanley v. Georgia*. I mean, this is a law school. I figure there should at least be one or two cases here. *Stanley v. Georgia*, I'm sure you all remember was a case in which obscene material was held to be constitutionally protected as long as you had it in your home. And that's at page 200; that holding is that the First Amendment protects the possession of material privately. I think that is relevant to a discussion of sexually explicit material on the Internet. Janet Reno reportedly has sent a letter to President Clinton, although I haven't obtained a copy, stating the Justice Department will not be enforcing the incorporation of the so-called Comstock Gag Law in the Communications Decency Act. You know, I looked all over for it. The materials are very complete, but the one thing they didn't include is

18 U.S.C. § 1462. You'd never think to look there, so I included it in the materials at page 182. What a surprise that was to me. I would never have believed such a law was on the books but, sure enough, it is a felony in this country to import or send through the mails or common carriers information about abortion. Who knew? It only got attention after it was incorporated by reference in the Communications Decency Act. Pat Schroeder immediately spotted this and she issued a press release which I've included in your materials, calling the Comstock law—it's at page 185—a "computer virus." I thought that was cute.

So I'm told many adult-oriented Web sites have ceased distributing adult-oriented material. Some have disappeared altogether. So in case some of you are not getting enough, at page 189, with the help of a Harvard lawyer and computer science major, I compiled a list of several hundred sites where you can find all manner of sexually-oriented material from sex with extraterrestrials to whatever your predilection. Many of these come and go and I can't promise that they'll all be there, but one of the important issues about these sites that have felt the chilling effect of the semi-constitutional aspects of the Communication Decency Act is—the individual who helped me compile these didn't want to be identified—but he pointed out, and rightfully so, that in the mix of sexually-oriented Web sites are a lot of Web sites that contain medical information, that contain information important to adolescents who may be going through a gender crisis, questioning their own sexuality, and they have no one to talk to about it. If they're not permitted to talk about frank matters of sexuality and safe sex practices on the Internet, I think that it is a disservice. That's what this blue ribbon that I am wearing, by the way, if none of you know, is in support of free speech on the Net.

Disclaimers are more explicit. At page 183, I have put together a hypothetical Web site disclaimer for a family medical clinic, operating, giving advice and medical information, but under the new Communications Decency Act and the incorporation of the Comstock rule, the medical clinic would be prevented from discussing any information concerning genetic counseling, female contraception, prenatal diagnosis, treatment of infertility, menstrual difficulties, pelvic/abdominal pain, complications of pregnancy or sexual abuse, and on and on and on. So if any of those things are your problems, don't look for answers on the Internet because, if this law were to be enforced, it would be a felony to do that.

We also have seen some civil disobedience. My own little niece has prepared a communication which is at 187, which says here are twenty-eight women at Eastern colleges who have e-mailed the White House saying, "Here is information about abortion. We want to discuss it. If this is a crime, come and get me." And Ken, if you want to prosecute any of these young women, their names can be found at page 188. I did not include the e-mail communication from my family practitioner brother to his eleven-year-old daughter explaining about birth control, however. Yesterday, President Clinton vetoed a bill that would outlaw a type of abortion. A sort of a ghoulish forced birth bill that was introduced fortunately was vetoed, and you know he's going to take a lot of political heat for this.

I'm just fascinated because euthanasia is one of my pet topics, and there's this tension pulling the country in two directions. The right wing folks seem to be very concerned about abortion, preserving life in utero, and the left wing folks, spearheaded by Judge Stephen Reinhardt and the Ninth Circuit, seem to be very eager to permit euthanasia and physician-assisted suicide. I make the joke that the "Jack in the Box" chain will be bought out by Jack Kevorkian. You'll be able to get drive-up service. Just drive up; they put a vacuum cleaner hose in your exhaust pipe and stick it in your window. You don't even have to leave your car. So it's an interesting social situation that's happening over the private, personal issue of life and death.

Some case law that is of great concern to me, *Phonavis v. Cherry Auction*. Lon may talk more about vicarious liability for copyright infringement and whether that could be applicable to the Net, and the *Religious Technology Center v. Netcom Online*—I have these cites if any of you want them later—in which the Church of Scientology got limitations were put on online service providers' liability. So there are two cases, one limiting the liability, the other expanding it, not specifically of computers, but I think it creates an important issue for Internet providers.

I wanted to read the text of the First and the Fourth Amendments. I didn't bring them. We probably all know them by heart, but it's worth taking a moment just to think about no law abridging freedom of speech and being secure in our houses and homes and papers, and how wire tapping is possible and with a court order now, online transaction records will show the FBI or whatever police agency is investigating you, everyone you've spoken to and for how long on the Internet. Yes, there's going to be regulation. It's

inevitable, but the rationale is difficult. The "scarcity of the airwaves" rationale doesn't wash. I think national security is a big issue. Frankly, with all due respect to Special Agent McGuire and the FBI, the FBI is clueless as to the potential for crime and the actual types of civil and criminal infringements that can happen. I say that in all due respect. It simply is at a point now that drug enforcement efforts were at fifteen years ago. I was told that the FBI had half a dozen people in its drug enforcement unit in L.A. ten years ago. Now they have fifty or so, and I expect that the FBI has a high tech computer crimes squad in L.A. consisting of how many agents?

KEN MCGUIRE:

Three or four.

VICTOROFF:

Three or four. Tripled in size from what I was told in less than a year and will be growing, but, frankly, everyone concerned about the FBI chasing down child pornographers, they probably have bigger fish to fry and there just aren't enough people to go around prosecuting every criminal violation that may occur on the Net. I see application of civil and criminal RICO laws, very elastic kind of regulations that may be applied to swindles and Internet broadcasts. Maybe John Perry Barlow is right, a founder of the Electronic Frontier Foundation and sometimes lyricist for the Grateful Dead. If I paraphrase him, he said that copyrights—

GODWIN:

He's no longer a lyricist for the Grateful Dead.

VICTOROFF:

Lost his gig, what can I say? It's terrible. He said something about copyright didn't fit in the world of cyberspace because it protects the bottle, not the wine; that copyright as we know it protects paintings and books and stuff you can fix, and that the Internet puts all this content in zeros and ones floating out there somewhere and maybe we need to think about the law of copyright differently. And then I'm told that there's all kinds of "Netiquette" and free stuff out there and that shareware, you don't have to pay for the stuff, and you can get anything you wanted, download it and have it, and this is an economy of goodwill. To an idealist like me, it sounds very exciting. The one thing we know for sure is with all of this goodwill traded

back and forth and shareware and free stuff you can get, the IRS has got to find a way to tax it. I think Scot is going to explain how they're going to do that to us.

I see problems for urban poets like the late Eazy-E, Dr. Dre, and other so-called rap artists, whose lyrical social commentary is patently offensive. It's supposed to be. If art doesn't offend somebody, it's not doing its job. But these artists are carried by companies like Time-Warner, who courageously defend them to a point. But talking about regulation, regulation is going to be inevitable because what's going to happen, it's not going to be governmental regulation. It's going to be internal regulation like record labeling, like movie rating, because to go out and buy Coolio's new record or download it off the Net—I'm sure Lionel is going to talk about music uses through the Internet—Time-Warner wants to be accessible to families, to every family in America, and so they're going to build in—it's in your materials—special passwords and encryption devices and ways that people coming on to material that could be patently offensive or obscene are going to be able to prove that they are over the legal age and get it. There's an article from the *L.A. Times* in your materials that discusses that.

Finally, real cutting edge stuff, not necessarily Internet, but we were talking about Tim McVeigh's computer chip implants, I am told that with the Lollapalooza '96 concert it is being offered—with body piercing and tattooing so popular—implants of electronic receivers that will boost the bass and the treble and make the musical experience even more enjoyable is going to be available. Now, exactly where the implants are placed, I'm not sure. It might be at the discretion of the wearer. But that's just the tip of the iceberg. There's about an hour and forty-five minutes of stuff I didn't include in this short summary and maybe I'll answer questions at the end. Thanks.

SOBEL:

Mr. McGuire, you can reply or . . .

MCGUIRE:

For a second there, I thought I was being toasted.

SOBEL:

Fine, reply or let it pass. Talk to us about Kevin Mitnick. This morning on the "Today" show, people were debating whether the

FBI was being too patient at Wyoming, so I guess what Greg said was mild as compared to those thoughts. So . . .

MCGUIRE:

Thank you. Some days you can't win for losing.

SOBEL:

No.

MCGUIRE:

I've been a special agent for the FBI for twelve years. I've been here in Los Angeles for ten, and I've been assigned to some kind of computer fraud case since 1991. As Mr. Victoroff has pointed out, no, we don't spend a lot of time and a lot of effort on putting together a high-tech squad here in Los Angeles. We jack-booted thugs, as we're endearingly referred to, have a wide span of violations and jurisdictions to handle. I've been assigned to a bank fraud squad, and along the way somebody says, "Hey, we've got another case on Kevin Mitnick," and they looked around and said, "Who's got the violation? I think that's down in the bank fraud squad." Supervisor says, "Anybody want it?" And what comes to the final point is I put my hand up, I said I'd take a crack at it, and now I hear myself tonight referred to as an expert. I am not an expert, okay? I'm the guy who's foolish enough to stick his hand up. I'm the guy just like probably all of you that picked up the computer, took a look at it and said, "Hey, I can figure this out and I can make my job easier." It's two o'clock in the morning, plugging my config.sys file and hearing my wife say, "You should've bought a Macintosh." Been there, done that.

