Law in Cyberspace

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The applicability of existing legal precedents and paradigms to the Internet (also "the Net") is more than just an interesting question. For years the Internet was home only to research scientists and computer aficionados. Suddenly, the Internet has become a dominant force in education, business, government, and entertainment in the United States and throughout the world. Thirty-seven million users in 161 countries connect to each other (generating 100 million e-mail messages every day) and to a dazzling array of on-line services and products, at negligible cost. Commercial service providers—the bellwethers of future growth and viability—have flocked to the Net in recent years. The number of companies on the Internet reached almost 20,000 as of August 1994, up from fewer than 100 in 1990; and that number, like all of the statistics about the net, is escalating at a dramatic rate.

In the face of such a new, different, popular, powerful, and ubiquitous medium, legal scholars (and just about everyone else) are asking how and whether laws created for the physical world will apply to the Internet. The Clinton Administration’s Information Infrastructure Task Force is considering the fit between existing copyright and

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1. On-line Exchanges Can Reach Thousands, Plain Dealer, June 11, 1995, at 17A.
privacy laws and what the Administration calls the "national information infrastructure" ("NII").\(^4\) Congress recently enacted a significant new curb on sexually explicit expression on the Net\(^5\) and is presently debating bills to amend copyright law\(^6\) to respond to the demands of the on-line environment.\(^7\) Increasingly, courts, local prosecutors, and civil litigants are testing the applicability of defamation,\(^8\) copyright,\(^9\) trademark,\(^10\) criminal,\(^11\) and export control.\(^12\) The media has generated an avalanche of Internet stories.\(^13\) Law reviews, and those of us who write for them, have focused extensive attention on the interaction of law and the Net, particularly through symposia—like this one—dedicated to the legal questions presented by the Internet and other electronic networks.\(^14\)

Byron Marchant and Raymond Kurz make important contributions to the debate over the applicability of existing law to cyberspace

\(^4\) Information Infrastructure Task Force, National Information Infrastructure Agenda for Action 5 (1993). The Task Force includes representatives from the Departments of Agriculture, Commerce, Education, Energy, Housing and Urban Development, Interior, Justice, State, and Veterans Affairs; from the Central Intelligence Agency, Environmental Protection Agency, Federal Communications Commission, Federal Trade Commission, General Services Administration, and National Economic Council; and from the National Science Foundation, White House Office of Science and Technology Policy, and the Vice President's office. The Task Force is divided into three committees—the Telecommunications Policy Committee, Information Policy Committee, and Applications and Technology Committee—which, in turn, are further divided into working groups and subworking groups. See generally Fred H. Cate, The National Information Infrastructure: Policymakers and Policy Making, 6 Stan. L. & Pol'y Rev. 43, 46-48 (1995) (describing the communication breakdowns and their role in guiding the development of NII).

\(^5\) On February 1, 1996, Congress passed the Telecommunications Decency Act of 1996, criminalizing the knowing use of an "interactive computer system" to transmit or display to a minor of "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Telecommunications Decency Act of 1996, S. 652, 104th Cong., 2nd Sess. § 502(d).


\(^12\) See Computer Software Writer Won't Be Prosecuted, L.A. Times, Jan. 12, 1996, at D2.

\(^13\) The Lexis/Nexis CURNWS database of periodicals reveals 187,112 stories in the past two years in which the word "Internet" appears.

\(^14\) The Lexis/Nexis ALLREV database of law reviews reveals 254 articles since January 1, 1994 in which the word "Internet" appears.
in their articles in this issue of the *Howard Law Journal*. In so doing, they demonstrate both the importance of the topic and the escalating need for more thoughtful, forward-looking analysis. Despite the popularity of the Internet as a medium of communication and commerce and as a subject for debate, cyberspace presents so many and such fundamental challenges to our current legal regime that we are only beginning to make a dent in understanding these challenges, much less in tackling them. Marchant and Kurz provide an instructive guide to the range of issues that Internet users face and to the complexity of applying non-electronic legal precedents—in Kurz’s article, particularly those dealing with copyright law—to the Internet.

