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## Bits and Bytes from the Chair

By Karl A. Hochkammer, *Honigman Miller Schwartz & Cohn LLP*

Happy New Year!

As we begin 2013, I would like to provide quick summary of the goals and planned events for the IT Law Section. I would also like to thank Charlie Bieneman, Chair of the Section for 2011-2012, for doing an excellent job and for his long-standing dedication to improving the IT Law Section. I have big shoes to fill.

One of our main goals for this coming year is to increase our level of engagement with all of our section members. We are planning to increase the use of our LinkedIn page at <http://www.linkedin.com/groups?gid=2993995>. For those who are not yet members of the IT Law Section's LinkedIn page, please join. In addition, please feel free to use the LinkedIn page to share articles of legal interest, notices of educational or networking events and jobs of interest. Susanna Brennan has graciously agreed to help make this page of interest and use to our members.

We are also actively seeking Section members who would like to increase their involvement with our Section – we welcome volunteers who would like to assist with the event planning committee, the annual IT law seminar and the newsletter and writing award committees. If you are interested in volunteering, please contact any member of the Council, and we will be happy to put you in touch with the correct person.

We are in the process of finalizing our meeting schedule for 2013. Our first event is tentatively planned to occur on Thursday, January 31, 2013 at Sweet Lorraine's in Berkley. This event will include a meeting of the Council and the Section, and all members are welcome to attend. I have asked Brian Wassom, a partner and the chair of the Social, Mobile and Emerging Media Practice Group at Honigman Miller Schwartz and Cohn LLP, to make a presentation on the legal issues relating to augmented reality – digital data superimposed on the physical world. This is an interesting and quickly evolving area in which

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2012-2013

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Bits and Bytes . . .

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traditional legal concepts are being applied in unique ways. Brian regularly blogs about these issues (and issues relating to social media) at <http://www.wassom.com>. Further details will be sent out in January.

We are also tentatively planning to hold a Section meeting on March 22, 2013, a Spring Networking Event in May, and, of course, our annual meeting and IT Law Seminar at St. John's in Plymouth in September. Please watch for further details. If anyone has suggestions for our upcoming meetings, please let a Council member know.

As many of you are aware, the Section has been holding an annual IT Law Seminar in conjunction with ICLE for the past five years. This event has been very successful, and has covered a wide array of topics of interest to attorneys who practice information technology law in many different areas of expertise. We want to make this event even better. Please let me know if you have any suggestions regarding topics that you would like to hear about or possible speakers.

We are looking forward to yet another interesting and fulfilling year for the IT Law Section. I look forward to seeing all of you at a meeting soon. As always, feel free to contact me with any questions that you may have regarding the IT Law Section.

Karl A. Hochkammer

2012-2013 Section Chair



INFORMATION TECHNOLOGY LAW SECTION  
Mission Statement

The purposes of the Section are to review, comment upon, and appraise members of the State Bar of Michigan and others of developments in the law relating to information technology, including:

- (a.) the protection of intellectual and other proprietary rights;
- (b.) sale, leasing, distribution, provision, and use of, hardware, software, services, and technology, including computer and data processing equipment, computer software and services, games and gaming, information processing, programming, and computer networks;
- (c.) electronic commerce
- (d.) electronic implementation of governmental and other non-commercial functions;
- (e.) the Internet and other networks; and
- (f.) associated contract and tort liabilities, and related civil and criminal legal consequences.

*The Information Technology Law Section's bylaws can be viewed by accessing <http://www.michbar.org/it/councilinfo.cfm> and clicking the 'Bylaws' link.*

The *Michigan IT Lawyer* is pleased to present “The First Amendment’s Place in Cyberspace” by Kate Maternowski, a winner of the 2012 Edward F. Langs Writing Award competition, and a graduate of the University of Notre Dame Law School.

The statements made and opinions expressed in this essay are strictly those of the author, and not the State Bar of Michigan or the Information Technology Law Section. Comments regarding this article can be forwarded to the Michigan IT Lawyer, care of [michael@gallo.us.com](mailto:michael@gallo.us.com). Enjoy!

## The First Amendment’s Place in Cyberspace

By Kate Maternowski

### Introduction

Earlier this year, Jim Harris authored an article for the Huffington Post titled “The Sexy Photo Facebook Doesn’t Want You to See.”<sup>1</sup> The photo at issue, which Harris said was taken at the Louvre in Paris, depicts four women in various states of undress with their backs to the camera in front of Henri Regnault’s “Three Graces.” Harris describes the picture as “very tasteful, and very funny.”<sup>2</sup> Judging by the positive comments the picture garnered when Harris posted it to his Facebook page, his art-enthusiast friends agreed. Facebook didn’t see it that way; the site removed the picture from Harris’s page for violating Facebook’s community standards.<sup>3</sup> “That was a harmless picture by my standards,” one of his friends commented.<sup>4</sup>

Underlying Harris’s article, and his friends’ comments, is a palpable uneasiness about Facebook taking on the role of Big Brother. With more than 500 million users, most of whom log in every day, Facebook is a virtual town square for one in every thirteen people on earth.<sup>5</sup> The site’s “community standards” are already playing a significant role in shaping the speech landscape for its millions of users, and as Facebook and other online forums like it become increasingly more important to meaningful expression, there is reason to consider applying the First Amendment to private online entities.

This paper begins in Part I by describing the increasing use and importance of online social forums, where forum hosts are free to censor content regardless of whether the First Amendment would protect it if the state was the host. Several examples across different forums are provided to illustrate the issue. The opening Part concludes by offering reasons why private censorship online is a dangerous enterprise, and suggests that we might seek ways to apply the First Amendment to some private actors online. Part II explores various legal obstacles that stand in the way of holding private internet entities accountable under the First

Amendment. Specifically, the state action doctrine likely prevents courts from subjecting private internet censors to First Amendment scrutiny. Although some case law supports an analogy between online forums and real-space public forums, it is unlikely that courts will expand the definition of speech-protected public forums under the First Amendment to include private online communities. Part III, then, describes other possible routes for importing free-speech strictures to online forums. This Part focuses on the merits and demerits of, first, designated public forums on government-hosted websites and, second, congressionally mandated open-access requirements. Part IV describes how states might address the issue of private censorship through their own state laws and constitutions. This Part proposes a test case, wherein a censored speaker challenges Facebook in federal court; this exercise demonstrates how important and widespread the effects of one state’s decision could be. Finally, Part V discusses why imposing First Amendment norms on private internet actors might be a bad idea. Part VI concludes.

### I. Increasing Prevalence of Private Speech Regulation Online

Online social communities are becoming an increasingly important part of everyday life for many people. “Virtual communities have sprung up, social networks have bloomed, and individuals are rushing onto the Internet to engage, argue, and disparage each other.”<sup>6</sup> And although millions of people regularly use the internet to access these virtual communities, the internet is not a public medium; it is a collection of mostly privately-owned networks that run on private servers and routers.<sup>7</sup> “After its initial role in creating the progenitors of the Internet, government largely exited the scene, leaving private parties to take on the responsibility of serving as facilitators of public discourse online. While the government owns

and maintains some websites and computer networks, most public discourse occurs on private websites and is facilitated by private Internet service providers.”<sup>8</sup>

This means that citizen journalists using Blogger, social activists using Facebook, political dissidents using Twitter, and artists using Flickr all “speak” online under the watchful eye of private intermediaries.<sup>9</sup> These private intermediaries can and do use their ownership powers to censor content users upload to their sites, all without First Amendment consequences. Nearly all major ISPs and social networks establish and enforce Terms of Service under which they prohibit the expression of certain types of speech that fall within the protection of the First Amendment.<sup>10</sup>

Published examples of private censorship abound. In a 1999 New York Times article, Amy Harmon described how an AOL discussion group about Ireland was suspended after debate on the electronic forum became heated.<sup>11</sup> Harmon quoted discussion group participants’ reactions: “Don’t stop just to appease the AOL Thought Police,” one proponent of a united Ireland wrote to the Unionist contingent. “I’d much rather have someone vehemently disagree with me than know that anyone has been silenced!”<sup>12</sup>

Another well-publicized example of private online censorship is Facebook’s tendency to remove photos of breast-feeding mothers. A recent article in Salon described the hypocrisy some see in the stance the social network takes regarding content on its site: “Facebook, where you can create an entire album of your drunken, vomity, relieving-yourself-into-a-sink exploits, where you can share images of your child happily sliding around in his own diarrhea, has long maintained a surprisingly prim attitude toward the comparatively tame issue of breast-feeding shots.”<sup>13</sup> That article’s author took issue with Facebook’s capricious enforcement terms for how “maddeningly punitive and arbitrary they can be.”<sup>14</sup>

Some Facebook users have also accused the site of political censorship. For example, Facebook reportedly locked down portions of the “Boycott Target Until They Cease Funding Anti-Gay Politics” page on its site after 78,000 Facebook users joined. Facebook claimed that the page violated the company’s terms of service, in that Facebook “restrict[s] Pages that represent ideas or positions—rather than discrete entities—from publishing stories to people’s News Feeds.”<sup>15</sup> In another example, Kyle Rogers wrote on Examiner.com about the removal of a page he created in support of George Zimmerman in the wake of the 2012 Trayvon Martin shooting in Florida.<sup>16</sup> “Facebook not only deleted the page, but my entire account,” he wrote.<sup>17</sup> “The account was five or six years old. I was given no warning, no reason, and apparently have

no recourse.”<sup>18</sup> He went on to suggest that his page was targeted for its conservative message, and ended by warning Facebook that “[p]eople do not like political censorship in their social media.”<sup>19</sup> Still another alleged incident of Facebook’s political censorship involved abortion-related posts.<sup>20</sup> Pro-life advocates cried foul when Facebook removed a user’s pro-life message that contained a graphic image, but allowed another user to post “do-it-yourself abortion instructions” as her profile picture.<sup>21</sup>

Facebook is not alone in taking heat for censoring user content. Numerous news stories describe Google’s censorship of political advocacy and offensive speech.<sup>22</sup> In one example, “Unknown News,” seeking to advertise its anti-Iraq-war bumper stickers on Google, headlined its ad with “Who Would Jesus Bomb?”<sup>23</sup> Google censored the ad, claiming that it was in violation of its policy against “sites that promote hate, violence, racial intolerance, or advocate against any individual, group, or organization.”<sup>24</sup>

Some scholars view this kind of private censorship as hugely detrimental to our society’s free speech values. “Because these private intermediaries are not constrained by the First Amendment’s free speech protections, it is perilous for society to rely on them to provide forums for public discourse. . . . When this private censorship happens, the public has little recourse because private parties have the power to determine—subject only to the voluntary limitations they may take on through their terms of use—when, how, and whether to make speech available to others.<sup>25</sup> Of course, one obvious way for internet users to avoid private censorship is simply not to use the forums with objectionable terms and policies. But there are at least two issues that dampen the appeal of this solution. First, users upset with one forum’s terms of service will likely run into similar censorship policies at any other major forum they enter.<sup>26</sup> Next, leaving the social network scene altogether is not a meaningful option for many would-be expressive speakers who seek a large audience, because most individuals’ personal websites are little known and infrequently trafficked. “[V]ery few online speech platforms provide meaningful public reach[.] . . . [T]he vast majority of sites are nearly invisible, except to the small niche audiences they serve.”<sup>27</sup> As Professor Yochai Benkler points out, “there is a tiny probability that any given Web site will be linked to by a huge number of people and a very large probability that for a given Web site only one other site, or even no site, will link to it.”<sup>28</sup>

In light of the growing importance of online forums for meaningful discourse, cyberspace might need the First Amendment.