Let me just give you an idea of what we're seeing. The FBI's encountering the new technology, the higher technology on all its fronts. We've got the old slug 'em extortion, kidnap, drug cases. They're all using cell phones, they're all using pagers, they're using these throwaway long distance cards. It's harder than heck to trace these guys back. We're finding in our bank fraud cases—one I can refer to in particular because we finally put the son of a gun away—we're finding that they are trying to get into the bank systems. Now, this is not a per se break in the Internet, and I think you'll find from your questions and what I have to say tonight that we're not out there actively, as far as I know, perusing the Internet looking for bad guys. We do have one particular agent in Los Angeles who's

assigned to the interstate transportation of obscene material, and basically what he's looking for is kiddie porn. We have about four or five agents that work white collar crime, and we go out and we help the guys in the dope squads and things like that and try and help them with that. We have four other agents whose job is purely to take evidence in when it's brought in computer form or some other magnetic media and break it down and help us figure what the heck these guys did so we can present it to a grand jury. And I want to tell you, the grand jury is just a bunch of folks, some of them without high school educations, and I have to explain to them, "Ladies and gentlemen, here's what happened." And they have no care about the config.sys file; they don't give a darn about magnetic media. "Tell me what happened in plain English." And if I can't do that, if I can't dumb myself down to explain these things, then the case is shot and the U.S. Attorney doesn't want me up there because I can't get the case through, and another victim says, "Ah, the FBI can't do a darn thing. They're not worth it."

So our new challenges are all over the place. We're at the edge as far as technology's going, and we're trying to catch up, as we always are, with the bad guys because they get the first move. We work the edge of the laws because we've got free speech problems on one side; we've got victims screaming bloody murder—where's my child, gotta stop the dope, gotta stop the people from infringing on my copyright, somebody's getting into my telephone and they hear what's going on. Four years ago we had somebody come to us and tell us, "Somebody broke into my computer system, took all my customer information and underbid me by one dollar per unit on every one of my customers. I lost fifty percent of my business in six months." That's a real issue. That's something that happens. That's dollars and cents. That's what the U.S. Attorney's office asks from us. Show me the loss, show me dollars in fraud cases, show me problems. I worked on the Teledyne relays case where there were semiconductors that weren't being tested. Those things went into submarines, bombs, airplanes, things that are black programs that they couldn't even tell me about because I had to get cleared on. So we're all over the place with this, trying to catch up. It's true we're trying to catch up, but we're a government agency. Everything's a low bid contract.

And on top of not being an expert and making that abundantly clear tonight, I can tell you about my experiences, I can tell you my understandings of what the Federal statutes are. I can even

cite a couple of sections, but no promises. What I also can do is not talk about pending cases. I can talk about historical cases, and what I'd like to do is keep my little chitchat here short so that if you have any questions for me, there is a broad spectrum of speakers tonight, and if I can handle anybody's particular question I'd be glad to do that. I'm over in the West L.A. Federal Building. We're in the telephone book, right inside the front cover. You've got my name, you're welcome to call me, you're welcome to have anybody call us. Sometimes we have telephone duty. You sit there and you take complaint calls from people all day. I must have taken forty or fifty calls between 6 A.M. and 2 P.M. today. Take about twenty-five percent out for nuts. Take about twenty-five percent out for people who have legitimate complaints, and the rest of them are information. And I call myself, when I sit on that phone, the Federal Bureau of Information because I'm telling screenwriters what kind of guns we use, standard procedures—hey, what would you do in this kind of situation; I'm trying to find this agency. You know, it's like American Express giving them travel information. If I can be of any help, I'd be glad to.

One thing I would like to point out is that since the fall of last year—we've got a terrific director; I am superbly impressed, completely impressed, with Louis Freeh. He is by far one of the finest men I think I've actually ever met and seen in action. He went to Congress and said we have an oncoming problem and it's starting to hit us now. We need to do legal wiretaps. We need to go out and find out who these dope dealers are. We need to be able to put up a wiretap in no time flat when somebody steals somebody's baby because they're trying to extort a bank president. And what we're running into is the digital technology that we have in telecommunications does not allow us all the time with all the different telephone companies to do those wiretaps. Congress, please give us money and please give the direction to these telephone and telecommunications companies to allow them to comply with legal wiretap orders. And if any of you have taken any kind of criminal law, you'll realize that for us to get a legal wiretap—and that's all we get no matter what they tell you because it is a real killer to get a wiretap—we have to go before a federal district judge and we have to show probable cause and we have to show all the work we've done, everything we've done and could not do to get this information, and a pressing need to sharply invade somebody's privacy. Louis did a great job for us. There was some reporting about the FBI being able

to wiretap hundreds or thousands more telephone calls. We don't have the power. If we don't have enough time and effort and facilities to put a whole high tech computer squad in Los Angeles, we sure as heck aren't going to have the time and the ability to wiretap everybody's phone. Nor do we care. I couldn't care less who's dating whom and what happened on the local soaps. So I'll leave it at that, and if anybody has any questions later on or afterwards, please feel free.

SOBEL:

Jonathan Rosenoer.

JONATHAN ROSENOER:

I'm not used to standing up and I'm going to have to try and restrain myself to this table. There is a joke that is told about a software company's engineers—not Nintendo—how many of them does it take to screw in a lightbulb, and the answer is zero. They just define darkness as a feature. It would be funny except where people are trying to define darkness as a feature in the First Amendment to the U.S. Constitution across many of the values that you and I hold dear by trying to take a technology that most people don't understand, that is probably one of the most impressive feats of communication that's ever been achieved, and to turn it off so that you can't use it. And it really is a fight for values and it works on many different levels, and if you don't understand the law very well and you don't understand what has gone before, it's very hard for you to figure out what's going on.

But I wanted to talk about a few different areas of law that are coming to people's perception, to their attention—they're seen through the filter of the media and they're seen wrongly, in my opinion—and try and give you an idea of what's going on here and what's happening. First of all, I believe fervently that the answer to speech that you don't agree with is more speech. Somebody in the audience asked the question earlier, "What about stuff that an editor doesn't see? Why should that go on the Internet?" It's good to have people put stuff on the Internet you don't agree with. There's a bomber who spent a decade or so terrorizing the United States. He didn't use the Internet, didn't use very much of anything, as far as I can see. I think he spent \$53 last year on food. And when his manifesto was published, not on the Internet, his brother recognized him and he was finally caught. The greatest threat to the United

States' liberties at that time was caught because something was published in a newspaper. It had nothing to do with computers at all, and I think that bears repeating.

The First Amendment is something we all hold dear. It reflects the fundamental values which were written into the Constitution. This country was founded on individualism. It was founded on the belief that we give up certain rights to the government, but we retain a whole lot more for ourselves, and when you start analyzing some of the changes in law that are being proposed in reaction to what people think or fear about the Internet, it clears things up for you. Ken just talked about wiretaps and why the government needs to expand its ability to wiretap. Well, I think it's great that the government wants to wiretap and that there are strong procedures there that they have to follow. I think that's wonderful. But I don't think that the way that you wiretap is you dumb down people's communication medium and essentially tell people that they have to communicate at a level that the Federal Bureau of Investigation can track. I think it might be more sensible to give the Federal Bureau of Investigation more money so it can learn how to trace certain calls.

I think Mike and other people have heard the illustration, what if you were in a restaurant and everybody was talking real loud, and the FBI came in and said, "Could you all be quiet because we want to tap, we want to listen to what that couple over there is saying?" That's not the kind of society that we have here. That's the type of society they had in East Germany, where the government asserted the right to force neighbors to inform on other neighbors, for people to work with the government to root out what the government thought was bad, instead of making the government do its own job. When you look at criminal trials, it's not the job in the United States for the defense attorney to collaborate with the prosecutor to get the end result that they desire. It is the job of the federal government, the state government, to obtain the conviction and for the defendant to defend himself. This is not France. This is not a civil law country. This is the United States where we're all individuals and the government works for us. We do not work for the government. Of course there are threats, and there are threats to be recognized, but the way that we encounter threats and defend ourselves in a free society is to not deprive the citizens of freedom to communicate. So I look at the argument about encryption: should we be forced to give a key to our communications to the federal government so when it feels like

it, it can read them? I think the answer is no. You could take a look at Paul Revere's ride. How effective would it have been if there had to be a Redcoat on the back of that horse. He wouldn't have gotten very far.