This complexity reflects many features of the Internet. For example, the Internet is inherently global. No other medium crosses not only every state boundary, but also the national boundaries of the majority of countries in the world. The Internet also crosses the regulatory boundaries that have come to dominate U.S. communications law. The Net provides content, like broadcasting, but it also carries the content of others, like telephone companies. It provides many channels, like cable television, but it also delivers mail, like the post office (only faster). The Net offers newspapers and magazines, provides low-cost venues for street corner speakers, and carries government information, but is neither owned nor operated by the government. Existing regulatory models, which focus—I would argue, inappropriately—on the technological medium, simply do not fit. The technologies of the Internet, which are many and complex in their own right, play havoc with the assumptions underlying many laws about how content is to be created, delivered, and accessed; how assent is to be manifest; and who is responsible for controlling content. For example, how do you “sign” an on-line contract? Finally, the application of current law to the Internet is difficult because there is no single entity—the Internet—to which to apply the law. Rather than a single “it,” the Internet is “they” or, more accurately, “we,”


because every user is also a provider of content, and every customer is also a provider of services.

While Marchant and Kurz both illustrate some of the difficulty of applying existing law in the face of these and other factors, neither fully suggests the serious nature of the Internet challenges to existing law or the significance of the consequences of the blind application of that law to the Internet. Consider two examples: the regulation of obscenity and the applicability of copyright law.

II. OBSCenity

The Supreme Court has repeatedly held that the First Amendment’s protection does not extend to the distribution or public exhibition of sexually explicit expression that is “obscene.” In 1957 in Roth v. United States, the court held that “obscenity is not within the area of constitutionally protected speech or press,” but declined to provide a specific definition for “obscenity.” Roth set off more than a decade of judicial confusion and indecision about the definition of obscenity, leading the late Justice Stewart to write in 1964 that an intelligent definition might be impossible, but “I know it when I see it.” In 1973, the Court finally adopted a specific, albeit subjective, definition of obscenity. In Miller v. California, a 5-4 majority held that works are obscene, and therefore outside the protection of the First Amendment, only if “the average person, applying contemporary community standards” would find that (1) the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual or excretory conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. In Miller and subsequent cases, the Court stressed that the first two prongs of the test could be judged under subjective local or state community standards. Writing for the Court in Miller, Chief Justice Burger stated “[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.” There cannot be “fixed, uniform national standards of pre-

19. Id. at 485.
22. Id. at 24.
24. Miller, 413 U.S. at 20.
cisely what appeals to the 'prurient interest' or is 'patently offensive.' . . . [O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation. . . .”

Redeeming literary, artistic, political, or scientific value, on the other hand, is not a subject for local standards and must therefore be judged under a national “reasonable person” standard.

Contemporaneously with the Roth-Miller line of cases, which dealt with distribution and public display of obscene material, the court also decided Stanley v. Georgia, which involved the possession of obscenity. In Stanley the court held, without dissent, that the Constitution protected the possession of sexually explicit material, even if that material was legally obscene. Writing for the court, Justice Marshall held that while the “[s]tates retain broad power to regulate obscenity[,] that power simply does not extend to mere possession by the individual in the privacy of his own home.” The court based its decision both on the “right to receive information and ideas, regardless of their social worth,” which Justice Marshall wrote “is fundamental to our free society,” and on the “right to be free, except in very limited circumstances, from unwanted governmental intrusion into one’s privacy.” The Georgia law at issue in the case criminalized possession of obscene material. The Court characterized the law as a “drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments,” and concluded “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”

Read together, Miller and Stanley indicate that it is the threat of harm posed by distribution or public performance of obscene material, and not a perceived threat from its possession by an individual, that permits criminalization of the former but not the latter. These possible harms include exposure to minors, accidental exposure to un-
witting adults, and "secondary" effects such as prostitution and neighborhood deterioration. The Court’s logic therefore suggests that if it were possible to receive obscenity in the home without posing any of the risks that distribution or public performance were feared inherently to impose, then the First Amendment would require that the government permit it.\textsuperscript{33} In fact, the Court went out of its way in \textit{Stanley} to note that even if it could be shown "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence"\textsuperscript{34}—an assertion for which the Court found "little empirical basis"\textsuperscript{35}—"the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."\textsuperscript{36}

It is clear today that the distribution or public exhibition of sexually explicit expression that meets the \textit{Miller} definition for obscenity may constitutionally be banned, whether the alleged obscenity is printed, broadcasted, mailed, distributed by telephone, or made available via the Internet.\textsuperscript{37} The delivery medium is not, however, irrelevant to the regulation of obscenity. In the context of the Internet, traditional obscenity law challenges our understanding of "contemporary community standards" and may exceed constitutional limitations under the Supreme Court’s reasoning in \textit{Stanley}.