## II. The First Amendment Does Not Govern Private Speech Regulation

*“If private entities will play an increasingly large role in creating the code that regulates cyberspace, what role does the Constitution play in regulating those private entities?”<sup>29</sup>*

### A. State Action Doctrine

At least one major hurdle stands in the way of subjecting private internet entities to the strictures of the First Amendment—the state action doctrine. Born out of case law dating back to the late 1800s, the state action doctrine provides that constitutional proscriptions generally apply only to state actors, and therefore do not govern the actions of private entities.<sup>30</sup> In other words, the “behavior of private citizens and corporations is not controlled by the Constitution.”<sup>31</sup>

Private conduct need only comply with the Constitution if it that conduct can fairly be attributed to the state in some way. The *Civil Rights Cases* announced the criteria courts use to determine whether private action is sufficiently state-like to warrant constitutional review: Individual action is subject to constitutional oversight if it is “sanctioned in some way by the State,” or “done under State authority.”<sup>32</sup> The Supreme Court in 1974 reiterated that “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”<sup>33</sup> Legal scholars note that courts employ many separate tests for determining whether there is sufficient state involvement in a given case to justify constitutional oversight, but, as Erwin Chemerinsky points out, the Court “has made clear that the overall inquiry is whether there is an adequate nexus between the private behavior and the state.”<sup>34</sup> This can include instances when the state delegates to a private entity a function that is exclusively reserved to the state;<sup>35</sup> when state action and private action are substantially entangled;<sup>36</sup> when private activity takes place on state property;<sup>37</sup> and when the state encourages the actions of the private entity.<sup>38</sup>

Accordingly, courts are usually “powerless to halt private infringements of even the most basic constitutional values,”<sup>39</sup> including internet users’ First Amendment rights. Although academics frequently criticize the public/private distinction as unworkable and bad public policy,<sup>40</sup> courts continue its enforcement, even in the wake of new complications brought out by the internet. For example, in *Cyber Promotions, Inc. v. America Online*, a federal district court held that defendant AOL is not a state actor, and therefore the plaintiff’s censorship claims against it were not reviewable under the First Amendment.<sup>41</sup>

### B. Public Forum Doctrine

Despite the state action doctrine’s general prohibition on subjecting private activity to constitutional review, courts do sometimes allow First Amendment claims to proceed against private actors. As discussed above, a private entity will be liable for constitutional transgressions if, for example, it performs a function that is exclusively reserved to the state. Because one such state function is to provide “public forums,” a private entity that provides an expressive forum sufficiently like those provided by the state might become subject to constitutional scrutiny.

The public forum doctrine imposes on the government the affirmative obligation to dedicate some publicly-held property for the use of those seeking to exercise their First Amendment rights.<sup>42</sup> In other words, one of the government’s “functions” is to provide certain space for people to use expressively. The public forum doctrine categorizes the kinds of property owned or controlled by the government and describes how the government is permitted to regulate speech in each category. The categories include traditional public forums, designated public forums (or limited public forums), and nonpublic forums.<sup>43</sup>

Traditional public forums are defined as those spaces that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>44</sup> Streets, sidewalks, and parks fall into this category. Speech activity in traditional public forums is accorded the highest level of First Amendment protection, meaning that a content-based restriction on speech taking place in this category will be upheld only if it serves a compelling state interest, is narrowly tailored to that interest, and is the least restrictive means of serving that interest.

The designated public forum is public property that has not, from “time out of mind,” been used as a speech forum, but which the government opens up to the public as a place for expressive activity.<sup>45</sup> For example, the government may choose to “open up property within a public school, university meeting facilities or municipal theaters, as forums for expression generally or for expression on certain designated subjects.”<sup>46</sup> Once the government opens up and dedicates a limited public forum, speech within that forum is accorded the same protection as speech in traditional public forums. However, the government can choose to open and close designated public forums at will.<sup>47</sup> The government can also limit the forum to certain purposes, such as use by a certain group or discussion on a certain topic, in which case it is usually referred to as a limited public forum.<sup>48</sup>

The nonpublic forum category includes government-owned property that it has not opened up for public expression. The state is allowed to regulate speech in nonpublic forums so long as its regulations are reasonable and not viewpoint-based.<sup>49</sup> Examples in this category include school mail systems,<sup>50</sup> government workplaces,<sup>51</sup> and prisons.<sup>52</sup>

While these forum categories apply to government-owned property, privately-held property can be considered a “traditional public forum” if its expressive capacity is enough like the parks and sidewalks that define the category. The landmark case on point is *Marsh v. Alabama*, where the Court found that private management of a company town was sufficiently state-like to warrant imposition of First Amendment norms.<sup>53</sup> *Marsh* involved a challenge brought by a Jehovah’s witness who was arrested after distributing religious literature on a sidewalk in the town of Chickasaw and refusing a policeman’s order to stop.<sup>54</sup> Chickasaw, a suburb of Mobile, Alabama, was like any other small American town, except that it was wholly owned by the Gulf Shipbuilding Corporation.<sup>55</sup> The town’s company-owned streets wove around residential buildings, a business block, a United States postal office, and a sewage disposal plant.<sup>56</sup> A deputy of the Mobile County Sheriff, paid by the company, served as the town’s policeman.<sup>57</sup> The town was thickly populated, and its residents frequented the business block as their regular shopping center.<sup>58</sup> A nearby highway would also bring out-of-town shoppers to the business block.<sup>59</sup> Grace Marsh attempted to distribute religious literature, expressing her religious views, on a sidewalk in the business area of Chickasaw.<sup>60</sup> The town’s policeman told her that company policy disallowed solicitation without a permit, and no permit would be issued to her.<sup>61</sup> When asked to leave the sidewalk, she declined and was arrested.<sup>62</sup>

Marsh challenged her arrest as an unconstitutional abridgement of her First Amendment rights. The Supreme Court, overlooking the formal public/private distinction the state action doctrine typically requires, agreed. Despite the fact that the Chickasaw sidewalks were privately owned, the Court said, they were “built and operated primarily to benefit the public” and “their operation is essentially a public function.”<sup>63</sup> Because the town of Chickasaw was open to the public, and because the public has an interest in uncensored speech that helps them make decisions which affect their community and the nation, even private restrictions on speech within the town would be subject to First Amendment scrutiny.<sup>64</sup> When balancing the “Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion,” the Court said, “we remain mindful of the fact that the latter occupy a preferred position.”<sup>65</sup>

Two decades later, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court again relaxed the public/private distinction in order to apply public forum status to privately-held property.<sup>66</sup> The plaintiffs in *Logan Valley* were union members who were enjoined from picketing on the sidewalks outside a supermarket. Weis Market was a non-union market located in a privately-owned shopping center that contained no publicly-owned walkways or streets. The picketers staged their demonstration outside the supermarket in Logan Valley Plaza where Weis managers, employees, and customers could hear them.

Reversing the injunction, the Supreme Court compared features of the Logan Valley Plaza to the sidewalks in Chickasaw. The Court explained, “[w]e see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business-district should be limited.”<sup>67</sup> The Court was careful to qualify its holding by noting that the picketers’ speech was directly related to the business going on at the shopping center, and that its decision did not necessarily extend to speech unrelated to the general purpose of the private property.<sup>68</sup> Like in *Marsh*, though, the *Logan Valley* Court placed more emphasis on the functional characteristics of the property at issue instead of a formalistic public/private distinction. The Court’s analysis focused on “the characteristics of the property on which the speech regulation occurred, the functional similarities between such private forums and public forums, the openness of the property to the public, and the suitability of such property for expressive purposes, instead of simply . . . whether the property was held privately or publicly.”<sup>69</sup>

Following *Marsh* and *Logan Valley*, the Court scaled back its protection of speech on private property. In *Lloyd Corporation, Ltd. v. Tanner*, the Court declined to apply First Amendment scrutiny to the silencing of Vietnam protestors at a large, privately-owned shopping mall complex in Portland.<sup>70</sup> The Lloyd Center sat on fifty acres of land vacated by the city of Portland and contained parking facilities, private sidewalks, stairways, escalators, gardens, an auditorium, a skating rink, and a multi-level building complex of retail stores.<sup>71</sup> The center catered to a large cross-section of Portland residents; in fact, two presidential candidates selected the center as a campaigning forum in order to reach a broad audience.<sup>72</sup> Despite the obvious similarities to the shopping center in *Logan Valley*, the Supreme Court held that the Lloyd Center protestors did not enjoy First Amendment protection for their speech on the shopping mall’s private property.<sup>73</sup> The Court distinguished *Logan Valley* by explaining that the

message of the picketers in that case was directly related to the shopping center's operation, and that "no other reasonable opportunities for the picketers to convey their message to their intended audience were available."<sup>74</sup> The Lloyd Center protestors' message, on the other hand, was wholly unrelated to the operation of the shopping mall, and could be expressed in alternative forums such as neighboring public sidewalks.<sup>75</sup> The Court's holding, put in the language of public forums, indicates that private shopping malls are more properly compared to designated public forums than traditional public forums, in that shopping centers invite speech only on issues relating to their operation.

If *Marsh's* extension of public forum status to private entities at all survived *Lloyd*, it was narrowed into obsolescence in *Hudgens v. National Labor Relations Board* four years later.<sup>76</sup> The *Hudgens* Court held that warehouse employees of a company which operated a retail store in a shopping center had no First Amendment right to use the shopping center as a place to speak about their strike against their employer.<sup>77</sup> In *Hudgens*, the Court was not even willing to treat shopping centers like designated public forums where speech about the center's operations would be protected.<sup>78</sup>

Taking stock of the Court's public forum jurisprudence, it is fair to say that "traditional public forum" status has been cabined back to those places which, since the time of soap boxes and speakers' corners, have been held in trust for the public to use expressively. The Court reinforced this cabining of the public forum doctrine in *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*, where it determined that an airport terminal operated by a public authority is not a traditional public forum.<sup>79</sup> "[G]iven the lateness with which the modern air terminal has made its appearance," the Court said, "it hardly qualifies for the description of having immemorially . . . been held in the public trust and used for purposes of expressive activity."<sup>80</sup> If an airport terminal is too modern to be considered a traditional public forum, it is not surprising that the Court, in *United States v. American Library Association*, held that the provision of Internet access at a public library is also unqualified for such categorization.<sup>81</sup> And if internet access at a *public* library is not a traditional public forum, it is difficult to imagine the Court granting public forum status to a privately-held online social network.