Copyright is another interesting area of law. I take a look at what's happening in copyright and some of the proposed revisions or additions or amendments to the Copyright Act, and to my mind it seems that there are a lot of publishers out there, people in the publishing industry, seeking to get an advantage they otherwise should not have. They're taking advantage of people's fears or what they can conjure up in their minds to deprive libraries of the ability to loan materials, to stop you from doing things you otherwise would have done. You all know there was a case involving Texaco where Texaco was sued by publishers because one of its researchers—it was actually a couple, but one went to trial—one of its researchers had photocopied an article in a scholarly journal to put in his file for later use. They lost that case. That was copyright infringement. How many people here photocopy articles and put them in a file for later reference? And the judge said, "Well, there's this exception called fair use and people used to think that photocopying was fair use and that was fine. But times have changed now and we can charge you for it, so you should pay." And that's what's happening with the Internet as well. People are seeing an opportunity to make people pay and say, "Hey, you should pay. That's a fair right. We put this stuff out and you should have to pay." Well, what happened to the idea of a public domain and fair use for scholarly and educational purposes? There's a book that was written that didn't, in my opinion, go far enough. It explains that the genesis of copyright law was not to make sure the authors got paid. It was to make sure the publishers didn't deprive the public of everything under the sun ad infinitum, to infinity. The copyright law, as I read it, was written as a restriction on the rights of publishers, but they like to talk about authors. I'm an author, Mike's an author—who owns our copyright? The publisher owns our copyright. They're the ones who make the big bucks. We get an advance. If we're lucky, we will get some royalties, but there's a case called the *Garrison* case which illustrates why it is that authors and other people don't get paid. They don't get paid. The publishers get paid.

The Communications Decency Act is exactly a fight over values. Well, you think it's a fight over values when it comes to saying dirty words that children might hear, and isn't that a terrible

thing. I wrote an article on the Communications Decency Act before it was passed. It's called "Indecent Communication," and make no mistake about it, I was talking about the proposed law, not about the object. They were talking about the Comstock laws, which I'd never heard of before, and I wasn't even aware of the proposed change that would amend the Comstock Act. I wrote, "The legal standard for the Comstock laws came from an English case, *Regina v. Hickman*, which, says the Cato Institute, held that the test for obscenity turned on whether the material tended to corrupt the morals of the young or immature person. Early feminists such as Margaret Sanger were notable targets of Comstock and the Comstock laws in that they banned the mailing of information on contraception and abortion."

There's a lot more happening here than dirty words. You're talking about the rights of women. This is not the 1800s in America. We're now in the 1990s and I have two daughters. I very much resent Representative Hyde and other people trying to bring what I consider an obscene law into the twenty-first century. What does that say about the rights of my daughters when they grow up? I have an eight-year-old and a one-year-old.

There's a lot going on here. The law of the Internet itself is emerging. It's emerging from a kind of cloud of darkness, as it were. People don't understand the technology. I don't think the law is very hard to figure out, what law should be applied where and what you should do in different circumstances if you have a good understanding of the U.S. Constitution and the values behind it and some of the people who've gone before to fight for these things. And I think I'll turn it over with that.

SCOT GRIERSON:

Well, now the topic you've all waited for. Here at tax time I'm not sure if I'm exactly the welcome person to come and talk about taxation of the Internet when we have barely developed laws already dealing with communication and freedom of speech, but I think someone said once that there are two things certain in life and that's death and taxes, and that certainly holds true for the Internet. I have made myself lots of friends by coming up with a theory based in constitutional law by which states can impose a sales and use tax on Internet transactions. It's very much in the formative stage, and I don't propose that it answers all the questions or is a comprehensive scheme.

We had a comment on whether the IRS is looking to tax Internet transactions. I haven't heard anything that they are. However, perhaps they think they're getting enough out of income taxes and estate taxes and whatnot, but it's clearly possible that they could come up with something. There was the national sales tax that was proposed that would have, I imagine would certainly have hit these transactions, but let's focus on the state and local governments for a moment.

The "why" of the tax from the state and local government perspective is very simple. First of all, there is the problem with unfunded mandates, where the federal government is currently imposing different social burden programs onto the state governments. State governments need revenues to support these mandates. And there's also a potential in Internet transactions for an erosion of the tax base, specifically the sales and use tax base, because let me point out—I'm sure you all know, but let me just point out that sales of tangible personal property are typically subject to sales tax. Well, now, because of digitization we're selling some of these tangible goods over the Internet and through other online services, through BBSs, etc. These include digitized music, where you can order up your favorite song and download it to your home computer for later playing. There are movies—you can get the digitized version, if not now then very soon, both over the Internet and by way of direct broadcast satellite where you can just order it up and have it beamed directly to your home. We have the software and shareware. We also have video games that will soon be able to be purchased at Blockbuster Video Stores by just walking up to a carousel and punching up—they won't even have the software in the store. You'll be able to punch it up in a carousel and it will be downlinked from a satellite right there and put into tangible form. And in many instances this digitization will erode the sales tax base because they will be delivered into intangible forms

There's also other reasons, but some of the services that are not typically subject to sales and use tax are interactive television and information services, such as CompuServe and America Online. Currently, only eleven states tax in one form or another these types of information services, such as CompuServe and America Online, and those include Connecticut, Delaware, the District of Columbia, Hawaii, New Mexico, Pennsylvania, South Dakota and Texas. The remaining states that tax services at all tax various other types of services such as laundry services, etc.

But, at any rate, to show how important the sales and use tax base is to state and local governments, sales and use tax generates \$200 billion in revenues for state and local governments annually. That's about thirty-five percent of their total revenue-generating potential. As we all know, our economy is making a transition from a manufacturing, solid goods type of economy to a more service-oriented economy, which affects the tax base in obvious ways. Now the advent of the information highway is merely accelerating this service-oriented economy. So you can see that state tax administrators are very concerned with what types of taxing structures they can create in order to reach Internet and information highway type transactions.

The problem is that current state taxing structures are very ill-prepared for reaching Internet transactions. Even the states that I mentioned to you that do tax information services, the statutes were frankly created way before this type of technology was even contemplated, so they would basically miss most Internet transactions. What's happening now is that states are applying their telecommunications laws to information services, laws that tax telecommunications services such as telephone calls, etc. They're making a stretch and saying an information service should be taxed under this scheme. Many information service providers may not realize it, but they may be subject to taxation in all fifty states when they don't even know where these transactions are taking place. What I have done in my paper is talked about these issues with an eye towards asking the state tax administrators to accept the challenge of creating taxing structures in an intelligent way, by becoming knowledgeable with the technology and creating a fair and equitable taxing structure that doesn't tax an Internet transaction, the sale of a CD on the Internet, without taxing it, on the other hand, when it's actually sold in the tangible form. There's no reason why there should be disparate treatment just because a transaction occurs over the Internet rather than in some other form.

Another major problem with taxing information highway transactions is that it really comes down to the state's jurisdiction to tax under the commerce clause of the United States Constitution. Typically, for a state to impose a sales tax or even an income tax on an out of state taxpayer, they must meet a four element requirement that was set forth by the Supreme Court, and since the requirements have to do with the interstate commerce clause and the avoidance of discrimination against interstate commerce, by states imposing taxes.

The first element of the test is the key for the information highway. That test requires that the tax apply to an activity which has a substantial nexus with the taxing state. So you ask yourself, "Where does a transaction take place when it happens over the Internet?" and the simple answer is it's cyberspace. It takes place out there somewhere. Actually, these theories go back to international tax law and other types of tax laws. It has to do with sourcing rules. Do states choose to impose a tax at the source where the service is being provided? Say, for example, where CompuServe has all of its mainframes and servers located all in one state. They would have no nexus or presence in any of the other forty-nine states, so should they be taxed just at their source where they're physically located, or should they be taxed at the destination state or market state where the consumer is accessing the service or accessing, let's say, the server and downloading some shareware?

I think the key is in three cases. Actually, there's probably five or six of them but just to simplify things, the three cases are a 1992 case called *Quill v. North Dakota*, which many of you may have heard about who think that tax law is a very interesting subject; the other case is called *Goldberg v. Sweet*; the third is *Scripto v. Carson*. And *Quill* really sets up the debate. *Quill* involved a mail order seller whose only contact with the state of North Dakota was the mailing of advertisements and deliveries of their products by common carrier. Now, the court below in *Quill*, the North Dakota State Supreme Court, said that only minimum contacts with the state under the due process clause was sufficient in order to impose a tax, and so the minimum contact here would be the contract with the in-state consumer. So they said that they upheld the tax and said it was constitutional. In so doing they reviewed a prior Supreme Court precedent which had sort of gone away from an absolute physical presence requirement for imposing a use tax collection duty. In *Quill*, it was an out of state seller selling into North Dakota but had no physical presence there. The United States Supreme Court reversed the state court and said that physical presence was required; a substantial physical presence was required under the commerce clause in order to impose the use tax collection duty, and they said this was the law for almost thirty years and basically they upheld the case on strictly stare decisis grounds because there was a substantial mail order industry that had relied on this physical presence requirement for many years, and it was a booming industry at the time. So that's one case that out of state information sellers will rely on to say, "We

don't have a physical presence in your state, a local node in which people dial up and access our services. Therefore, it is insufficient to impose a use tax collection duty."

Now the other key case is *Goldberg v. Sweet*. In *Goldberg*, the State of Illinois imposed an excise tax, which operates similar to a sales tax on the price of telephone call which either originated or terminated within the state and was billed to an in-state billing address or was paid by an in-state addressee. Now, in that case, nexus was not an issue. It was actually stipulated. But the court, when it examined the fair apportionment prong of the four element test which I saved the other three for you, when they examined that fair apportionment prong in dicta, clearly dicta, the court said only one state would have sufficient nexus to tax this telephone call and that is the state in which the call originates, terminates and is billed to an in-state service or billing address. So until now, until recently, until the decision of the third and main case that I think is important here, *Goldberg* was just considered nexus and was considered mostly a sourcing case that said an information service provider could source a sale there but they couldn't get nexus over the seller by way of *Goldberg*.