The problem of defining the applicable community is clearly evinced in the pending appeal of Robert and Carleen Thomas. The Thomases were convicted by a Memphis, Tennessee, jury in 1994 for operating the Amateur Action electronic bulletin board in Milpitas, California.\textsuperscript{38} Amateur Action provided a wide variety of sexually explicit pictures to paying subscribers, who connected to the bulletin board using modems and telephone lines. A Tennessee postal inspector joined the Thomas' bulletin board and downloaded sexually ex-

\textsuperscript{33} Id. at 566-68.
\textsuperscript{34} Id at 566.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Federal law today prohibits the sale of "an obscene visual depiction" on federal property; the mailing, importation, and interstate transportation of obscene matter; selling obscene material which has been "shipped or transported in interstate or foreign commerce;" the distribution of obscene matter by cable television; the transmission of obscenity by telephone in the District of Columbia or across state lines; and the broadcasting of obscene language "by means of radio communication." 18 U.S.C. §§ 1460-1469 (1988); 47 U.S.C. § 223 (1988 & Supp. 1993).
licit images. He also requested that a videotape be sent to him by UPS, and he sent to the Thomases an unsolicited video tape of child pornography. The Memphis jury acquitted the Thomases on charges of purveying child pornography, but convicted them on eleven counts of interstate transmission and transportation of obscenity for their bulletin board displays. Judge Julia Gibbons sentenced Robert and Carleen Thomas to thirty-seven and thirty months in prison, respectively, and authorized the government to seize the Amateur Action computers.  

The convictions were upheld by the Sixth Circuit Court of Appeals. In its amicus brief, the Electronic Frontier Foundation, a Washington-based, non-profit organization that explores legal, policy, and social issues surrounding information technologies raised the important issue of whether it was constitutional for a Memphis jury to apply Memphis standards when evaluating whether the material downloaded from Milpitas, California, met the *Miller* definition of "obscenity."

Tennessee is but a single locality that can access the international telecommunications network generally and the Amateur Action bulletin board system specifically. Robert and Carleen Thomas had no physical contacts with the State of Tennessee, they had not advertised in any medium directed primarily at Tennessee, they had not physically visited Tennessee, nor had they any assets or other contacts there. The law enforcement official in Tennessee, not the Thomases, took the actions required to gain access to the materials, and it was his action, not the Thomases, that caused them to be "transported" into Tennessee (i.e., copies to his local hard disk). The Thomases may indeed have been entirely unaware that they had somehow entered the Tennessee market and had subjected themselves to the standards applicable in that community.

Applying Memphis standards to the Thomases runs contrary to the Supreme Court's position in *Miller* that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." Because the Internet—like the telephone system used to access the Amateur Ac-

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40. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).
41. Brief for amicus curiae Electronic Frontier Foundation at 4, Thomas v. United States, Nos. 94-6648 and 94-6649 (6th Cir. 1995).
tion bulletin board—crosses all state lines, it allows local juries to use local standards when applying the first two prongs of the *Miller* test. This necessarily means that Internet content across the nation will be judged by standards embraced by the most conservative communities. There is nothing that the operator of a telephone or Internet-based bulletin board can do absolutely to prohibit people in a specific state from accessing the material.

The *Thomas* case raises important issues about the meaning of "community" in the Internet context, where traditional notions of geography are no longer relevant. Should the Court abandon the community-based approach it adopted in *Miller* or should it define a new type of community—a "virtual community" that takes into account the technological realities of the medium?