For some critics, the Court's cabining of the public forum doctrine evinces an unwillingness to accommodate the ways people actually assemble and speak today.<sup>82</sup>

### C. Where Have All the Public Forums Gone?

Concurring in *ISKCON*, Justice Kennedy criticized the

majority opinion for its narrow and naïve focus on history rather than function. He warned that the public forum doctrine as interpreted by the majority "retains no relevance in times of fast-changing technology."<sup>83</sup> Four years later, in *Denver Area Education Telecommunications Consortium v. FCC*, he observed that "[m]inds are not changed in streets and parks as they once were" but, instead, "the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."<sup>84</sup> If the Court takes seriously its assertion that public forums are essential to a healthy society, and if we also recognize that meaningful speech is happening online instead of in traditional public real-space forums, the public forum doctrine should make room for the internet.

But, at least so long as private entities dominate internet ownership, that is not likely. Individuals and companies whose speech has been restricted by private internet actors have asked courts to extend public forum status to internet entities, hedging around the state action doctrine. So far, those attempts have not been successful. For example, in *Cyber Promotions, Inc. v. America Online, Inc.*, an internet company that specialized in e-mail advertisement dissemination sought to enjoin AOL from blocking e-mails it wanted to send to AOL e-mail addresses.<sup>85</sup> Cyber Promotions argued that AOL had opened its private network to the public, thereby establishing a public forum where speech regulations should be subject to First Amendment scrutiny.<sup>86</sup> The district court, analyzing whether AOL can fairly be labeled a state actor, considered (1) whether AOL assumed a "traditional public function," (2) whether an elaborate financial or regulatory nexus existed between AOL's conduct and the state, and/or (3) whether a symbiotic relationship existed between AOL and the state.<sup>87</sup> The court found no nexus or symbiotic relationship, and further concluded that e-mail service is not something the state has provided since time out of mind, and therefore is not a traditional public function.<sup>88</sup> To Cyber Promotion's argument that it had no viable alternative method of communication with AOL members, the court said it could use the U.S. mail, telemarketing, television, cable, newspapers, magazines, and leafleting.<sup>89</sup> In other words, the *Cyber Promotions* court "essentially concluded that the only alternative avenues of expression for Cyber Promotions to reach its desired audience of AOL members would be non-Internet channels."<sup>90</sup>

Of course, this result is only possible after the court determines that strict scrutiny does not apply to private speech regulations. If, for example, the government performed the online speech regulation, in which case strict scrutiny would apply, foreclosing all speaking opportunities except through a

different medium would be unacceptable. In *Reno v. American Civil Liberties Union*, reviewing portions of the Communications Decency Act which prohibited “indecent” and “patently offensive” communications on the internet, the Supreme Court reminded that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>91</sup> But so long as public forum status (and therefore strict scrutiny) is considered inapplicable to privately-operated online spaces, it is of no consequence that speakers must turn to alternative, less-desirable speech outlets if they are censored on Facebook.

For some critics, though, excluding all forums except government-owned property from public forum status ignores the spirit of the doctrine.<sup>92</sup> Dawn Nunziato argues that “[u]nder the Supreme Court’s public forum doctrine, the government has the affirmative obligation” to provide speaking forums.<sup>93</sup> She starts from the principle that the public forum doctrine directs governments to dedicate (public) property—and not just any kind of property, but property that is “well-suited to the expression and exchange of ideas”—to the public’s use for speech purposes.<sup>94</sup> The backbone reasoning of this directive, she says, is that individuals who do not have their own resources or private property from which to speak need a meaningful outlet. The required existence of public forums “ameliorates the inequalities that disparities in private property ownership would otherwise impose on individuals’ free speech rights.”<sup>95</sup> In real space, the government subsidizes speech for the benefit of the democratic system. “On the Internet, however, essentially no places exist to serve as ‘public forums’ because the places within which expression occurs are overwhelmingly privately owned. As a result, the government’s affirmative role of advancing free speech by providing speakers with meaningful forums from which to express themselves free of censorship is non-existent on the Internet.”<sup>96</sup>

Therefore, unless we believe that real space public forums are sufficient to serve the speaking needs of the general public, the government should be obligated to either open up its own publicly-owned forums online (see *infra* Part IV.A) or apply public forum status to some that already exist. Given the amount of speech happening online,<sup>97</sup> it is at least fair to say that excluding online spaces from First Amendment protection will inconvenience speakers (who have unpopular, likely-to-be censored messages) in trying to reach the widest possible audience.

This line of reasoning—meaningful speech forums are now somewhere other than public parks, so the new spaces need protection—harkens back to *Marsh* and *Logan Valley*. In

*Logan Valley*, the Court used this same language to describe the new suburban landscape:

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The largescale movement of this country’s population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.<sup>14</sup>

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.<sup>98</sup>

The court was persuaded by the fact that a population shift meant people frequented suburban shopping centers more than downtown plazas. Because important speech opportunities were occurring with increasing frequency on private property, the Court held that that private property should accommodate First Amendment protected speech. This is essentially the same argument some critics make today about the internet. People now spend their time (to speak, shop, learn, etcetera) online instead of in public places, and denying First Amendment protection for their speech online means that they cannot criticize private internet entities in the place where it would be most meaningful. Not only can private internet companies silence critical speech on their virtual property without legal repercussions, they can silence any kind of speech they choose. If one of the major privately-held social networks decided it would silence all political speech of a certain variety, speakers of that persuasion have to find a different (probably less convenient) speaking space. In fact, all major online social forums could decide to silence a certain viewpoint.

The comparison between population shifts to suburbs and increased online activity is apt. If the comparison teaches anything, though, it is that public forum status will not readily be granted to private online forums. In time, the Court changed its course with respect to suburban shopping centers, implicitly deciding that despite an evolving population landscape, people could still find ways to exercise their First Amendment rights. The population shift to the internet as a speaking forum is relatively new, and courts would be consistent with lessons learned from the shopping center case law if they maintained the status quo and forced speakers to sort things out for themselves.

### III. Possible Avenues for Importing First Amendment Values to Online Forums

#### A. Designated Public Forums on Government-Hosted Websites

If the courts will not extend public forum law to cover private online speech forums, another possible avenue for First Amendment protection online is government-operated online property. That is, the state could provide a place for public discourse to occur online, just as it has done in real space through the maintenance of public streets and parks. Some academics go so far as to say that if private entities do not provide adequate opportunities for people to speak freely online, “the First Amendment requires the government to create at least some public forums that provide effective means of communication” in the “modern technological equivalents of traditional public forums.”<sup>99</sup>

Federal and local governments are, in fact, already embracing the internet as a communication tool. The General Services Administration maintains a website, USA.gov, which it calls “the U.S. government’s official web portal.” USA.gov’s directory contains links to more than 500 federal agency websites.<sup>100</sup> A 2010 Pew Research Center study found that “82% of internet users (representing 61% of all American adults) looked for information or completed a transaction on a government website in the twelve months preceding [Pew’s survey in December 2009].”<sup>101</sup> While many government websites cater to the internet user seeking forms or information, other government websites also actively invite discussion. David Ardia, in his article *Government Speech and Online Forums*,<sup>102</sup> notes several examples: the State Department’s “Exchanges Connect,” an “online community” where exchange students can “discuss” and “chat about” their experiences;<sup>103</sup> a Texas city’s active blog where the public can post comments and interact with social media tools;<sup>27</sup> the Federal Communications Commission’s Broadband.gov, which al-

lows users to participate in developments and interact in real time with the agency members; President Obama’s “online town hall.”<sup>104</sup>

As Ardia points out, “it remains an open question whether these virtual spaces will inherit the same protections for speech that we take for granted in the physical world.”<sup>105</sup> The level of First Amendment protection afforded to the speech happening on government websites depends on where the websites are classified on the public forum spectrum. Most government property falls into the nonpublic forum category.<sup>106</sup> In a nonpublic forum, the government operates much like a private property owner and can regulate speech in any way, so long as the regulation is reasonable and not viewpoint-discriminatory.<sup>107</sup> Internet speech on governmental websites can escape this low level of protection only if those websites are classified as traditional or dedicated public forums. The Court’s traditional public forum jurisprudence, explained in the previous section, makes clear that online forums are simply too modern to occupy a place in that category.

It is possible, though, that courts will classify governmental website forums as designated public forums. The Sixth Circuit took up this question in *Putnam Pit, Inc. v. City of Cookeville*, which involved a challenge brought by an online publisher against a city that refused to post his hyperlink to its website.<sup>108</sup> The Cookeville website did provide space for links to sites for other entities, including a local technical college, two internet service providers, a law firm, a local computer club, a truck product manufacturer and distributor, and a site with information about Cookeville. However, Cookeville had no stated policy on who could be linked on the city’s page; instead, a computer operations manager generally added links as they were requested.<sup>109</sup> The publisher’s link, which led to his online tabloid publication often critical of the city, was denied.<sup>110</sup>

The court used a two-part analysis to determine if Cookeville had opened a designated public forum. “First, we look to whether the government has made the property generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property. Second, we look to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum’s purpose.”<sup>111</sup> On the first point, the court observed that Cookeville had not provided open access to post links on its site; instead, the city responded to requests for hyperlink posts on a one-by-one basis.<sup>112</sup> On the second point, the court found that the website’s purpose

was to convey information about the city, and not to foster dialogue between users.<sup>113</sup> Based on these observations, the court held that the website was not a designated public forum.<sup>114</sup> Notably, however, the court did not automatically dismiss the possibility that the governmental website could be a designated public forum. It looked for evidence of “open access” to the public for discussion and exchange; only after exhausting its search for such evidence did the court label the website a nonpublic forum. Presumably, government websites that invite public discussion and provide open access could be labeled designated public forums.

Given that First Amendment scrutiny is strict in designated public forums (apart from permissible initial limitations on topic and members), online government forums could be good havens for First Amendment protected speech online. However, this scenario falls short of ideal in two important ways. First, the government can choose to close its designated public forums at any time, meaning that speakers’ speech opportunities are dependent on the government’s benevolence. Second, government websites simply do not attract an audience like Facebook and Twitter can. People tend to congregate online at sites that can afford to advertise their presence and gain a following. Apart from major websites, there is no “central gathering point,” online. A governmental website that designates itself as a public forum might receive visitors who specifically seek it out, but this “only serve[s] to segregate public speech on the Internet and not to make it more accessible.”<sup>115</sup> The Pew Research Center study reinforced this point in finding that most of the online debate around government policies or issues occurs “outside of official government channels.”<sup>116</sup>

## B. Federal Open-Access Law

Another potential route for applying First Amendment norms to private online speech forums would be for Congress to mandate that all (or certain) internet forums respect its users’ First Amendment rights and provide a cause of action for violation. In other words, Congress could fill the gap in speech protection caused by the courts’ unwillingness to expand the public forum to accommodate cyber forums.