In *Oklahoma Tax Commission v. Jefferson Lines*, decided in 1995, the interesting thing about that case was the court referred to *Goldberg* specifically saying, "We held in *Goldberg* that nexus for a service transaction is acquired where the service originates, terminates, and when it is billed to an in-state billing address." So, under my proposed scheme, and you can take a look at the statutes and the regulation at your leisure—it's in the materials—what I suggest doing is, states could source and impose a sales tax on information highway transactions in the state in which the consumer accesses their computer and in the state in which they pay for and agree to acquire the service. So in the example of CompuServe, by entering into the agreement to become a subscriber and in accessing the service from within the taxing state, the *Goldberg* and *Oklahoma Tax Commission* decisions together permit the state to source it to the market state, rather than just to the state in which the service is created.

Some people are going to say well, that's fine, and specifically telecommunications companies are going to—they've been up in arms saying you can't impose a use tax collection duty on us, the information service providers, because that would just be an administrative burden that would destroy us, essentially. But at a recent multi-state tax commission meeting, AVP Taxware announced

that it had created a software package that could track the state in which a consumer was located when they entered a cybermall and made purchases from the cybermall. So you can imagine their surprise. Actually, they were sort of up in arms at this meeting about the whole thing, but I was ecstatic because I thought, well, I had the theory down, but how would you do it as a practical matter? And there it was. AVP Taxware had created it.

Another way of doing it would be electronic cash or DigiCash. This is a third party intermediary that protects the purchaser from the seller ever knowing where they live or what their credit card number is, etc. Well, people won't like this either; however, I think states could legitimately impose a duty upon the seller to contract with this third party intermediary to collect the tax as part of the transaction and remit it to the state in which the consumer is located because the third party intermediary does have the billing address information.

In closing I'd just like to point out an obvious fact that there's going to be lots of action in this area. I'm very excited about it, very excited about the Internet in general and the information highway. I think the nexus hurdle is an all-important one for state tax administrators to impose a tax, and I think we're going to see a lot of interesting battles here in the future over the issue. Thank you.

DAVID HAYES:

Good evening. I do support freedom of speech. I feel a little bit like Kramer in the famous episode where he wouldn't wear the ribbon. I would wear the ribbon. I hope you don't beat me up on the way out. Before I get started, I'd like to thank the *Entertainment Law Journal* and the California Lawyers for the Arts in general and Tom Kosakowski and Shaun Clark in particular for their help in putting together this symposium and getting me involved. I'd also like to thank Andy Dolack, who's a student here at Loyola Law School, works in our office, and he was very helpful in helping me put together my materials, but you shouldn't hold Andy responsible for any of the silly things I might say. And also you shouldn't hold the third largest Internet service provider liable for anything I say.

That said, I'd like to give you a little bit of a different perspective. I'm not an advocate for any particular position. I'm not a scholar. I'm a practitioner, and that perspective is a little bit different than the way we're taught in law school. I forget who said it, but some smart guy said, "At some point you'll want to focus on

what courts do rather than what they say.” And I think when you’re a practitioner you do that in spades. The fine points and the distinctions that a court makes in settling cases are less important in the day to day affairs of your clients than what actually the outcome is. And so I’ll try to go through this as quickly as possible, but I’d just like to take you through a few of the key areas that an Internet service provider, that service that allows you to get on the Net, maybe provides you some Web space, they come in a variety of flavors, some of the kinds of legal issues that they confront on a daily basis, just to give you a flavor of what it’s like out there.

So let’s assume that you’re setting up your Internet service and you want to be the good person. You want to stay on the right side of the law, so you say, “What do I need to do with respect to protecting myself from liability for those acts that are done by my end users?” I guess one answer might be, Well, what if I do nothing? And that works in certain circumstances. There’s a case, *Cubby v. CompuServe*, where CompuServe was sued for libel for a posting made on one of its rumor mills—I’m not sure, some site on their system, and the fact that they did not manage, review, create, delete, edit, or otherwise control the contents was found to mean that CompuServe had no liability.

But then you might think, maybe I don’t want to leave it wide open. Maybe the way I distinguish myself in the marketplace is by providing a different kind of an environment, a little bit more family-oriented, not the raw Internet that everybody worries about. So can I exercise some control? And you might read a case which isn’t an Internet case but it’s a case where CBS affiliates were sued by apple growers for some libelous statements regarding their use of carcinogenic chemicals in the growing of these apples, and the court found in that case that the distributor or deliverer of the defamatory material, which was the affiliate that broadcast the story, even though they did in certain instances exercise editorial control, the court reasoned that they could not monitor the contents and to do so would force the creation of full-time editorial boards at local stations throughout the country, which would have to possess sufficient knowledge and legal acumen and access to experts to continually monitor incoming transmissions and exercise on the spot discretionary calls or face \$75 million lawsuits at every turn, and that is not realistic. I submit to you that that’s also the case for Internet service providers.

So you can exercise some editorial control, you think, and so you go forward and do that a little bit, and then you find out there's *Stratton Oakmont v. Prodigy Services*. In that case, Prodigy was sued because an anonymous Prodigy subscriber posted defamatory messages about a brokerage firm, Stratton Oakmont, and Prodigy was sued for \$200 million in damages. Even though no editing was made to that particular defamatory statement, the court found Prodigy liable, and some of the factors they used were that Prodigy held itself out as exercising control over its network. I would suggest that that's not unlike most television stations, and that they did in fact exercise editorial control in other areas. So there we have it.

I think part of the problem with this line of cases is the courts create these fantastic fictions and analogize from them in certain instances. I think it is a fiction of grand proportion to say because Prodigy tried to edit certain things on their system that they were analogous in some strong way to a newspaper and, therefore, constitute a republisher of the information. Andy and I were talking earlier and I think a good analogy to that is if you've got a building owner and somebody is spray painting graffiti on the outside of his building, and every so often he goes out there and covers up some objectionable thing. If the next day somebody goes out there and says, "Jack Johnson was a thief," and he doesn't see it for a day, has he republished that statement? I submit to you that he has not. I think in general for the reasons mentioned in the CBS case, the fact that you don't have the resources available to monitor these ongoing communications at the Internet service providers, and even if you did, notwithstanding my client's good intentions, you don't want them to make these determinations. We have courts that do a pretty good job of resolving those complex disputes.

So then after those two cases you might say, well, okay, I'm not going to review any content at all. To heck with it. I'm just going to give everybody the raw Internet. And then you'd run into some copyright infringement problems. In *Playboy Enterprises v. George Frena*, the court imposed liability for a copyright infringement even though the system operator had no knowledge whatsoever of the activity. At least, again, according to the fiction created by the court. And so you say to yourself, "Okay, Mr. Frena had something to do with this content being on his system. What if all of it's totally automated? I certainly can't be liable in that case." And then you find yourself in the grips of *Religious Technology Center v. Netcom*, where the court did say in that case that some papers that were trade

secrets of the Religious Technology Center were posted. Netcom was notified and failed to remove them in a manner that was timely, and so they were included in the suit. The court stated that the Internet service provider's automated and indiscriminate copying mechanisms were not unlike a copying machine. So they weren't liable for direct infringement. So you think, "Okay, we're off the hook," but you're not because they found that they might be liable for contributory infringement because they did not remove the material in a timely fashion. And so it's a matter of fact as to whether they induced, caused or materially contributed to that activity.

And if that wasn't bad enough, we have the NII White Paper that was put out by the Clinton Administration that states that Internet service providers may be liable under a vicarious liability theory. They analogize the Internet service providers to the so-called dance hall cases, where club owners were held liable for copyright infringement based on the unauthorized public performance of musical works by bands they hired, even though they had expressly warned the bands not to engage in that activity.

So there you have it in the copyright area. So you don't want to have a general system at all then. "To heck with it. I'm just going to have a specialized system, and it's going to be pornography or indecent material. But you know what? I'm not going to let kids get it. I'm going to make sure that the people who sign up with me are adults, so I'm going to have a system whereby people register with me, I verify they're of age, and that's going to work, isn't it?" Well, so the Thomases may have thought. As it turned out they were held liable for distributing obscene materials and held to the local community standard, as has been mentioned here, in Memphis, clearly not favorable facts upon which to go into Memphis, but somewhat counter-intuitive in that it appeared that the operator was trying to take some action to prevent minors from gaining access. That case isn't directly related to the Internet; it's a BBS service, but it has implications for the potential question of whose community standards are being used.

The better case, and there's a lot of them out there, one is *Smith v. California*, and that is the analogy of a bookstore, and the Supreme Court struck down an L.A. ordinance making it unlawful for booksellers to possess obscene and indecent writing. And the requirement was even if the seller didn't know there was obscene material in the documents. The court reasoned that by eliminating the knowledge requirement, the ordinance severely limited the public's

access to constitutionally protected material, and booksellers' self-censorship compelled by the state would be censorship affecting the whole public, hardly less virulent for being privately administered. And I think that's also true of the Internet by the Communications Decency Act, which has been touched on here. It prohibits Internet service providers, any person operating a telecommunications facility under their control from permitting any of the activities that are prohibited in that Act, and in so doing, I think, in some ways causes the Internet service provider to self-censor. That censorship is, I would submit, no less virulent than the state doing it themselves.