A better question is whether obscenity laws should apply in cyberspace at all. The accessibility, security, and anonymity of the Internet for adults, combined with the ability to restrict access to inappropriate material by children, make it an ideal medium for serving the values the Supreme Court identified in *Stanley v. Georgia*. The fundamental "right to receive information and ideas, regardless of their social worth" and the "right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy," suggest that if it is possible to receive obscenity in the home without posing any of the risks that distribution was feared to inherently impose, for example, exposure to minors, accidental exposure to unwitting adults, and "secondary" effects, then the First Amendment would require that the government permit it. The right of adults, in the privacy of their homes, to possess obscene material is meaningless unless someone has the right to distribute it to them; it is only the threat of possible harm posed by distribution, and not posed by possession, that prompted the Court to permit the criminalization of distribution. If the technology of the Internet eliminates, or decreases sufficiently, those risks, then it would follow that the distribution of obscenity through that medium should no longer fall outside the protection of the First Amendment. If "our whole constitutional heritage rebels at the thought of giving government the power to control

44. *Id.* at 564.
45. *Id.*
46. *Id.* at 566-68.
men's minds, as Justice Marshall wrote for the Court in *Stanley,* then technology may eliminate the need to permit the government that power.

The *Thomas* case illustrates the fact that, even though obscenity law is applied to date without regard for the medium of communication, the technologies and structure of the Internet clearly affect how liability for obscenity will be measured. The case also brings into focus the issue of whether liability for obscenity in cyberspace serves the Supreme Court's stated objectives for permitting regulation of obscenity in the first place in light of competing First Amendment values.

### III. COPYRIGHT

Applying copyright law to the Internet raises equally challenging issues. U.S. copyright protection extends only to expression. No matter how original or creative, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." In *Feist Publications, Inc. v. Rural Telephone Service Company,* a unanimous Supreme Court stressed: "The most fundamental axiom of copyright law is that "[n]o author may copyright his ideas or the facts he narrates." . . . [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." Facts may not be copyrighted because they "do not owe their origin to an act of authorship." The basis for the exclusion of facts and ideas from copyright protection, according to the Court, is the U.S. Constitution. They are therefore "not 'original' in the constitutional sense." And "[o]riginality is a constitutional requirement." Although "[i]t may seem unfair that much of the fruit of the com-

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47. Id. at 565.
51. Id. at 347.
52. Id. at 346–47.
53. Id.
54. Id. at 346.
pilier's [as opposed to creator's] labor may be used by others without compensation,"55 the unanimous Court stressed in *Feist* that "this is not 'some unforeseen byproduct of a statutory scheme.' It is, rather, 'the essence of copyright,' and a constitutional requirement."56

Given the constitutional importance of not extending copyright protection to facts or ideas, courts will not protect expression if it includes one of a limited number of ways of conveying an idea, concept or fact, or if it is necessary to implementing an idea or concept. Under the doctrine of "merger," courts withhold copyright protection from original, fixed expression if that expression "must necessarily be used as incident to"57 the work's underlying ideas or data.58 The doctrine of merger highlights the importance of preventing copyright law from ever protecting a fact or idea: it is preferable to exclude otherwise protectable expression from copyright law's monopoly rather than to allow that monopoly to extend to any fact or idea.

This limit reflects the law's purpose of protecting copyright holder's rights only as a means to promote creativity. The whole focus of copyright law, and the structure of current protection, is to provide incentives for creating and disseminating expression for the benefit of the public. The public's interest in copyright is not secondary to the interests of copyright holders; it is the basis for those rights. The Supreme Court has written that "[t]he sole interest of the United States and the principal object in conferring the monopoly [of copyright law] lie in the general benefits derived by the public from the labors of authors."59

The structure of copyright law reflects this purpose. The law grants creators only those rights necessary to exploit the market potential of their works. Copyright holders alone may reproduce, adapt, distribute, and publicly perform and display their expression.60 However, copyright holders are powerless to prevent copyright users from making any other use of copyrighted expression, and any use at all of the facts or ideas conveyed by that expression. Creators do not have to create; if they create, they do not have to disseminate. But if they do create and disseminate, they have very few rights to control the

55. Id. at 349.
58. Id.
59. Id.
private uses of their copyrighted works. They cannot deny the public
the ability to use a work for its intended purpose, that is, if the work is
a book, to read it; if a painting, to display it; if a song, to sing it; if a
computer program, to run it. Other countries neither recognize such
user rights, nor impose limits on private use of the facts or ideas con-
tained in a copyrighted work. For example, Great Britain charges a
royalty every time a library loans a book. The United States has
eschewed such limits on the public access to copyrighted works.