This route is unlikely for at least two reasons. First, Congress has already taken steps in the opposite direction. Far from battling against internet content restrictions, Congress in the mid-1990s attempted to do the restricting itself.<sup>117</sup> The Supreme Court struck down most of these regulatory regimes,<sup>118</sup> and Congress then decided to provide private internet entities the power to do what it could not. In § 230 of the Communications Decency Act,<sup>119</sup> a portion of the statute that was not struck down by the Court in *Reno*, Congress

“granted Internet service providers (ISPs) carte blanche to regulate as they see fit.”<sup>120</sup> In relevant part, § 230 reads:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>121</sup>

Commentators note that § 230 “supplies the most blatant example of state sponsorship of private regulation, giving ISPs immunity from civil suits stemming from their choices regarding content regulation” and “effectively creates an environment for unrestrained and irresponsible censorship.”<sup>122</sup> Other commentators note that the government’s intention was actually to create an environment where ISPs would not feel pressure to remove potentially defamatory speech from their sites for fear of litigation.<sup>123</sup> Either way, Congress has decided to cede regulatory control of internet content to private actors, and therefore is unlikely to take action on its own.

The second reason that a congressional mandate is an unlikely solution rests on a broader question of rights allocation, and is an important consideration in the conversation about First Amendment rights online generally (and not just about federal open access laws). Private internet entities have speaking interests (and rights) of their own. Legal battles between user access rights and provider speech rights are nothing new. A line of cases starting in 1969 with *Red Lion Broadcasting Co. v. FCC* illustrates the complex issues presented by new technology and the balancing of speaking rights.<sup>124</sup> In *Red Lion*, the Court confronted the “fairness doctrine,” an FCC requirement that radio and television broadcasters present coverage of both sides of issues.<sup>125</sup> In upholding the doctrine, the Court stated that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>126</sup> The *Red Lion* Court also focused on technological barriers to speakers’ entry into the market; the Court was persuaded that the small amount of available broadcast frequencies meant that, without judicial intervention, unpopular speakers would not have a viable outlet.<sup>127</sup>

Just five years later, in *Miami Herald Publishing Co. v. Tornillo*, the Court declared unconstitutional a state statute granting political candidates a right to equal space in newspapers to reply to criticism and attacks on their record.<sup>128</sup> Although *Tornillo* presented an issue very similar to *Red Lion*, only in a different medium, the *Tornillo* Court did not even mention the *Red Lion* case. Instead, the *Tornillo* Court

focused on the editorial rights of newspapers not to publish certain content: “A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”<sup>129</sup> Editorial control and judgment, the Court held, is protected by the First Amendment.<sup>130</sup> An unmentioned factor that clearly plays an animating role in distinguishing *Tornillo* from *Red Lion* is that the Court imagines newspapers more as speakers than conduits, and broadcast media more as conduits than speakers.

The Court again had occasion to consider the intersection of rights between users and media in *Turner Broadcasting System, Inc. v. FCC*.<sup>131</sup> In that case, the Court reviewed the must-carry provisions of the Cable Television Consumer Protection Act, which require cable operators to carry the signals of a specified number of local broadcast stations.<sup>132</sup> The Court declined to compare the cable medium to broadcast, noting that the scarcity argument that played an important role in the *Red Lion* decision is inapplicable to cable. Because of rapid advancements in fiber optics and digital compression technology, the Court said there is no practical limitation on the number of speakers who can use the cable medium; therefore *Red Lion* relaxed scrutiny does not apply to regulation of the cable medium.<sup>133</sup> Nonetheless, the Court found that intermediate scrutiny, not strict scrutiny, applied to the cable regulations because they are content-neutral: “Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.”<sup>134</sup> The Court used this point to distinguish *Tornillo*, which involved speech compulsions triggered by content.<sup>135</sup> The Court also distinguished *Tornillo* by pointing out that, unlike with newspapers, cable viewers generally do not “assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”<sup>136</sup> Again, the way the Court viewed the medium—in this case, as more of a conduit than a speaker—played a determinative role in the case’s outcome. The *Turner Broadcasting* Court remanded the case for fact-finding that would aid in an intermediate scrutiny analysis;<sup>137</sup> on remand, the district court upheld the statute,<sup>138</sup> and the Supreme Court affirmed.<sup>139</sup>

While the *Turner Broadcasting* Court ultimately permitted the government’s content-neutral regulation in the cable medium, it maintained an important distinction between media that are more like conduits and media that are more like speakers. The constitutionality of congressional cyberspace

regulation, then, depends on where courts would place the internet on the conduit/speaker spectrum. Of course, placement on the spectrum would probably vary depending on which internet actors the government sought to regulate. For example, Internet Service Providers (ISPs) seem more like conduits than Facebook, which seems (relatively) more like a speaker.

The Federal Communication Commission’s 2010 Open Internet Order is a helpful example that tees up the issue of whether ISPs are more like conduits or speakers. The Order comprises a set of regulations that move toward the establishment of the “internet neutrality” concept.<sup>140</sup> It sets out three broad rules toward this end: transparency in broadband management, a prohibition against blocking “lawful content, applications, services, [and] non-harmful devices,” and a prohibition against “unreasonable discrimination.”<sup>141</sup> In its Order, the FCC argues that intermediate scrutiny should apply to its net neutrality mandate, just as intermediate scrutiny was applied to cable television in *Turner Broadcasting*.<sup>142</sup> Because strict scrutiny applies to regulations affecting the “speaker” end of the speaker/conduit spectrum, and intermediate scrutiny applies to regulations affecting the “conduit” end, the FCC describes ISPs as conduits as opposed to speakers. In fact, the FCC argues, ISPs have even less editorial control than do conduit-like cable operators: “The broadband Internet access service at issue here does not involve an exercise of editorial discretion that is comparable to cable companies’ choice of which stations or programs to include in their service. . . . Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.”<sup>143</sup> In other words, the FCC argues that if the government is permitted to regulate cable, then it should also be permitted to regulate ISPs.

Even if this argument is persuasive as to ISPs, though, the same argument is not necessarily as persuasive when applied to entities like Facebook, which occupy a different place on the conduit/speaker spectrum. A court deciding whether to apply strict or intermediate scrutiny to a law mandating Facebook to allow all lawful speech, then, would have to weigh Facebook’s “speaker” traits against its “conduit” traits. The Court defines the speaker end of the spectrum with examples of media that make affirmative choices about content, and whose audiences would associate the content with the provider. Because nearly all content on Facebook is uploaded by users, and because users tend to associate content with the individual page owner instead of the corporate entity, Facebook is not an easy fit in the speaker category.<sup>144</sup>

However, Facebook might retort in defense that its decision to remove certain content is precisely “editorial control,” in that Facebook has decided to edit the content on its site to meet a certain community standard (although accepting this argument would invite a paradox where Facebook could escape a government non-discrimination mandate by proving that it discriminates enough). Not only does Facebook monitor content on users’ pages, though; Facebook also “speaks” when it chooses certain design elements for its site. For example, Facebook recently announced that it will add an option for users to announce their organ donor status on their individual pages.<sup>145</sup> The decision to add the organ donor feature came from Sheryl Sandberg, the chief operating officer at Facebook, when the issue of organ donation came up at a college reunion in a conversation she had with a transplant surgeon. In response to the doctor’s tales about the struggle to get more organ donors, Sandberg replied, “I think we can fix that.”<sup>146</sup> Facebook’s initiative, then, can be fairly described as a message that organ donation is important. Facts like this one move Facebook closer to newspapers on the speaker/conduit spectrum, making it more difficult for the state to defend a law regulating Facebook’s content decisions.

## IV. State Law Protection of Speech Rights Online

### A. *Pruneyard*

Apart from courts applying the First Amendment to private internet entities or Congress passing an open-access law compelling private forum operators to respect lawful speech, another option for protecting internet users’ speech is through state law. For example, state courts could (and do) interpret their state constitutions’ free speech clauses to extend to private speech regulations.

After the United States Supreme Court changed course in its public forum jurisprudence and stopped applying the First Amendment to shopping centers, the California Supreme Court found that its state free speech law protected student political protestors at a large privately-owned mall in California.<sup>147</sup> The California case, *Robins v. Pruneyard Shopping Center*, arose after *Lloyd Corp. v. Tanner*, in which the U.S. Supreme Court held that the First Amendment did not protect students protesting the Vietnam War at a privately-owned shopping center. In balancing the rights of the shopping mall and the protestors, the California Court determined that its constitutional free speech provision is broader than the First Amendment and protected speech at the private mall.<sup>148</sup>

The U.S. Supreme Court granted certiorari on the case and affirmed, holding that California is free to interpret its

state constitution’s free speech provisions more broadly than the First Amendment.<sup>149</sup> Commentators note that the *Pruneyard* decision is a leading case identifying states’ role in protecting individual rights and serving as laboratories for novel social and economic experiments.<sup>150</sup> In fact, several state courts have since examined whether their state constitutions provide speech protection beyond the First Amendment.<sup>151</sup> Most state courts facing the issue have held that their state constitution grants no more protection than does the First Amendment; but at least five states, in addition to California, have found extra speech protection in their state laws.<sup>152</sup>

### B. The Test Case:

#### Facebook and California State Speech Law

A state’s protection of speech at a private shopping mall, though, does not guarantee that speech on a privately-held internet forum would be similarly protected. At least one federal district court has considered the issue.

In *Cyber Promotions, Inc. v. America Online, Inc.*, a federal district court in Philadelphia considered whether an online entity can be enough like a shopping mall to allow a comparison to the right-of-access shopping mall cases.<sup>153</sup> The court found that the closest analogy in case law to online forums are indeed the shopping mall cases, but then also found that Pennsylvania’s case law on point did not afford protection.<sup>154</sup> The court also looked to Virginia’s case law on point, because AOL is based in that state. Finding no protection in Virginia law either, the court rejected Cyber Promotion’s claim against AOL.<sup>155</sup>

If a censored speaker challenged Facebook, which is headquartered in California, the outcome might be different.<sup>156</sup> A hypothetical case might involve a speaker from Pennsylvania<sup>157</sup> filing suit against Facebook in a California federal district court.<sup>158</sup> The case would likely turn on two points: first, if choice-of-law principles dictate that California law should apply, and second, whether California’s constitution, which protects speech at private shopping malls, also protects speech on private online forums like Facebook. The choice of law will matter significantly, given that many states (including Pennsylvania, as we know from *Cyber Promotions*) have declined to read their state laws more broadly than the First Amendment. The case might proceed as follows.

Recognizing that the plaintiff and defendant reside in different states, and that Pennsylvania and California interpret their state constitutions differently on the issue of speech protection, the court would have to decide which state’s law governs. The *Cyber Promotions* court did not undertake a

choice-of-law analysis, but instead simply found that neither Pennsylvania's nor Virginia's constitution afforded protection. In the hypothetical Facebook case, though, the court would apply the choice-of-law rule of the state in which it sits in order to sort out which state's speech law governs.<sup>159</sup> In this case, the court would look to California's choice-of-law rule.