I hope you have gotten a sense there are many other areas of potential liability. These are just a few. There are credit card numbers being posted by the Net. What is an Internet service provider's liability there? Invasion of privacy issues, planning and coordination of offline crimes, just a whole variety of things. In closing, I hope this gives you some of the sense of from a practitioner's perspective how incoherent the current law is regarding the obligations of Internet service providers. It implies a duty to monitor in the copyright context, yet if you do so imperfectly you can find yourself in trouble on the libel/slander front. And I hope you ask yourself, do we really want Internet service providers making these kinds of decisions on a daily basis, whether in fact a communication is slanderous, whether in fact it is a copyright violation because I call up the Internet service provider and tell him it is, and/or whether material is obscene or indecent. I suggest to you that we do not. Courts resolve these complex issues quite well, and perhaps we might explore the possibility of putting in place mechanisms that permit better enforcement of the existing laws. That should be the extent to which, I believe, we need to go in order to solve the problem. For instance, there might be a mechanism that in most cases would preserve the anonymity of the user but permit identification in those instances where a sufficient showing had been made that a crime had been committed and/or providing the purveyors of indecent material the opportunity to have a safe harbor if they were to register their site or list it with some centralized service that would permit parents to use Surf Watch and other types of blocking devices in an effective manner. One of the big concerns that a lot of people have with the current technology is that industrious providers of indecent material may change their addresses in a way that would permit the unsuspecting to fall upon it. I suggest that that's a stretch, but this would actually potentially close that loop as well. So I think what we really

want to develop is a coherent strategy that doesn't put the Internet at risk.

SOBEL:

On Monday of this week, the *Los Angeles Times* devoted the front page of its business section to a long article entitled "Rocking the Net," and the sub-headline included a phrase: "You want to become a record company? The Net and digital technology may make it happen soon." In this same week, I got a postcard in the mail at home from a company whose name I think you'll all recognize, 1-800-MUSIC NOW. 1-800-MUSIC NOW is, of course an 800 telephone number that you can call to order albums over the line, on the voice telephone, using a credit card, but it also happens to be a Worldwide Web site, www.1-800Now.com. You can order records over the Internet as well. Today, and when I say today I mean literally today, this month. When you order over the Worldwide Web, you provide a credit card number and your album will show up in a day or two through Federal Express or UPS or the mail, but we are literally only months away from the album coming back at you instantaneously over the Internet as well; only months. For those of us that have 28.8 modems, we'd have to sit there for a while before the album got delivered. When our cable TV companies decide to dedicate one of their channels to Internet connections, the album will come to us very quickly. The reality is that the Internet is an ideal way to distribute recorded music, and for any of you that were thinking of investing your money in a retail record store, walk-in-off-the-street record store, let me suggest to you that we are today where the buggy whip industry was on the dawn of the automobile age. This is not the time to be investing in record stores. We're going to see the end of it. We'll be downloading our recordings, including our cover artwork, off of the Internet or whatever the Internet evolves into.

What does this mean for the law? Well, in addition to the Communications Decency Act, which Congress passed and the President signed, the Internet and its suitability for distributing recorded music has also caused Congress to enact another piece of legislation signed by the President that's now currently in law that I happen to think is a wonderful piece of legislation. It's extremely narrow, and I'm going to describe just a couple of its points to you in a minute, but I want to give you all a disclaimer or a basis for evaluating my suggestion that it's a wonderful piece of legislation.

A number of my fellow colleagues on the panel have spoken or alluded critically to the NII, the National Information Infrastructure White Paper, which ended with a recommendation for federal legislation, and bills have been introduced in both the Senate and the House that, if enacted, would amend the Copyright Act in ways that are broader than the legislation that the President has already signed, and I for one am wholly in favor of the legislation based on the White Paper. I think it does none of the things that alarmists, including librarians, have shrieked about. I think not only does it not erase people's current expectations, or that is to say not only does it not change the law to counter people's current expectations; in fact, it changes the law to coincide with people's current expectations.

But I don't want to debate that because we could easily consume three hours or more. I want to talk about really the narrower version of the law that was passed, how it came to be passed and what, in fact, it did do. Let me by way of introducing this law which is the law that's described in the article that I contributed to your symposium material, "The Digital Public Performance Act," let me back up just a little bit historically to sort of set the stage for you as to how it was recording artists and their record companies and, to somewhat lesser extent, music publishers and songwriters finally persuaded Congress to enact that law. Let me remind all of you that have already studied copyright law that when we think about recorded music, it's necessary for us to keep in mind as a legal matter that every sound recording contains at least two conceptually distinct copyrights. There is the copyright in the song itself, and you ought to be picturing sheet music. That should be the image you have in mind. And then there's an entirely separate and distinct copyright in the recorded performance of that song. When recordings are publicly performed, and by way of illustration think of a radio broadcast, the music publisher and the songwriter receive a royalty from the radio station because of the fact that the broadcast is a public performance, and public performance is one of the rights of copyright. But the recording artist and the record company and the musicians and the background vocalists get nothing on account of radio broadcasts or even television broadcasts, and that's simply an accident of history. It's an accident of history that recording artists and musicians and record companies have been trying to get Congress to change for thirty years or more now.

In other countries of the world, especially in Europe, their legislatures have taken the modern path and have given recording

artists and record companies the public performance right so that they get royalties in connection with radio and TV broadcasts as well as songwriters and music publishers. But we in the United States, until this new law was enacted, have not given recording artists and record companies a public performance right, a right to receive a royalty, and I have a cynical, but I believe accurate, explanation for why that is so. Radio stations don't want to pay more royalties for the broadcast of recordings. Just the way they would prefer not to pay for the bottled water but haven't been able to figure out how to get Congress to enact legislation requiring the Arrowhead man to deliver water for free, just the way radio stations would like get on-air personalities, DJs, to work for free, but haven't been able to get Congress to reverse the minimum wage law with respect to DJs, they would like, radio station owners would, to preserve their right to broadcast recordings without compensating the artists or the record companies, and they have succeeded. My cynical explanation for why is that every Congressman in America has at least one and sometimes several radio station owners in their districts, but only Congressmen from New York City, Nashville, Los Angeles, maybe Austin, have record companies and recording artists in their districts. It's just a matter of count-the-vote politics.

What happened to change all of this in the little way in which it has been changed is that while record companies and recording artists were flailing about without success in getting the performance right, the Internet was born and became a technique for distributing prerecorded music in a way that really has the potential for doing damage to the entire industry of recorded music. And the reason that it has that potential is because, I think, that before anybody else's hair in this room is as grey as mine, that's the way all of you will be getting your recorded music like me too: down through a wire. So what the Recording Industry Association of America did, the trade association that represents record companies, it acquiesced to a proposed compromise. The compromise was that those like radio stations who had opposed the public performance right for record companies and artists would withdraw their opposition if in return the only thing that record companies and recording artists asked for was a very razor thin public performance right, namely, the right to be compensated for public performances of music and for other digital distributions of music in, for all practical purposes, only two circumstances: one of them is a circumstance I'm going to call "music on demand," like you access www.1-800Now.com, and then you go

through the series of menus until you find the album that you want and you click on it, and that click represents an instruction to deliver the recording. That is music on demand. There, because the radio stations aren't in the business of providing records this way, the radio stations said, "Fine, we'll give you a right to be compensated in that circumstance." And the other circumstance is one that I don't think anybody in this room has actually ever seen. There exists in America two subscription radio stations today. They're channels on cable-TV service. So there are two subscription radio stations today, and in connection with subscription radio stations, radio stations that you actually pay for the privilege of listening to and that in turn send out albums from first cut to last, uninterrupted, there too the radio industry, because it's not doing that sort of thing, was willing to have the record companies get a public performance right, and that, in fact, is what this new digital public performance right is all about.

The bill which is now, as I say, a statute, an amendment to the Copyright Act, is included in your materials. It's worth taking a peek at because if you're anything like me, you will find it to be almost immediately incomprehensible. Those of us that are copyright lawyers, copyright lawyers-to-be, no longer need to take a back seat or be the least bit ashamed about how our statute is less complex than the Internal Revenue Code. I mean until now it used to be that those among us who really liked complexity, who really liked the game, would become tax lawyers whether they liked taxes or not because that was the most complex statute in the federal codes. No more. We copyright lawyers now have sections of our own, and this is one, that are every bit as complex, and the explanation for why it's as complex as it is is that individual Congressmen almost never have a political or philosophical opinion about what the content of copyright law should be. This is just business. And as a consequence, for decades now, Congress has said to elements of the copyright industries, "If you folk will get together and tell us what legislation you'd like enacted, so long as all elements of the copyright industries can agree, we'll enact it."