Copyright law applies much the same way on the Internet: it pro-
hibits access and protects ideas and facts. Yet it also dramatically ex-
pands the monopoly granted to copyright holders. On the Net, a user
can access digital expression only through a reproduction in RAM or
on a hard drive, floppy disk, or magnetic tape. This is an essential
characteristic of digital technologies. It is simply impossible to read,
view, listen to, print, upload, download, transfer, or otherwise access
digital expression without making at least one copy of it. That one
copy violates the copyright holder's exclusive right to reproduce. Ac-
cording to the report, Intellectual Property and the National Informa-
tion Infrastructure, issued by the Clinton Administration Task Force

[I]n each of the instances set out below, one or more copies is
made:

When a work is placed into a computer, whether on a disk,
diskette, ROM, or other storage device or in RAM for more than a
very brief period, a copy is made.

When a printed work is “scanned” into a digital file, a copy—
the digital file itself—is made.

When other works—including photographs, motion pictures,
or sound recordings—are digitized, copies are made.

61. See Paul Goldstein, Copyright's Highway 163-64 (1994); John Cole, Public Lend-

62. RAM refers to random access memory and is the computer's active, “thinking” mem-
ory. RAM must be constantly “refreshed” by electric current to retain its digital content. Un-
like other forms of digital media, RAM is erased when a computer is turned off. See generally
MAI Sys. Corp. v. Peak Computer, 991 F.2d 511 (9th Cir. 1993), cert. denied, 114 S. Ct. 671
(1994) (holding that a copy in RAM is “fixed” within the meaning of 17 U.S.C. § 101 (1988));
(E.D. Va. 1994).

63. See Michael D. McCoy & Needham J. Boddie, II, Cybertheft: Will Copyright Law Pre-
vent Digital Tyranny on the Superhighway?, 30 Wake Forest L. Rev. 169, 185 (1995) (“Virtu-
ally every transmittal of a work across the superhighway will involve the exclusive right to copy.
Printing to paper, copying to disk, and loading into memory all amount to reproduction.”).
Whenever a digitized file is "uploaded" from a user's computer to a bulletin board system or other server, a copy is made. Whenever a digitized file is "downloaded" from a bulletin board system (BBS) or other server, a copy is made. When a file is transferred from one computer network user to another, multiple copies generally are made.

Under current technology, when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or the buffer of the user's computer, no screen display would be possible.\(^\text{64}\)

Moreover, to read or otherwise view digital expression on a computer screen, or to listen to it through computer speakers, requires that the digital work be "displayed" or "performed," within the meaning of copyright law.\(^\text{65}\) In the case of digital expression downloaded from a computer network, the display or performance meets the statutory definition of "public," even though the location of the computer may not be open to the public.\(^\text{66}\) This violates the copyright holder's exclusive rights to display publicly and perform her copyrighted work.\(^\text{67}\)


\(^{65}\) Under the Copyright Act, "display" is defined as "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process." 17 U.S.C. § 101 (1988). The Act defines "perform" as "to recite, render, dance, play, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." Id.

\(^{66}\) The Copyright Act includes in its definition of public display or performance "to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." Id. This language and its legislative history suggest that no one need actually receive the performance or display; it must be merely capable of being received by the public. “[A] performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission.” H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976); see also On Command Video Corp. v. Columbia Picture Indus., 777 F. Supp. 787, 790-91 (N.D. Cal. 1991).