California follows the "governmental interest analysis" approach to choice-of-law issues.<sup>160</sup> Under this analysis, "the court must consider the policies behind the state laws relevant to the case at hand and then determine which state's laws would best advance those policies."<sup>161</sup> If the court determines the laws are different and that each state has a legitimate interest in having its law applied, the court chooses the state whose interests would be more impaired if its law was not applied.<sup>162</sup> When the court evaluates comparative impairment, location of the harm can be determinative.<sup>163</sup>

In the Facebook hypothetical, the court would compare Pennsylvania's and California's state constitutional speech provisions. The Pennsylvania constitution does not support a wide right of access to speakers on private property, but California's does (at least when it comes to real space property like shopping malls). In other words, Pennsylvania's governmental interest leans more toward protecting property owners, while California's leans more toward protecting individual speakers. Given that the state's laws are different, then, the next questions would be whether Pennsylvania has an interest in having its law applied, and which state's interest would be more impaired if its law was not applied. This analysis would likely result in application of California law. Facebook is headquartered there, not Pennsylvania, meaning that Pennsylvania's interest in protecting property owners is not especially relevant in this case. Moreover, the "harm" could be said to have happened in California, where Facebook makes decisions about content removal. Of course, the "harm" could also be tied to the domicile of the plaintiff, from which he presumably accesses his Facebook account. Even in that case, California's interest in opening up private entities, who act like forums, to all lawful speech activity could trump Pennsylvania's interest in protecting private property rights because Facebook does not have private property in Pennsylvania.

Then, if California's state constitution is applicable to the Facebook case, the next question is whether California's law does in fact extend protection to speech on private internet forums. Under *Pruneyard*, California courts must recognize that "[t]o protect free speech and petitioning is a goal that surely matches . . . other societal goals that have been held to justify reasonable restrictions on private property rights."<sup>164</sup>

Facebook, and other defenders of private entities making their own content decisions, might argue that it has its own speech rights in determining which content to allow on its site. In other words, Facebook would highlight its speaker qualities over its conduit qualities. However, if the court decided instead that California's law does protect lawful speech on private internet forums, the effect could reach any state where Facebook users reside. In other words, California's rule could become the governing rule for any internet forum headquartered in California, which is many.

Importantly, this test case would give a court the opportunity to more fully explore the competing rights and interests of internet users and forum owners. Whatever the result, the analysis alone would be beneficial in the continuing struggle to find a place for societal speech values in cyberspace.

## V. Keeping the First Amendment Offline

While some scholars toil away trying to find a way to protect users' speech rights against the private entities that have come to dominate internet ownership, others warn that imposing regulations in cyberspace is counterproductive.

The first and most obvious reason to find that online forums should not be forced to protect users' speech rights is that there is room for the market to work out a solution. As the Court pointed out in *Reno*, "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."<sup>165</sup> This sentiment is in direct tension with those who contend that, despite the internet's capacity for almost limitless users, the only meaningful spaces for discussion online are through the mega-forums like Facebook, YouTube, and Twitter. However, this is not to say that the market will not eventually offer a speech forum that is both meaningful and free from private censorship. "Diaspora," an open source network created by four NYU students, is one example. Diaspora provides users with complete control of their content by cutting out the private forum operator. "[S]eparate computers connect to each other directly, instead of relying on a central hub to relay information. Since each computer—or "seed"—is owned and hosted by the user, they have total control over what information is shared and with whom."<sup>166</sup> Staying regulatory action in favor of allowing operations like Diaspora to take root could be the more successful long-term answer.

Another reason to hold back on applying First Amendment norms to online private entities is that it could actually result in fewer speech opportunities online. "Specifically, these rules would restrict providers' choices about how to

deal with unwanted speech. These restrictions distort providers' abilities to make profit-maximizing decisions, which in turn increase providers' financial risk and reduce incentives to invest in the industry. Converting private virtual world providers into state actors could, paradoxically, limit speech rather than increase it."<sup>167</sup>

Finally, as Professor Eugene Volokh points out, members of online forums often actually want private censorship because of its sanitizing effects on their forum. People who engage on internet forums "want speech that's relevant to their interests, readable, reliable, and not rude. Sometimes an open, unedited [forum] can provide this, but often it can't. Often—as [forum] operators have been learning—editing is critical to making online speech worth listening to."<sup>168</sup> Philip Giordano makes the same point about virtual communities, noting that "limitations on speech are essential to the formation and individuality of virtual communities" because players use the rules about group discussion "to realize the kind of community with which they wish to identify."<sup>169</sup> In other words, prohibiting private censorship online could lead to a collapse of the desirable shape of online community life.

## VI. Conclusion

For better or for worse, censorship of user content by private online forum owners is going to have an appreciable effect on the speech landscape. First Amendment jurisprudence has grown up around the assumption that the public needs (and uses) government-owned property to exercise important First Amendment rights. As more and more speech happens online instead of in traditional public forums, the impulse can be to import First Amendment rules into the internet context. For the various reasons outlined above, that does not make for an easy fit. To that end, though, a test case in California would help courts and interested observers sort out the various competing interests in online speech regulation. Apart from taking the small step of testing the waters with one state's constitutional law, other possible routes for importing speech law to the internet are probably both unlikely and ill-advised at this point. A better way to accommodate internet users' speech, without compromising forum owners' own rights, is to encourage projects that eliminate users' dependency on private intermediaries. ■

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- 30 See, e.g., United States v. Cruikshank, 92 U.S. 542, 554–55 (1875) (“The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but the provision does not . . . add anything to the rights which one citizen has under the Constitution against another.”); Virginia v. Rives, 100 U.S. 313, 318 (1879) (“[T]he provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals.”); Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).
- 31 Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 507 (1985).
- 32 *Civil Rights Cases*, 109 U.S. at 17.
- 33 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).
- 34 Chemerinsky, *supra* note 31, at 508 n. 19 (citing Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment 'State Action' Requirement*, 1976 SUP. CT. REV. 221, 224).
- 35 See, e.g., Terry v. Adams, 345 U.S. 461, *reh'g denied*, 345 U.S. 1003 (1953) and Smith v. Allwright, 321 U.S. 649, *modified*, 322 U.S. 718, *reh'g denied*, 322 U.S. 769 (1944) (private management of elections for public office treated as state action).
- 36 See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948) (court enforcement of private decisions).
- 37 See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (defendant’s restaurant was located in a building owned by the Delaware parking authority).
- 38 See Reitman v. Mulkey, 387 U.S. 369 (1967) (an Article of the California Constitution that prohibited the state from denying property owners a right to sell, lease or rent property according to their own discretion would encourage private racial discrimination).
- 39 Chemerinsky, *supra* note 31, at 508–09.
- 40 Berman, *supra* note 29, at 1267.
- 41 948 F. Supp. 436 (E.D. Pa. 1996).
- 42 Hague v. CIO, 307 U.S. 496, 514–16 (1939) (plurality).
- 43 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 47 (1983).
- 44 *Hague*, 307 U.S. at 515 (Roberts, J., plurality).
- 45 *Perry Educ. Ass’n*, 460 U.S. at 45.
- 46 Nunziato, *supra* note 10, at 1149 (citing *City of Madison Joint Sch. Dist. v. Wisc. Employment Relations Comm’n*, 429 U.S. 167 (1976); *Widmar v. Vincent*, 454 U.S. 263 (1981); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).
- 47 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (“Of course, the government is not required to indefinitely retain the open character of the facility.”) (internal citation omitted). See also *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814–15 (1984).
- 48 See, e.g. *Perry Educ. Ass’n*, 460 U.S. at 45, 46, n. 7.
- 49 *Id.* at 46 (“[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).
- 50 *Id.*
- 51 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).
- 52 *Jones v. N. Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977).
- 53 326 U.S. 501 (1946).
- 54 *Id.* at 502–04.
- 55 *Id.*
- 56 *Id.*
- 57 *Id.*
- 58 *Id.*
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 *Id.* at 506.
- 64 *Id.* at 508.
- 65 *Id.* at 509.
- 66 391 U.S. 308 (1968).
- 67 *Id.* at 319.
- 68 *Id.* at 320, n. 9.
- 69 Nunziato, *supra* note 10, at 1133.
- 70 407 U.S. 551 (1972).
- 71 *Id.* at 553.
- 72 *Id.* at 555.
- 73 *Id.* at 570.
- 74 *Id.* at 563.
- 75 *Id.* at 566–67.
- 76 424 U.S. 507, 518 (1976) (“[T]he rationale of *Logan Valley* did not survive the Court’s decision in the *Lloyd* case.”)
- 77 *Id.* at 520.
- 78 *Id.* at 520–21. The Court reasoned that because content-based speech restrictions are not allowed in traditional public forums, and because the *Lloyd* Court allowed a content-based speech restriction at the shopping center (no war protesting), the shopping center is not a traditional

- public forum and therefore the protestors have no rights there. This logic disregards the possibility that a private shopping center can be a designated, limited public forum. Speech in limited public forums can be tailored to discussion on specific topics, which is a content-based distinction; beyond the content-based topic designation, other First Amendment rights are retained in limited public forums. The Court could have held, like it implied in *Lloyd*, that speech on shopping mall property must be related to the operation of the shopping mall, but so long as it is, the mall cannot infringe First Amendment rights.
- 79 505 U.S. 672 (1992).
- 80 *Id.* at 680 (internal quotation marks omitted).
- 81 Ardia, *supra* note 7, at 1998 (citing *United States v. Am. Library Ass'n*, 539 U.S. 194, 204–05 (2003)).
- 82 *See, e.g., id.*
- 83 *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring). It is important to note here, though, that Justice Kennedy would expand the definition of “traditional public forums” to include *government-owned* property that is more modern than the sidewalks and parks that define the category. He specifically did not argue for expanding the definition to cover *privately-owned* forums. His logic about the evolving nature of communication is nonetheless relevant.
- 84 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part and dissenting in part).
- 85 948 F. Supp. 436 (E.D. Pa. 1996).
- 86 *Id.* at 450.
- 87 *Id.* at 447 n. 2.
- 88 *Id.* at 451–52.
- 89 *Id.*
- 90 Nunziato, *supra* note 10, at 1136.
- 91 *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997) (citing *Schneider v. State of N.J. (Town of Irvington)*, 308 U.S. 147, 163 (1939)).
- 92 *See, e.g., Steven G. Gey, Reopening the Public Forum-From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538–39 (1998) (“The larger reality behind the myth of the debate on the public street-corner is that every culture must have venues in which citizens can confront each other’s ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that not only cannot come to agreement about the Common Good, but also will not even know enough about other subcultures within the society to engage effectively in the deal-making and horse-trading that is the key to every modern manifestation of democratic government.”).
- 93 Nunziato, *supra* note 10, at 1117. *See also* Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS, 101, 104 (2007).
- 94 Nunziato, *supra* note 10, at 1117.
- 95 *Id.*
- 96 *Id.* at 1117–18.
- 97 *Facebook Statistics, Stats & Facts For 2011*, DIGITAL BUZZ BLOG, Jan. 18, 2011, <http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/> (“Over 700 Billion minutes a month are spent on Facebook. . . . [I]n just 20 minutes on Facebook over 1 million links are shared, 2 million friend requests are accepted and almost 3 million messages are sent.”).
- 98 *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324–25 (1968) *abrogated by* *Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976).
- 99 J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412.
- 100 USA.gov, *Directory of Federal Agencies*, <http://www.usa.gov/directory/federal/index.shtml> (last visited May 7, 2012).
- 101 Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, Pew Internet & American Life Project 1, 2 (Apr. 27, 2010), [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Government\\_online\\_2010\\_with\\_topleftine.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Government_online_2010_with_topleftine.pdf).
- 102 Ardia, *supra* note 7, at 1987–88.
- 103 Exchanges Connect, U.S. Department of State, <http://connect.state.gov/> (last visited May 7, 2012).
- 104 Sheryl Gay Stolberg, *Obama Makes History in Live Internet Video Chat*, N.Y. TIMES (Mar. 26, 2009), <http://www.nytimes.com/2009/03/27/us/politics/27obama.html>.
- 105 Ardia, *supra* note 7, at 1993.
- 106 Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 120 (2010).
- 107 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).
- 108 221 F.3d 834 (6th Cir. 2000).
- 109 *Id.* at 841.
- 110 *Id.*
- 111 *Id.* at 843–44.
- 112 *Id.* at 844.
- 113 *Id.*
- 114 *Id.*
- 115 Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 26 (2003).
- 116 Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, Pew Internet & American Life Project 1, 2–3 (Apr. 27, 2010), [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Government\\_online\\_2010\\_with\\_topleftine.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Government_online_2010_with_topleftine.pdf).
- 117 *See, e.g., CDA*, 47 U.S.C. §223 (2000 & Supp. 2005) (prohibiting the transmission of “indecent” material and the display of “patently offensive” content and communications to minors); *Child Online Protection Act (COPA)*, 47 U.S.C. §231 (2000) (regulating the commercial distribution of materials deemed “harmful to minors”); *CAN-SPAM Act of 2003*, 15 U.S.C. §7701 (2006) (outlining congressional findings in relation to unsolicited mass e-mail).