And that's what happened with this Digital Public Performance bill. There were lawyers in Washington that closeted themselves in a conference room, some representing record companies, some representing recording artists and background musicians and vocalists, others representing radio stations and television broadcasters, others representing songwriters and music publishers, and they sat around the table and did a negotiation as though what they were

writing was a contract. But when they were done, they wanted to make sure that this agreement that those that were there had agreed to was binding not only on the clients who were represented in the room but on every other person who was in the music industry as well, and the way you accomplish that is by having your privately negotiated agreement enacted into copyright law and that's what's happened. So as you read through the act, you will find paragraphs that can only cause you to say, "Huh? What is this about?" How many companies in the United States, indeed in the world—we got a question about the international implications in our discussion tonight—how many companies in the entire world could this provision conceivably apply to? And the answer in many cases is two or four, and some people know the names of those companies. The rest of us, just reading the Act and the legislative history, don't really know the names of those companies, although it will come out, and that's why the legislation is as complex as it is and why I thought it took a flow chart in order to begin to sort it all out.

There exists now today—bottom line and then we'll take your questions—a very razor thin public performance right so that when music is distributed over the Internet or distributed by CompuServe forum managers to CompuServe subscribers, that is a performance which, without doubt, has to be licensed and indeed you also see in your materials some news articles based on press releases issued by ASCAP; that ASCAP has already issued a public performance license to CompuServe. I expect to see that ASCAP, BMI and SESAC within a matter of weeks, maybe a matter of months, will be issuing public performance licenses to America Online, to Prodigy, to maybe Netcom as well—is Netcom the third biggest? Earthlink—to Earthlink and the others as well, and we will now have brought the Internet into the copyright fold in a way that won't be painful to anybody. The music business has always been a business of pennies, but if you aggregate enough they weigh a lot and they constitute spendable money. There are some songwriters and recording artists who send their children to private, tuition-driven law schools on the earnings that they get from the sale of their music, and it, as I say, won't be painful at all.

Then it's my hope, although it's not altogether my expectation, that the NII bill will be enacted this summer as well. My expectation is that if it's enacted, it's going to suffer some serious amendments in ways that in my judgment aren't necessary but which

are necessary in the opinions of other people on the panel here. Thanks.

IV. AUDIENCE DISCUSSION

SOBEL:

We've gotten a number of questions from you in the audience and one of the questions does address itself to something that none of us has really mentioned so far. The question reads: "Granted that there are concerns that are U.S.-oriented. Since the Internet is international, why are we being so U.S.-centric in all of this? Shouldn't international law be given some consideration as well?" And indeed this absolutely is the case. I think, for example, in the sales tax area, those companies that are setting up business as Internet-based gambling casinos are doing so from the Caribbean. I think that the piece of software that probably more people in this room have downloaded than any other single piece of software was probably a piece of software downloaded from Australia, the piece of software that at least in the early days allowed us to make a connection with the Internet at all, called Trumpet. Trumpet Winsock came to us from Australia. Many of the copyright infringement sites are based in Europe rather than in the United States, even though the material is of American origin. What can we say about the interaction between international law and domestic law?

Let me just start with the casino issue because there would be a beautiful application of the issues that you raised, Scot, the desire of states to impose some sort of an excise-like tax on gambling activities engaged in by residents of their state, even though the computer-based casino is in the Caribbean instead of here. Have you thought about the interaction of international law with domestic law on this issue?

GRIERSON:

I don't think that it applies directly to my discussion, necessarily. I think that there are probably some federal tax aspects as far as sourcing from an international tax standpoint that may apply to that, and I think it would also be impacted by NAFTA, but I'm not sure exactly how.

SOBEL:

Let me ask Mike if you have any thoughts. Mike's sidekick, John Perry Barlow, said at least one thing that was eminently quotable. I disagree with John—

GODWIN:

Sidekick?

SOBEL:

Colleague.

GODWIN:

I'm sure John's remarks didn't represent the Electronic Frontier Foundation.

SOBEL:

Well, actually, here he may very well have. But the eminently quotable remark that he made that is implicated in this question is, John Perry Barlow said, "In cyberspace, the First Amendment is a local ordinance."

GODWIN:

He definitely didn't represent us on that. It's a very easy answer. Actually, John's remark is a little more nuanced than that. What he has always meant for that point to represent was the notion that geographic authorities are going to have to rethink their sort of blasé imposition of jurisdiction.

But let me just actually address the freedom of speech issue because one of the things I've done is lecture to international convocations of law enforcement personnel about civil liberties issues under the Universal Declaration of Rights promulgated by the United Nations. Freedom of speech is actually an international standard. At least we give lip service to the notion of freedom of speech internationally through the United Nations. Of course, various signatories to the United Nations take a different view of what freedom of speech means. But I often get queried, typically not by foreign participants in discussions but by United States citizens who want to appear very global: "Is it terrible for us to sort of ram the First Amendment down the throats of other countries?" What they invariably seem to miss is that other countries are deeply hungry for freedom of speech. On the Internet, one of the classic and famous uses of the Internet to promote

discourse was the use of Chinese students on the Internet to disseminate information about Tianamen Square and about resistance in China. In the United Kingdom, it's a frequent theme among the Law Lords, the equivalent of the Supreme Court, it's a shame, at least among the dissenters in the Spycatcher case, that there is no First Amendment in the United Kingdom. There is no express prohibition of government censorship of content in the United Kingdom. And I see again and again—in Canada, for example, the Carla Homolka case, the murder case, the distribution of information about that case in violation of a court order was a success du scandal, as they say in Montreal, because people in Canada wanted to know about the case. More and more, it's not the citizens in individual countries who would like to prohibit freedom of speech on the Net. It's typically governments.

SOBEL:

In Germany, for example, most of the news groups that Greg provided us the names of have been banned. At least for a time, if not to this very day, CompuServe had to knock all those news groups off its server because—

GODWIN:

It's thought that they were banned in Germany. Actually, the reporting of this in the American press seems to be skewed by the fact that very few American journalists speak German, so they don't know how to check the reports. In fact, there actually was no ban in Germany of the newsgroups. There was an inquiry from a Bavarian prosecutor—Bavaria is the German equivalent of Tennessee; I'm not making this up—about newsgroups, and CompuServe unaccountably took that as a directive and on its own initiative removed access to the newsgroups. The full story of that particular set of events has not yet been told, but I think it's very interesting to note that once again it was the case—this is back to my theme—governments are more worried about the freedom of speech on the Internet than individuals are. Individuals normally want it or at least are pretty blasé about it.

SOBEL:

Greg?

VICTOROFF:

I just wanted to point out that distinction that it is the governments who are not eager for free speech. In fact, free speech in the country of China is the last thing in the world that government wants. In fact, they are erecting an electronic Great Wall. This is the history of this people. If they saw that outside values and trading was a threat to their security or they perceived it as a threat, they erected the Great Wall of China. Now in the twenty-first century they're doing the same thing again to try to keep out this counter-revolutionary data like Western newspapers and controversial stuff like that. Fortunately, I don't think they're going to be able to do it despite advanced filtering technology. But in Germany, I think they're more concerned about hate speech sites, which are very interesting to visit here in this country. In Saudi Arabia and Iran, they're very nervous about portrayals of the human body. Singapore and Vietnam are also searching for technology to stop Western ideals, keep the rock and roll away from the kids, and anything else that might undermine or be inconsistent with the values of those countries. It's exciting times.

SOBEL:

We have one question for Ken, wanted to know whether you were alluding to the "clipper chip" in your remarks when you talked about the need of the government to be able to—I think you were talking about wiretapping—but be able to understand communications between kidnappers in order to recover children, was it the clipper chip that you were alluding to and what is the current status of the Administration's proposal that electronic devices be equipped with a clipper chip and that messages not be coded in such a way that they cannot be decoded?

MCGUIRE:

That's a relatively easy question. I'm not a spokesman for the Clinton Administration and, as Greg noticed, I'm not an attorney. I'm a simple CPA and a bean-counter, and pretty much what you hear from me is what I'm thinking. I think in bits and bytes and simple stream, single or double syllable words. The clipper chip is in there, but what we're principally concerned with in wiretaps is the difficulty in the digital technology and what's going to be taking place with that and trying to tap in. Principally, what we try to do in wiretaps, physically speaking, is we have an agent go out there and clip on to a couple of pieces of coaxial cable or wire, copper. When everything

goes optical, we're in trouble because we've got to go to the telephone company and they tell us they may not be able to accomplish our wiretaps in emergency situations as quickly as possible. I know in a case where I needed to do a track and trace, one of the long distance carriers was not able to give me a live time and tell me that day, that minute where the phone call was emanating from. They said, "Call us back in about twelve hours when we have the information. We'll spool it off for you." I said, "Thank you very much. I'm just trying to arrest the guy." The long and short of it is the clipper chip would be nice, and I personally have no opinion on it. The Bureau principally wants to be able to intercept communications to prevent and to stop crimes in process and gather evidence for criminal cases, be it the clipper chip, be it some way to crack PGP. We're not out there trying to find out what's in people's back yards. So whatever it takes to get there.

GODWIN:

Let me just say there are two issues here: one is the interception of communications. The other is the encryption of communications or the decoding of encrypted communications. So the question about the clipper chip is really about the latter issue. The question about the digital telephony bill that was passed by Congress in late '94 is about interception. There are two sets of issues, one of which is isolating a particular message stream in the digital medium, and the second is: once you get it, can you read it? So the clipper chip is really about that. The government has abandoned the clipper chip. They have not abandoned the key escrow approach to encryption. The current administration believes that key escrow is a standard that needs to be promoted, and key escrow requires various schemes that require the holding of at least some or all of the keys to encrypted communications, to encoded communications. How they're going to do that is an open question. There's been negotiations between industry and government on this, and they're ongoing. The government has not succeeded in selling everyone as to its need to be able to decrypt encrypted communications.