\(^{67}\) See Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1554, 1559 (1993) (holding that the defendant's operation of a computer bulletin board service, which provided users with unauthorized copies of digitized copyrighted photographs, violated the plaintiff copyright holder's exclusive right to display those works publicly); see also McCoy & Boddie, supra note 62, at 189 ("[A] public display occurs every time a user browses a copyrighted work on the superhighway. Consequently, an owner's right to display may be the broadest of all the exclusive rights in the context of the superhighway, because a majority of uses constitute a public display.").
The new technological environment is radically altering the impact of copyright law. The broad application of the exclusive rights to reproduce and to display and perform publicly, prohibits public access to expression in the digital context of the Internet. This is a dramatic extension of and contravention of the policies underlying the copyright holder's rights in nondigital contexts, where users may read, see, or hear expression in the market without the copyright holder's permission. Of even greater significance is the fact that the holder of a copyright in expression that is found only on the Internet can deny the public access to the facts or ideas contained within that expression, and not just to the expression itself, because there is no way to obtain those facts and ideas from the Internet without copying and publicly displaying or performing the expression as well.

Consider, for example, a newspaper. If published on paper, any person is free to read a copy in a library, over someone's shoulder in the subway, or in any other place where the printed paper is located. The reader can use the facts and ideas found within that paper without copying the paper's expression—and thus, without violating the copyright laws. If that same paper is published only on the Net, the reader can only get access by first copying the paper into RAM or onto a hard drive or floppy disk. Unless authorized by the copyright holder, accessing the paper thus violates the copyright holder's exclusive right to reproduce. Then actually to read the paper, the user must display it on her screen, violating the right to display the work publicly, or to obtain a copy, the user must download the paper, violating the right to reproduce the work again. The Net user cannot access or use facts or ideas in the newspaper without necessarily reproducing and publicly displaying the copyrighted expression. As a result, on the Internet, copyright law protects facts and ideas, not merely expression. The technology is turning the law on its head.

IV. CONCLUSION

Obscenity and copyright laws provide only two of many examples of how existing law may be dramatically altered when applied to the Internet. These examples suggest that lawmakers, judges, attorneys, and legal scholars must understand the technological and other features of the Internet, before rushing to apply existing legal precedents and theories. Regrettably, the technologies, lingo, decentralization, and dynamic character of the Internet frighten many. The very fear of Internet complexities and the lack of Internet experience, which
should quell the impulse to regulate, have led many—particularly in Congress and the Administration—to pursue hasty, unwise, and ill-considered regulatory policies. It is easy to understand why one response to the frontier quality of the Internet has been a push to regulate. But common sense, as well as constitutional impediments, should stay even the well-meaning regulatory hand.

Not all laws yield results as counterproductive as the obscenity and copyright laws do when applied to the Internet. In fact, the Internet may give new meaning to some longstanding legal paradigms. Consider the First Amendment. The Supreme Court has repeatedly written that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."68 Judge Learned Hand wrote in 1943 that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."69 The "marketplace" metaphor, however worthy, has had little meaning in the physical world, where the ability to reach large audiences is controlled by a handful of major media corporations. On the Internet, however, anyone armed with a computer and a modem can become an author, artist, and creator, as well as a reader and viewer. She has the same access to the same on-line audience as the largest broadcaster and newspaper. For the first time since the printing press, the telegraph, and the radio set the stage for tremendous inequality among speakers, the speech "marketplace" may be a reality. The Internet gives real meaning to the constitutional preference for a "multitude of tongues."

Marchant and Kurz help focus our attention on the need to consider carefully the applicability of existing legal norms to the on-line world. Marchant’s argument, in particular, for creating a legal and policy framework for the on-line world, rather than “dragging current traditional precedents into the on-line world, and forcing the on-line world to fit the mold,”70 is both far-sighted and correct. Certainly, our considerable experience with existing legal paradigms offers valuable lessons even for the new, complex world of the Internet. Additionally, the principles that undergird existing law remain vital. We will

70. Marchant, supra note 15, at 500.
never realize the Internet's potential for allowing expression, or for any other purpose, however, until we recognize the effect of cyberspace on the application of existing laws. Appreciating what is different about the Internet will not necessarily cause us to alter the objectives that we have identified over the past 200 years as guiding our lawmaking and judicial processes. Rather, that understanding should help us assure that the laws we create for, and apply to, the Internet continue to serve those objectives.