- 118 See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004); *Reno v. ACLU (Reno II)*, 521 U.S. 844, 874 (1997).
- 119 Section 230 Communications Decency Act of 1996 (CDA), 47 U.S.C. §230(c)(2)(A) (1996)).
- 120 Nicholas P. Dickerson, *What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated?*, 46 Hous. L. Rev. 61, 63 (2009).
- 121 CDA, 47 U.S.C. §230(c)(2) (2000).
- 122 Dickerson, *supra* note 120, at 80, 83 (internal citation omitted).
- 123 See Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 852 (2005) (explaining that § 230 was a legislative response to a 1995 case in which a New York Supreme Court held that an online network, Prodigy, was liable for user-submitted defamatory content on its network, just like a newspaper would be liable for publishing defamatory content) (*citing* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)).
- 124 395 U.S. 367 (1969).
- 125 *Id.* at 369.
- 126 *Id.* at 390.
- 127 *Id.* at 391 (“As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on ‘their’ frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.”).
- 128 *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).
- 129 *Id.* at 258.
- 130 *Id.*
- 131 512 U.S. 622 (1994).
- 132 *Id.* at 626.
- 133 *Id.* at 638–39.
- 134 *Id.* at 643.
- 135 *Id.* at 655.
- 136 *Id.*
- 137 *Id.* at 668.
- 138 *Turner Broadcasting Sys., Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995).
- 139 *Turner Broadcasting Sys., Inc. v. FCC*, 516 U.S. 1110 (1996).
- 140 *Preserving the Open Internet: Broadband Industry Practices*, 25 FCC Rcd. 17,905 (Dec. 21, 2010) (report and order).
- 141 *Id.* at 17,932–33.
- 142 *Id.* at 17,983.
- 143 *Id.*
- 144 *But see* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener’s Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 388 (1996) (comparing an online discussion forum to a newspaper, calling it a “coherent speech product, one whose content is a function of all its components.”).
- 145 Matt Richtel and Kevin Sack, *Facebook Adds Feature for Organ Donor Status*, N.Y. TIMES, May 2, 2012, at A14, available at [http://www.nytimes.com/2012/05/01/technology/facebook-urges-members-to-add-organ-donor-status.html?\\_r=2&hp](http://www.nytimes.com/2012/05/01/technology/facebook-urges-members-to-add-organ-donor-status.html?_r=2&hp).
- 146 *Id.*
- 147 592 P.2d 341 (1979), *aff’d*, 447 U.S. 74 (1980).
- 148 *Id.* at 346.
- 149 *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).
- 150 Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call”*, 30 VAL. U. L. REV. 509, 541 (1996).
- 151 See *New Jersey Coalition Against War v. J.M.B. Realty Corp.*, 650 A.2d 757, 769–70 (N.J. 1994) (describing several different state constitutional interpretations).
- 152 *Id.* (Noting that “California, Oregon, Massachusetts, Colorado, and Washington . . . have held that their citizens have a right to engage in certain types of expressive conduct at privately-owned malls,” and then finding a similar right in the New Jersey constitution.).
- 153 948 F. Supp. 436 (E.D. Pa. 1996).
- 154 *Id.* at 445–46.
- 155 *Id.*
- 156 Professor Gladstone introduced this possibility in a 1998 article. Because of the idea’s continued relevance, I explore here further. See David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 23–28 (1998).
- 157 I choose Pennsylvania simply because the *Cyber Promotions* court has already provided an answer (in the negative) to whether Pennsylvania’s constitutional free speech provision applies to restrictions by private internet entities.
- 158 I choose in this hypothetical to have the suit filed in California to make the subsequent conflict-of-law analysis easier, and also because some courts, despite the global impact of internet commerce, have refused to find personal jurisdiction over online defendants who do not have sufficient contact with the forum state. See Mark S. Kende, *Lost in Cyberspace: The Judiciary’s Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125, 1126 (1998) (discussing a trend in the personal jurisdiction area whereby “many lower federal courts have refused to extend personal jurisdiction over defendants who own World Wide Web sites.”). See also *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). Moreover, though, it is not unlikely that a plaintiff challenging Facebook would choose to bring suit in a California federal court, both because Facebook is headquartered there and because California’s choice-of-law provision often defaults to California law, which is generally protective of individual rights.
- 159 *Klaxon Co. v. Stentor Electric Manufacturing*, 313 US 487, 496 (1941).
- 160 See *Bernhard v. Harrah’s Club*, 546 P.2d 719, 726 (1976). See also Richard H. Acker, *Choice-of-Law Questions in Cyberfraud*, 1996 U. CHI. LEGAL F. 437, 451 n. 77 (1996).

- 161 Acker, *supra* note 160, at 450.
- 162 See *Washington Mutual Bank v. Superior Court*, 103 Cal. Rptr. 2d 320 (Cal. Ct. App. 2001).
- 163 *Hernandez v. Burger*, 162 Cal. Rptr. 564, 568 (Cal. Ct. App. 1980) (“Indeed, with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.”).
- 164 *Robins v. Pruneyard Shopping Center*, 592 P.2d 346 (1979), *aff’d*, 447 U.S. 74 (1980).
- 165 *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).
- 166 Darren Quick, *Diaspora – a distributed, open source, secure social network with Facebook in its sights*, GIZMAG, May 13, 2010, <http://www.gizmag.com/diaspora-open-source-social-network/15098/>.
- 167 Goldman, *supra* note 123, at 851.
- 168 Volokh, *supra* note 144, at 378.
- 169 Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, 31, 69, available at <http://stlr.stanford.edu/pdf/giordano-invoking-law.pdf>.



## Publicly Available Websites for IT Lawyers

Following are some publicly available websites relating to varying aspects of information technology law practice. Some of these websites may require payment for certain services. Neither the State Bar of Michigan nor the IT Law Section endorses these websites, the providers of the website, or the goods or services offered in connection therewith. Rather these websites are provided for information purposes only and as possible useful tools for your law practice.

Please provide any feedback or recommendations for additional websites to [michael@gallo.us.com](mailto:michael@gallo.us.com)

### Legal Sites

- <http://tushnet.blogspot.com> – Rebecca Tushnet’s 43(B)log. Ms. Tushnet teaches intellectual property law, advertising law, and First Amendment law at the Georgetown University Law Center, and her blog covers issues surrounding false advertising, copyright and commercial speech as well as matters involving students and legal scholarship.
- <http://www.bna.com/ecommerce-tech-law-blog> - The E-Commerce and Tech Law Blog is a forum for practitioners and Bloomberg BNA editors to share ideas, raise issues, and network with colleagues on news, hot topics, and trends affecting e-commerce and technology law and regulations.
- <http://blog.zwillgen.com> – Law Across the Wire and Into the Cloud. The perspective of seven experienced Internet Lawyers on breaking legal issues in the technology sphere.
- <http://mcir.usc.edu/> - Music Copyright Infringement Resource. Sponsored by UCLA and Columbia Law Schools, the purpose of this resource is to make information available about music copyright infringement cases from the mid-nineteenth century forward. ■

# The State of Information Technology Law – 2012

By David R. Syrowik, Brooks Kushman P.C., Southfield, Michigan

## PATENTS – Case Law – U.S. Courts of Appeal

As reported at 84 BNA's PTCJ 1029, on October 12, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that a patent based on computer technology in 1986 can capture later advances under the doctrine of equivalents. *Energy Transportation Group Inc. v. William Demant Holding*.

As reported 84 BNA's PTCJ 1022, on October 11, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that a preliminary injunction against a Samsung smartphone is an abuse of discretion. *Apple Inc. v. Samsung Electronics Co.*

As reported as 84 BNA's PTCJ 990, on October 9, 2012 the U.S. Court of Appeals for the Federal Circuit agreed to rehear en banc a case on how to determine the patent eligibility under 35 U.S.C. § 101 of method, system, and medium claims implemented on a computer. The order vacates a split panel decision that computerized methods of eliminating risk in bank funds exchanges are patent eligible. *CLS Bank International v. Alice Corp.*

As reported at 84 BNA's PTCJ 992, on October 9, 2012 the U.S. Court of Appeals for the Federal Circuit ruled that patent infringement under the doctrine of equivalents was improperly limited to exclude equivalents of subject matter cited in external references. The court overturns rulings against flash memory patent holder SanDisk Corp., correcting two interpretations of how to apply the "disclosure-dedication" rule. *SanDisk Corp. v. Kingston Technology Co.*

As reported at 84 BNA's PTCJ 962, on September 28, 2012, the U.S. Court of Appeals for the Ninth Circuit ruled that a district court properly issued a preliminary anti-suit injunction, preventing enforcement of an injunction imposed by a German court against Microsoft Corp.'s Xbox game system. *Microsoft Corp. v. Motorola, Inc.*

As reported at 84 BNA's PTCJ 785, on August 31, 2012, the U.S. Court of Appeals for the Federal Circuit, in an en banc, 6 – 5 split, ruled that a patent owner claiming induced infringement no longer has to show a single induced entity is liable for direct infringement. *Akamai Technologies, Inc. v. Limelight Networks Inc.; and McKesson Technologies Inc. v. Epic Systems Corp.*

As reported at 84 BNA's PTCJ 809, on August 3, 2012, the U.S. Court of Appeals for the Federal Court ruled that entire market value theory is irrelevant where laptop computer demand is not driven by disc reader. *LaserDynamics Inc. v. Quanta Computer Inc.*

As reported at 84 BNA's PTCJ 814, on September 4, 2012, the U.S. Court of Appeals for the Federal Circuit affirmed a District Court reversal of a \$208 million patent judgment by a jury. *Mirror Worlds LLC v. Apple Inc.*

As reported at 84 BNA's PTCJ 741, on August 24, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that Verizon remains liable for \$115 million damages for infringement by its FiOS video-on-demand service, but a permanent injunction against the service is vacated. *ActiveVideo Networks v. Verizon Communications Inc.*

As reported at 84 BNA's PTCJ 667 on August 14, 2012, the U.S. Court of Appeals for the Federal Court ruled that patent claims on "10 percent to infinity" computer performance measure not enabled. *MagSil Corp. v. Hitachi Global Storage Technologies Inc.*

As reported at 84 BNA's PTCJ 551 on July 26, 2012 the U.S. Court of Appeals for the Federal Circuit ruled that a patent claim on managing the risk in the value of a life insurance policy is not patent eligible under 35 U.S.C. § 101. Affirming a lower court's judgment, the appeals court distinguishes post-*Bilski* rules that have addressed the patent eligibility of claims focused on an algorithm that is implemented on a computer. *Bancorp Services LLC v. Sun Life Assurance Company of Canada (USA)*.