SOBEL:

Something occurs to me and maybe one of you can answer. Suppose that Congress got behind the President one hundred percent on the ability to decode encrypted transmissions. How would that be enforced against Internet users who simply elected to use encoding

software for which the government didn't hold the key. Would it be a crime to transmit an encoded message for which the government didn't have the decoding key?

GODWIN:

At the Computers for Freedom and Privacy Conference a couple of weeks ago, that particular issue was addressed in a moot court, and the government argued that it would be constitutional to require that people use only encryption technologies that were susceptible to decrypting by the government, whether through key escrow schemes or some other kind of scheme. The defense—it could have actually been the plaintiff; I forget the procedural posture of the case—but the other side, the anti-government side, took the position that both the communicative and privacy interests in the First Amendment and also the Fourth Amendment outweigh the government's purported interest in either maintaining the keys or preventing the use of non-key escrow encryption. A good analogy—at least I love this analogy—is the Navajo code talkers of World War II. If in fact you use Navajo in order to—let's make it a great hypothetical since we are at a law school—if you were engaging in a conspiracy to kill the President and you use Navajo and other people also engage in such conspiracies, could the government then decide to outlaw the use of Navajo because there aren't enough FBI agents and U.S. attorneys who speak Navajo? The answer, I think, taken in that point seems to be no, you probably couldn't do that. The question is, is encryption technology more like the use of Navajo for the preservation of privacy, or is it more like a neutral time, place and manner restriction? That's it in a nutshell.

SOBEL:

You didn't actually have to go back to World War II to find an example that many people in this room would understand. You know that many Loyola law students when taking blue book exams use a special kind of encryption to write out the answers to the questions that makes their handwriting totally illegible?

I've got a question here that asks whether the big six distributors of recorded music, BMG, Polygram, Sony, CEMA, WEA, EMI, whether they're going to perish alongside the retailers. And the answer is no, they won't perish. That's because there's going to be some vertical integration. Those big six distributors will—they already have, in fact—set up World Wide Web sites of their own, and

they'll be the ones that will be distributing the recorded music down the pipeline directly to us, the retail consumers. So they won't perish. What will happen and what was really being promoted by this article in the *L.A. Times* on Monday was that those recording artists and little record companies that haven't yet enjoyed enough success to get distribution through the majors won't be locked out of the industry because it will be possible for them to offer their recorded music over the Internet with a computer that costs no more than a couple of thousand dollars and a hookup that might not cost them more than hundreds of dollars a month and, indeed, the question might be, if then little record companies and even recording artists working on their own can get direct distribution, what would they want big distributors for? Why would it be desirable to have an album deal with any of these companies? I think the answer to that is that just hooking yourself to the Internet doesn't mean that anybody knows you're there. You have to promote your existence and, ironically, the way promoting existence is being done today is by taking out ads in newspapers and periodicals that likely viewers will be reading, and that will still be the case for little record companies. They're going to need some capital in order to advertise their existence, and that's really what these big six companies are. They are capital resources, banks in the music business.

ROSENOER:

There's something called the Online Guitar Archive. It's not a major company, not a minor company. I think Mike knows a lot more about them than I do, but I received this phone call from somebody who wanted to interview me about this wonderful archive that's set up in the United States and is reflected around the world, and a major record company called them up and said, "There's something infringing in there," and because this set of people who founded and maintain the Online Guitar Archive cannot afford a lawyer, they took down the whole site and I believe around the world they took it down. Even though they might have been able to remove the infringing material, it was easier for them to just take it down. So when David talks about well, courts can figure things out, you have to figure there's a lot of people out there with valuable things to say and contribute who cannot even afford the risk, and those are the people that are getting closed out of the market as the law is evolving now. Those are the people who really need help in protecting their rights.

SOBEL:

I would just respond by asking sort of rhetorically, and I hope politely, what makes you suppose that anything in the Archive was public domain music? Why don't you suppose it was guitar recorded versions of songs, each and every one of which was protected by copyright?

ROSENOER:

I'm sure every one of them was protected by copyright, but it wasn't the music company's copyright and I'm sure there were probably a lot of people who just strummed some stuff and put it in there. Why should I assume that everybody's guilty when, in fact, that's the way to close down a medium and not to help it develop?

SOBEL:

There are two copyrights there. The strummer may not have wanted to claim his copyright, her copyright in the recorded version of the strumming, but if the strummer was strumming a song written by, say, you, the royalties which you were going to use to send your children to private law school someday, you wouldn't want the strummer strumming your song for free on the Internet.

ROSENOER:

Let me use a different illustration. There is a company out there that says the page numbering to cases, U.S. case law, is copyrightable, and therefore you can't get access to law that your judges who you paid actually published. I think they're wrong. I think they're trying to take advantage, and I think they've turned everything upside down for their own financial gain. And I think the argument you're making goes exactly the same way.

SOBEL:

I hope not because I agree with you about the incorrectness of the *West Publishing* case, and it's being challenged as we speak by Matthew Bender.

GODWIN:

I always think of Irving Berlin because many people here know lots of Irving Berlin songs, but there are many, many Irving Berlin songs that we don't know. We never hear them. I mean there are lots of copyrighted works that we would not recognize as

copyrighted works, and normally we have never imposed fault, we've never required a showing of fault on the part of an infringer in order to hold them liable for civil copyright infringement. That's because typically the entities that were defendants in those cases were newspapers or magazines or somebody large enough to pay sort of retroactively for the use of the copyrighted work. Now, in a world where everyone is a publisher, the question is to what extent does that scheme, liability without fault, impose a barrier to entry on becoming an Internet service provider or provider for an online forum? I think that there are issues there that ought to be raised that are not. I think one of the things that we learn from *Playboy v. Frena*, which was the BBS case that was discussed earlier is that even though the holding in that case was correct, that is to say the sysop, the system operator, was held liable for civil copyright infringement for putting Playboy scanned images up on his BBS, there was a lengthy discussion about the fact that the sysop clearly knew what he was doing. And even though the law does not require a discussion of that factual showing, there was that discussion. And I think what that represents is that judges faced with this technology tend to have a gut level sense that there ought to be a showing of fault at least some of the time with regard to civil copyright infringement. So I think that there's at least a moral argument for revisiting the fault issue in civil copyright, but for cynical reasons, on the basis of cynical calculations, I doubt that it's going to be revisited any time soon.

SOBEL:

Although if Congress were willing to, I could show you exactly where in the Copyright Act the exemption for service providers should go. It should go in the same section of the Copyright Act that already provides an exemption to telephone companies. If I sing a song to my daughter in college over the AT&T network, AT&T is not liable for my performance of the song, and that's because there's a section of the Copyright Act that exempts common carriers, and that section could be expanded to provide the same exemption for Internet providers.

GODWIN:

That's right, but the important thing if that happens is not to shoehorn Internet service providers into the common carrier role because, in fact, there are reasons not to do that. One of the things that Internet service providers and other kinds of online services

provide is places of different character, and that requires at least some autonomy to edit without incurring liability.

SOBEL:

We have a question from the audience that, David, I think is for you. I'm going to recite it from memory, and that was something like, "Do your clients or do you find it bizarre that there are actually three separate standards for provider liability?" In the copyright area it's absolute liability, though on a national standard of infringement. In the obscenity area, I guess there has to be some culpability, but the standard is community-based, and in the defamation area there has to be some culpability as well, negligence or sometimes recklessness, although the standard is again national. So that means that every time one of your clients asks you how they ought to behave, expecting one answer, you have to respond with three different answers.

HAYES:

That's precisely one of the points I was trying to make, that it's incoherent vis-à-vis the activities of the operator, and if there was anything that could be done to resolve that in a way that made it possible for—and bear in mind that we're talking about data that is coming in literally at the speed of light, going through systems, popping up on chat groups and all these kinds of things, and to put an Internet service provider in the position of having to make determinations with respect to that material, triage it, determine what is potentially at issue here—is it libel, is it copyrighted, is it obscenity—and then make those kinds of determinations is something I don't think they're best suited to do.

GODWIN:

Obscenity and libel law actually began to converge in *New York Times v. Sullivan*, which relied on an obscenity precedent, *Smith v. California*, in articulating the principle of no liability without fault. So we've seen an attempt on the part of the Supreme Court to harmonize those two areas of the law under a general First Amendment principle of no liability without fault. I personally think that you get the same kinds of protection of copyright if you don't impose civil liability without a showing of fault. Showing of fault turns out be easy against the copyright infringers you care about. The commercial ones are so commercial you can nail them, they're easy, and even the individual ones, if they're acting egregiously, are so

clearly culpable that showing fault is not difficult. So I think that that would be a way to harmonize those three areas of the law.

SOBEL:

We have one question that's good for capping it, and since it's five minutes until nine, maybe this is a good time to cap the entire conversation. The question that we got that's good for capping it is: Is there a single issue or pending bill that in the opinion of any of us represents the greatest threat to the continued existence of the Internet as we know it?