As reported at 84 BNA's PTCJ 561, on July 31, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that patent's internet-based software functions can be distributed over multiple computers. *01 Communique Laboratory Inc. v. Log Me In Inc.*

As reported at 84 BNA's PTCJ 391, on July 9, 2012, the U.S. Court of Appeals for the Federal Circuit, in a split decision, ruled that computerized methods of eliminating risk in bank funds exchanges are patent eligible. Reversing a district court ruling, the majority analyzes the "inventive concept" – a term introduced by the Supreme Court's recent decision in *Mayo v. Prometheus* – of the patent claims

asserted by looking at the claims as a whole. *CLS Bank International v. Alice Corp.*

As reported at 84 BNA's PTCJ 354, on June 26, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that a nanoprocessor system was obvious as mere substitution of nanoscale materials. *Mouttet, In re.*

As reported at 103 USPQ 2d 1865, on August 15, 2012, the U.S. Court of Appeals for the Federal Court ruled that invention of claim directed to method of operation of synchronous "memory device" was anticipated by "memory module" disclosed in prior art reference manual, since claimed "memory device" can contain more than one chip, and may contain controller that provides logic necessary to receive and output specific data but does not function like central processing unit, since "memory control unit" in prior art memory module provided necessary logic, since bus controller of prior art device was clearly outside memory module, thereby satisfying claim's requirement that memory device receive block size request from bus controller, and since there is consequently no principled way to distinguish claim at issue from prior art memory module. *In re Rambus Inc.*

#### **COPYRIGHTS – Case Law – U.S. Courts of Appeal**

As reported at 84 BNA's PTCJ 792, on September 11, 2012, the U.S. Court of Appeals for the Eighth Circuit ruled that the Due Process Clause does not bar a Copyright Act statutory damages award of \$222,000 - \$9,250 for each of 24 songs – that a jury awarded against an individual who infringed the songs over the internet file-sharing program. *Capitol Records Inc. v. Thomas-Rasset.*

As reported at 84 BNA's PTCJ 740, on August 27, 2012, the U.S. Court of Appeals for the Second Circuit affirmed that a paid online service that streams broadcast content live to subscribers and offers a remote digital video recording service is not a "cable system" entitled to a compulsory license under the Copyright Act. *WPIX Inc. v. iVi Inc.*

As reported at 84 BNA's PTCJ 713, on August 17, 2012, the U.S. Court of Appeals for the Fifth Circuit held that business practices suggested by software are beyond scope of copyright protection. *GlobeRanger Corp. v. Software AG.*

As reported at 84 BNA's PTCJ 622, on August 2, 2012, the U.S. Court of Appeals for the Seventh Circuit ruled that website users' links to infringing uploads unlikely to create copyright liability for site. *Flava Works Inc. v. Gunter d/b/a myVidster.com.*

As reported at 103 USPQ 2d 1585, on August 2, 2012, the U.S. Court of Appeals for the First Circuit ruled that

plaintiff monastery established that it owns valid copyrights in translations of religious texts, and that copies of texts available on defendant's website are substantially similar to plaintiff's works, and grant of summary judgment of infringement is therefore affirmed. *Society of the Holy Transfiguration Monastery Inc. v. Archbishop Gregory of Denver, Colo.*

#### **TRADEMARKS – Case Law – U.S. Courts of Appeal**

As reported at 84 BNA's PTCJ 747, on August 23, 2012, the U.S. Court of Appeals for the Sixth Circuit ruled that a bank with only a handful of customers in Kentucky could not be sued for trademark infringement in the state based on those customers' use of its banking website. *Community Trust Bancorp Inc. v. Community Trust Financial Corp.*

As reported at 84 BNA's PTCJ 614, on August 3, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that use of software to sell goods online does not support finding that it is in commerce. *Lens.com Inc. v. 1-800 Contacts Inc.*

As reported at 104 USPQ 2d 1238, on June 13, 2012, the U.S. Court of Appeals for the Sixth Circuit affirmed a summary judgment that plaintiff's descriptive mark "iShopStark.com" lacks secondary meaning in action alleging that mark, which is domain name for website that promotes goods and services of businesses in Stark County, Ohio, is infringed by defendants' "ShopNStark.com" domain name for competing website. *Papa Ads LLC v. Gatehouse Media Inc.*

#### **TRADEMARKS/CYBERSQUATTING – Case Law – U.S. Courts of Appeal**

As reported at 84 BNA's PTCJ 423, on June 21, 2012, the U.S. Court of Appeals for the Eleventh Circuit ruled that jury instruction error did not bolster mark owner's ACPA appeal. *Pensacola Motor Sales Inc. v. Eastern Shore Toyota LLC.*

#### **ANTITRUST/PATENTS – Case Law – U.S. Courts of Appeal**

As reported at 84 BNA's PTCJ 355, on June 21, 2012, the U.S. Court of Appeals for the Second Circuit ruled that RIM didn't breach settlement agreement, violate Sherman Act. *Eatoni Ergonomics Inc. v. Research in Motion Corp.*

#### **PATENTS – Case Law – U.S. District Courts**

As reported at 84 BNA's PTCJ 739, on August 24, 2012, a jury in the U.S. District Court for the Northern District of

California awarded nearly \$1.05 billion to Apple after it finds utility and design patent infringement by 25 distinct cell phone and three tablet computer devices made by Samsung. *Apple Inc. v. Samsung Electronics Co.*

As reported at 84 BNA's PTCJ 416, on July 1, 2012, the U.S. District Court for the Northern District of California granted Apple a preliminary injunction when it stated that Samsung Nexus Smartphone likely infringes. *Apple Inc. v. Samsung Electronics Co.*

As reported at 84 BNA's PTCJ 338, on June 26, 2012, the U.S. District Court for the Northern District of California ordered a preliminary injunction barring Samsung Electronics Co. from making, using, offering to sell, selling, or importing the Galaxy Tab 10.1 tablet computer in the United States. The decision follows a ruling by the Federal Circuit denying Apple Inc.'s request for an injunction against Samsung's Android-based smart phones but leaving the tablet injunction decision up to District Court Judge Lucy H. Koh. *Apple Inc. v. Samsung Electronics Co.*

As reported at 84 BNA's PTCJ 349, on June 22, 2012, the U.S. District Court for the Northern District of Illinois dismissed the Apple – Motorola smartphone patent fight for lack of remedy. *Apple Inc. v. Motorola Inc.*

As reported at 103 USPQ 2d 1235, on February 27, 2012, the U.S. District Court for the Western District of Washington granted plaintiff summary judgment that defendant patentees entered into binding contracts with international standards-setting organizations requiring defendants to license, on reasonably nondiscriminatory terms and conditions, patents that have been declared "essential" to practicing standards for interoperability of computing devices; however, summary judgment is denied on questions of whether defendants' initial license offer, not just final negotiated license, must be on RAND terms, and whether defendants' offers to plaintiff breached defendants' RAND obligations. *Microsoft Corp. v. Motorola Inc.*

As reported at 84 BNA's PTCJ 1023, on October 10, 2012, the U.S. District Court for the Western District of Washington ruled that Motorola Inc. must agree to license standard-essential patents to Microsoft Corp., and if the parties cannot come to an agreement, a federal court will force one. *Microsoft Corp. v. Motorola Inc.*

### **COPYRIGHTS – Case Law – U.S. District Courts**

As reported at 84 BNA's PTCJ 989, on October 4, 2012, in the U.S. District for the Southern District of New York, one of the parties in a long-running dispute over Google Inc.'s

mass digitization of books announces that it is settling its claims with Google. The Association of American Publishers and Google release a statement that they have agreed to settle their now seven-year-old dispute. *McGraw-Hill Cos. v. Google Inc.*

As reported at 84 BNA's PTCJ 996, on October 2, 2012, the U.S. District Court for the District of Massachusetts ruled that joinder in BitTorrent cases "technically" okay but inappropriate due to potential abuse. *Third Degree Films v. Doe.*

As reported at 84 BNA's PTCJ 1003, on October 2, 2012, the U.S. District Court for the District of Hawaii ruled that Web magazine's removal of copyright notice, adding own, warrants maximum DMCA damages. *Pacific Stock v. MacArthur & Co.*

As reported at 84 BNA's PTCJ 965, on September 18, 2012, the U.S. District Court for the Western District of Washington ruled that a video game maker's copyright infringement claims against a competitor survive dismissal. *Spry Fox LLC v. Lolapps Inc.*

As reported at 84 BNA's PTCJ 820, on September 4, 2012, the U.S. District Court for the Northern District of California ruled that the Copyright Act preempts negligence lawsuit alleging failure to secure wireless network. *AF Holdings LLC v. Doe.*

As reported at 103 USPQ 2d 1902, on August 23, 2012, the U.S. District Court for the District of Massachusetts ruled that jury award of \$22,500 per infringement, for total damages award of \$675,000, in action against defendant based on his file-sharing of music recordings, does not offend due process, since award is neither "wholly disproportioned to the offense" nor "obviously unreasonable", given deference afforded to U.S. Congress in offering and establishing statutory damages as option to collection of actual damages, and in increasing penalties for willful infringement, and in view of defendant's particular behavior and fact that award not only is within range for willful infringement, but also below limit for non-willful infringement. *Sony BMG Music Entertainment v. Tenenbaum.*

As reported at 103 USPQ 2d 1759, on July 5, 2012, the U.S. District Court for the District of Massachusetts denied a motion to quash subpoena requesting identities of 29 Doe defendants from their respective internet service providers in case arising from alleged trading of copyrighted work in related transactions using BitTorrent software. *Discount Video Center Inc. v. Does 1-29.*

As reported at 102 USPQ 2d, on May 18, 2012, the U.S. District Court for the Southern District of New York ruled that

text and structure of preemption statute, 17 U.S.C. § 301(a), suggest that Copyright Act preempts unfair competition claim asserted by television production, distribution, and transmission companies alleging that defendant's internet-based broadcast television streaming service "unfairly exploit(s) Plaintiffs' property interests in their audiovisual works" for defendant's commercial benefit, even though defendant's service involves private performances that are not actionable under Copyright Act. *WNET v. Aereo Inc.*

As reported at 84 BNA's PTCJ 716, on August 10, 2012, the U.S. District Court for the Central District of California ruled that Michael Jackson's estate is not precluded from pursuing claims against "Vault" website. *Branca v. Mann.*

As reported at 84 BNA's PTCJ 456, on July 11, 2012, the U.S. District Court for the Southern District of New York ruled that the system that Aereo Inc. uses to allow its customers to watch and record television broadcasts is "materially identical" to the system used in *Cablevision*, and thus the Second Circuit's determination that the Cablevision device does not transmit the broadcast precludes an issuance of a preliminary injunction against Aereo. *American Broadcasting Cos. v. Aereo Inc.*

As reported at 84 BNA's PTCJ 483, on July 13, 2012, the U.S. District Court for the Northern District of California granted Shutterfly a TRO against former employee for alleged theft of copyrighted source code. *Shutterfly Inc. v. Forever Arts Inc.*

As reported at 84 BNA's PTCJ 420, on June 11, 2012, the U.S. District Court for the Central District of California ruled that a software programmer is employee even with gaps in receipts of regular salary. *Siniouguine v. Mediachase Ltd.*

As reported at 84 BNA's PTCJ 358, on June 15, 2012, the U.S. District Court for the Central District of California ruled anti-abortion websites' use of pro-choice film was fair use of parody under Section 107. *Northland Family Planning Clinic Inc. v. Center for Bio-Ethical Reform.*

As reported at 103 USPQ 2d 1959 on May 30, 2012, the U.S. District Court for the District of New Jersey ruled that principle that patents and copyrights protect distinct aspects of intellectual property does not mean that any and all expression related to rule or function of video game falls outside protection of copyright law, since expression is unprotected only if it is integral to or inseparable from idea or function under doctrines of merger or scenes à faire, and expression of "method of operation" is copyrightable if it is distinguished from method itself and is not essential to its operation; in present case, defendants' accused video puzzle

game is substantially similar to plaintiff's copyrighted game with regard to design and movement of playing pieces, as well as other discrete copyrightable elements. *Tetris Holding LLC v. XIO Interactive Inc.*

### **COPYRIGHTS/DMCA – Case Law – U.S. District Courts**

As reported at 84 BNA's PTCJ 361, on June 12, 2012, the U.S. District Court for the Southern District of New York held that keyword ad placement, website metrics do not yield notice of website's infringement. *Obodai d/b/a Heptad v. Demand Media Inc.*

### **COPYRIGHTS/CRIMINAL – Case Law – U.S. District Courts**

As reported at 84 BNA's PTCJ 1037, on October 5, 2012, the U.S. District Court for the Eastern District of Virginia ruled in a file sharing case that a criminal summons may be mailed to Megaupload's alter ego. *United States v. Dotcom.*

### **TRADEMARKS – Case Law – U.S. District Courts**

As reported at 84 BNA's PTCJ 669, on August 7, 2012, the U.S. District Court for the Western District of New York ruled that the internet is not geographic zone over which one mark holder can have exclusive rights. *Dudley d/b/a HealthSource Chiropractic v. HealthSource Chiropractic Inc.*

As reported at 84 BNA's PTCJ 418, June 19, 2012, the U.S. District Court for the Eastern District of Pennsylvania accepted a claim of initial interest confusion in case against online gripe site. *Amerigas Propane LP v. Opinion Corp. d/b/a Pissedconsumer.com.*

As reported at 101 USPQ 2d 1161, on July 5, 2012, the U.S. District Court for the Eastern District of Virginia ruled that plaintiff asserting in rem action for violation of Anticybersquatting Consumer Protection Act against 265 internet domain names is granted default judgment on its claim for relief under 15 U.S.C. § 1125(D)(1), since accused domain names are confusingly similar to plaintiff's "Montblanc" mark, and since registrants of domain names have demonstrated bad-faith intent to profit from plaintiff's mark; permanent injunction orders transfer of infringing domain names to plaintiff. *Montblanc-Simplo GmbH v. Cheapmontblancpens.com*

As reported at 103 USPQ 2d 1927, on September 6, 2012, the U.S. District Court for the District of Columbia ruled

that plaintiff's "Embassy of Libya" and "Libyan Embassy" marks are descriptive, and absent evidence of secondary meaning, plaintiffs cannot pursue trademark infringement and anticybersquatting claims against "expeditor of document legalization for use of domain names such as "embassyoflibya.org". *Libya v. Miski*.

As reported at 103 USPQ 2d 1853, on July 16, 2012, the U.S. District Court for the Middle District of Florida rules that Florida law that converted plaintiff provider of online educational courses into state agency, Fla. Stat. § 1002.37, does not grant plaintiff ownership of "Florida VirtualSchool" and "FLVS" trademarks that plaintiff used and registered with U.S Patent and Trademark Office, since statute permits plaintiff's board of trustees to "acquire, enjoy, use and dispose of patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein," but states that "[o]wnership of all such" intellectual property "shall vest in the state, with the board having full right of use and full right to retain the revenues derived therefrom". *Florida VirtualSchool v. K12 Inc.*

### Trademarks/Cybersquatting

As reported at 84 BNA's PTCJ 1035, on October 2, 2012, the U.S. District Court for the District of Arizona ruled that "Cybergripe" site did not make commercial use of plaintiff's trademarks, trade dress. *Aviva USA Corp. v. Vazirani*.

### UNFAIR COMPETITION – Case Law – U.S. District Courts

As reported at 104 USPQ 2d 1231, on September 20, 2012, the U.S. District Court for the Southern District of Ohio ruled that plaintiff has failed to state claim for "hot news" misappropriation under common law by alleging that defendant improperly "scraped" or copied information about jewelry and gold items from plaintiff's internet advertisements for use in defendant's advertisements for same products, since, even if it is assumed that "hot news" misappropriation claim would survive preemption by federal copyright law, there is no support for such claim under Ohio law. *Allure Jewelers Inc. v. Ulu*.

### LANHAM ACT – Case Law – U.S. District Courts

As reported at 84 BNA's PTCJ 919, on September 19, 2012, the U.S. District Court for the Northern District of Illinois ruled that Web posts calling competitor testimonials "scam" could generate Lanham Act liability. *Invent Worldwide Consulting LLC v. Absolutely News Inc.*

### TRADE SECRETS – Case Law – U.S. District Courts

As reported at 104 USPQ 2d 1280, on February 6, 2012, the U.S. District Court for the District of New Jersey ruled that plaintiff financial services firm has shown likelihood of success on merits of its claim for breach of employment agreement against defendant former employee, who sent protected client information to his personal e-mail address before leaving firm to work for competitor; however, plaintiff has not established likelihood of success on merits of its claim for misappropriation of trade secrets, since information defendant forwarded likely contained trade secrets, but extent of resulting harm is unclear. *Ameriprise Financial Services Inc. v. Koenig*.

As reported at 103 USPQ 2d 1721, on May 9, 2012, the U.S. District Court for the Western District of Virginia denied summary judgment that plaintiffs lack trade secret protection for combination of design features for their vehicle fleet management system, and in technical information provided to defendants in development of software application; however, defendants are granted summary judgment that they did not misappropriate trade secrets embodied in plaintiffs' source code and other technical details of their software. *Beacon Wireless Solutions Inc. v. Garmin International, Inc.*

### ANTITRUST – Case Law – U.S. District Courts

As reported at 103 USPQ 2d 1109, on April 20, 2012, the U.S. District Court for the Northern District of California ruled that plaintiff has made sufficient showing in complaint that defendant has monopoly power over upstream market for flash memory technology, since plaintiff alleges that defendant owns 100 percent of flash memory technology patents; however, plaintiff has failed to state claims for monopolization or attempted monopolization under Sherman Act's Section 2, or for conspiracy in restraint of trade under Section 1. *PNY Technologies Inc. v. SanDisk Corp.*

### TRADEMARKS – U.S. Patent and Trademark Office

As reported at 102 USPQ 2d 1955, on April 19, 2012, the Trademark Trial and Appeal Board ruled that Applicant's "GIS Empowered by Cityworks" mark, as displayed on webpage submitted by applicant as specimen of use, fails to create association with applicant's computer software for management of public works and utilities assets, and fails to serve as indicator

of source of those goods, since mark is distant from description of software on webpage, and is separated from that description by more than 15 lines of text concerning marginally related topics. *In re Azteca Systems Inc.*

### TRADEMARKS – U.S. International Trade Commission

As reported at 84 BNA's PTCJ 510, on July 20, 2012, the International Trade Commission (ITC) ruled that Apple Inc. and Research in Motion Ltd. escape liability for patent infringement because the sole patent claim asserted by Eastman Kodak Co. is found invalid by the International Trade Commission. The decision is a temporary blow to Kodak, which is trying to emerge from bankruptcy in part by auctioning its patents. *In the Matter of Certain Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras and Components Thereof.*

### State Courts – California - Trademarks

As reported at 84 BNA's PTCJ 758, on August 22, 2012, the California Court of Appeal, Second District ruled that notice of alleged infringement creates no duty for Amazon to remove listing. *Tre Miklano LLC v. Amazon.com Inc.*

### State Courts – New York – Trade Secrets/Criminal Infringement

As reported at 84 BNA's PTCJ 675, on August 9, 2012, the District Attorney for New York County Criminal Court announced that a former programmer at Goldman Sachs faces state charges over code theft. *People v. Aleynikov.*

### Foreign Courts – Europe – Copyrights

As reported at 84 BNA's PTCJ 433, on July 3, 2012, the European Court of Justice ruled that Oracle software buyers may resell "used" downloaded copies under first sale doctrine. *UsedSoft GmbH v. Oracle International Corp.*

### Foreign Courts – France - Trademarks

As reported at 84 BNA's PTCJ 1009, on September 25, 2012, a chamber of the Supreme Court of France ruled that Google AdWords advertisers do not necessarily infringe marks. *Auto IES v. Google France.* ■



## 2013 Edward F. Langs Writing Award

### Essay Competition Rules

1. Awards will be given to up to three student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either endnotes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter's name, email address, mailing address, telephone number, and school attended.
5. A total of \$1,500 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section's newsletter, the *Michigan IT Lawyer*.
7. Essay must be submitted as a Microsoft Word document, postmarked by June 30, 2013, and emailed to [dsyrowik@brookskushman.com](mailto:dsyrowik@brookskushman.com). ■