GODWIN:

Yes, I think it's FCC jurisdiction over the Internet. One of the things that I struggled very hard to get into the lawsuits challenging the Communications Decency Act was not just a least restrictive means challenge and vagueness/overbreadth challenge, but also a general federal jurisdiction challenge. I think that what happened in the United States is that we made a bad decision with regard to broadcasting half a century or three-quarters of a century ago, and our jurisprudence follows it, where we have given lowered First Amendment protection to broadcasting, ostensibly for various reasons, and the result is that the potentially democratizing medium of broadcasting is actually the least free now, and I would hate to see—it would be a tragedy, I think, if the challenges against the Communications Decency Act succeeded on least restrictive means grounds and vagueness and overbreadth grounds, but did not succeed on the general question of federal authority or governmental authority to regulate non-obscene content. The government simply has no business there. It's very hard to map that to the jurisprudence that exists now, and I'd hate to see the same mistake that was made for broadcasting be made there. Even if the indecency challenges succeed but there's granted a general federal authority to regulate non-obscene conduct on the Net, I think you've lost the battle.

SOBEL:

Aren't you worried because at least the D.C. Court of Appeals so far has sustained a couple of pieces of decency legislation as they apply to cable television? The analogy would be between Internet communication and cable television communication, an analogy that becomes more apt when the cable TV companies begin to dedicate one of their channels to Internet access.

GODWIN:

I'm always bothered by D.C. Circuit decisions in which the judges clearly have not read the Supreme Court decisions they're supposed to be reading. The D.C. Circuit is astonishingly bad on this, and Ruth Bader Ginsburg, when she was an appellate judge, was bad on this, too. You actually see things in D.C. Circuit, decisions to the effect that the *Pacifica* case defined the term indecency. It did not. And you see citations of *Sable* in support of the proposition of general governmental authority to regulate non-obscene content, which *Sable* does not hold. And I think that the D.C. Circuit's cable television jurisdiction is a little bit more justifiable in the light of *Turner Broadcasting*, where at least it's predicated on an antitrust rationale, a dysfunctional market rationale which we've accepted as part of our jurisprudence, but it's a very touchy issue. I mean one of the things about *Turner Broadcasting* is that it opens the door partway to recognizing that cable TV ought not to be regulated the same way broadcasting is, and I think that leadership on this issue is going to have to come from the "Supremes" because the D.C. Circuit is just not right.

SOBEL:

Greg, do you see any issue or piece of pending legislation that you think is the biggest threat to the Internet as we know and love it?

VICTOROFF:

Someone had told me that someone had predicted that the Internet is a passing fad like quadraphonic stereo and that it's going to come crashing down because of economic forces, but quite to the contrary, I think that the marketplace of ideas will out and that economic forces will cultivate some very thriving Internet—a lot different than probably any of us would be able to describe it, but there's too much commerce to be done out there. It will endure.

SOBEL:

Anybody else?

HAYES:

I think that anything structured like the Communications Decency Act that tries to impose liability on the intermediary rather than imposing it on—as is already the case in most instances that are

tried to be covered by the Communications Decency Act—on the perpetrator. It's a grand idea to put blame at the feet of the perpetrator of the activity as opposed to remove it because it's more difficult to find the perpetrator of the activity. So the scheme of putting the Internet service provider in the middle, I think, could have a substantial chilling effect and substantially affect the way the Internet works by reducing the amount of the variety of content.

SOBEL:

I understand your point of view because you represent Internet providers, but don't you think that what you're saying is a lot like what the railroad lawyers used to say back in the days before railroads were liable for fires they set by the side of the tracks, if you imposed liability on them they'd have to suspend railroad service through the farm country?

HAYES:

Internet service providers wear many hats. They're not always just Internet service providers. Sometimes they're content providers, and if they provide content that violates the existing obscenity laws, then enforce those laws against them, but if some bits fly by on their system or get posted on their system temporarily, or if defamatory statements get posted, holding them liable does nothing more than cause them to be overly cautious and they don't want to walk close to the line, so they're going to have to take steps to prohibit that kind of activity.

ROSENOER:

The greatest threat that I see is illustrated by the Telecommunications Bill, where parts of the bill are even admitted by the Justice Department to be completely unconstitutional, and various lawmakers who voted for the bill knew that. And the most disturbing thing to me is the ability of elected officials to disregard the Constitution and pass things because it's expedient to pass them instead of providing some leadership and some values of their own in accordance with their oath to uphold the Constitution.

GODWIN:

It's the most compelling argument for judicial review, the Telecommunications Reform Act and the Communications Decency Act sections of it.

SOBEL:

A friend of my daughter's wrote a column for the *Wall Street Journal* several months ago in which he said the biggest threat to his lifestyle was the Boston ordinance that prohibited people from parking cars on the streets without a sticker in advance and an inability to get a sticker until you had established residency, which required utility bills to show you lived there. He wasn't concerned about anything that people in Washington wanted to do to him. He wanted to get the parking enforcement people in Boston off of his back. So my answer to the question is in part influenced by the fact that there is no Internet as all of us collectively know it. Each one of us uses some different piece of the Internet most of the time, and in fact most of us use the Internet for e-mail, and I don't see that anything that's been suggested is a threat to the kind of e-mail messages that all of us transmit. I use the Internet primarily to—

GODWIN:

That all of us admit to transmitting.

SOBEL:

—to download sample software that somebody's trying to sell or patches to existing software, and I don't see that anything that's been suggested presents a threat to that. None of the things that I do have been threatened. I will tell you, even though I'm being videotaped, that when CompuServe took all those newsgroups off line, my curiosity was intense to see what was there that had to be taken off line, and despite the sometimes eye-popping names that are given to some of these newsgroups, most of what's there are advertisements for the sale of products, just commercial products, that have been posted in those newsgroups because of the belief by the product sellers that the name of the newsgroup will attract viewers. It was incredibly disappointing to see what was there.

AUDIENCE MEMBER QUESTION

SOBEL:

For the benefit of the tape, the question is, "What about the proposal that we tax products that we get off of the Internet?" I don't see that as a threat any more than it's a threat to the restaurant business that we charge sales tax on restaurant meals. It's just part of the cost. Do you see something more threatening than that?

GRIERSON:

From a constitutional standpoint, I know that there's case law that has upheld taxes on newspapers and things like that—

GODWIN:

As long as they're content neutral.

SOBEL:

In some states, legal fees are taxed.

GODWIN:

There's a great case involving *Texas Monthly*, which I care a lot about, being from Texas, which actually deals with differential tax for religious and non-religious publications, but in the discussion of that case, where they struck down the particular statute because it made those distinctions between religious and non-religious publications, it certainly acknowledged that you could have a tax on newspapers—so long as the power of taxation is not used to destroy, as they used to say.

ROSENOER:

Before Al Gore started talking about the National Information Infrastructure, whatever the heck that was, there were a lot of people out there who had found out that they could have free access to a world worth of information, very, very good information, and that it cost them virtually nothing to do it. And that information is available to all school children, and all people around the United States and around the world. And the more and more we start talking about taxes, we're erecting barriers to entry to this wonderful information source, and I think people should actually think about that part of it. As Netscape's valuation hit incredible heights, that was the biggest threat to the Internet because Netscape suddenly had to start doing something to justify its existence. So now you see an incredibly simple multi-platform system being transformed into frames and job aplets. You can see a guy walk around a kiosk in Paris. It's a bunch of nonsense which just ups the price and ups the standards so other people can't follow. That's the greatest threat.

SOBEL:

Okay, Shaun, do you want to take the microphone and then we'll stay and talk.

V. CONCLUDING REMARKS

SHAUN CLARK:

Good evening, my name is Shaun Clark. I'm going to be graduating from this fine institution in thirty-eight days.

SOBEL:

Provided you write your blue books in a legible handwriting and not encode them.

CLARK:

I'm here to wrap things up, and on the John Barlow theme, co-founder of the Electronic Frontier Foundation, I'd like to quote something he said about the Internet. He called the Internet "the most profound transformation a technology has brought since the capture of fire." Tonight we've heard about this new transformation in technology. We've heard about the Communications Decency Act, the various enforcement dilemmas we have on the Internet, the future of taxation on the Internet, server liability and different privacy issues. We've heard a lot of different things that we as lawyers and future lawyers are going to have to face, and we need to keep in mind as we use the Internet how the decisions we make are going to affect our lives and the future. I can tell you how the Internet has affected my life. I now have a sister. I used the Internet to find the sister that I had who was given up for adoption thirty-one years ago. And this is a success story; the Internet has changed my life. And as we look at legislation regulating the Internet we need to think about how our decisions are going to affect people like me who want to use the Internet for good things and for educational purposes. We need to keep in mind that, like the fire analogy, if we try and censor the growth of the Internet, we also run the risk of extinguishing the many benefits we can get from the Internet.

As I wrap up, I want to invite you to visit Jonathan Rosenoer's award-winning Web site—it is very interesting—to support the Electronic Frontier Foundation as a plaintiff in the suit against the Communications Decency Act. I want to let you know that a complete transcript of tonight is going to be available in the next issue of the *Entertainment Law Journal*. Also, we have food available, and I'd like to have a big round of applause for our panelists.

