Panel Discussion
SHERI LEWIS: On behalf of Mercer University's Walter F. George School of Law and the Mercer Law Review, I am pleased to convene the second day of the 1999-2000 Oliver Wendell Holmes Symposium and Lectureship. Last evening we were treated to an entertaining and insightful presentation by preeminent First Amendment lawyer Floyd Abrams. And while he is a hard act to follow, I suspect that Mr. Abrams will be in good company this morning with our symposium.

We have four presentations from four unique individuals who have travelled from various parts of the country and whose work all touches upon cutting edge issues and free speech in the age of the Internet. They all hold an interest in the marketplace of ideas in cyberspace, and we are grateful that they have joined us here in Macon this morning to share your thoughts with us.

My name is Sheri Lewis. I am the Associate Law Librarian for Research Services here at Mercer, and it will be my pleasure to moderate this morning's symposium. I'd like to begin by briefly

861
introducing our four panelists and outlining the schedule for the morning. We will begin presentations from Mr. Greg Lefevre, who is seated to the far left of the stage, and next from Professor Margaret Chon, who is seated next to Mr. Lefevre. Following the first two presenters, there will be an opportunity for questions and discussion from the entire panel and the audience. We will take a short break at approximately 10:30 and then reconvene for presentations by Mr. Daniel Jaffe, who is seated at the table to the right, and by Ms. Liza Kessler, who is seated next to Mr. Jaffe. We will then conclude with a final opportunity for questions and discussion with all the panelists.

Our first two presenters this morning, Greg Lefevre, then Margaret Chon, offer perspectives from a seasoned broadcast journalist who routinely covers technology and a national recognized legal academic. Mr. Greg Lefevre is presently the Bureau Chief for CNN's San Francisco office, a position he has held since 1989. For CNN he supervises a staff of twenty in the northwestern United States and also reports for the CNN newsgroup. Recently, Mr. Lefevre has developed the CNN San Francisco Bureau's new Media Beat which offers extensive coverage of personal technology.

Mr. Lefevre has covered many important news events for CNN, including the Unabomber arrest and trial, the TWA Flight 800 crash, the O.J. Simpson trial, and various natural disasters, earthquakes in California, fires and flooding in the western United States. He was the Bureau Chief for CNN's coverage of the 1995 bombing of the Oklahoma City Federal Building. Mr. Lefevre reported extensively from Alaska during the 1989 Valdez oil spill, and he is a veteran of three broadcast tours in the Middle East, covering the Gulf War during two stints.

Prior to joining CNN in 1983, Mr. Lefevre was the news director for KSEE-TV in Fresno, California, and was a television reporter for local stations in both San Diego and Dallas. Mr. Lefevre has won numerous journalistic awards, including three CableACE Awards, the cable industry's highest honor, for coverage of the Oklahoma City bombing, the Los Angeles earthquake and the Alaska oil spill. Additionally, he has held various leadership roles in his profession, having served as the president of several professional journalism societies. Mr. Lefevre holds a Bachelor's Degree in television and film from San Diego State University. The topic of Mr. Lefevre's presentation this morning is, "The Internet: What are We Doing Here," and having been part of a television audience that has watched Mr. Lefevre, I am most excited to be part of the live audience this morning.

Our second speaker this morning will be Professor Margaret Chon. Ms. Chon has been on the faculty at Seattle University School of Law since 1997 and previously taught at Syracuse University College of Law.
She teaches courses in computers and the law, Internet law, race and the law, administrative law, civil procedure, and intellectual property. Her ideas about introducing critical legal theory into cyberlaw promise to provoke some interesting debate over technologically optimistic views of the Internet during today's symposium.

Professor Chon is a nationally recognized scholar, having written on issues such as race and the law, gender and the law, intellectual property, and, in particular, as it relates to technology. She's a frequently invited speaker at law school symposia and academic conferences. In fact, I counted forty-six separate speaking engagements during the past ten years on her résumé. While Professor Chon's résumé is extensive and impressive in terms of academic research and writing, she has also been an active member of the law school communities of which she has been a part and involved with the local Bar.

Prior to joining the legal academy, Professor Chon served as an assistant to the Honorable Doloris Slouter on the Third Circuit Court of Appeals. She also was a law clerk to the Honorable A. Leon Higginbotham on the Third Circuit Court of Appeals. She has practiced law with the firm of Schnader, Harrison, Segal & Lewis in Philadelphia, focusing in intellectual property.

Professor Chon received her Juris Doctor from the University of Michigan Law School. She did her Bachelor's work in biology at Cornell University, and holds a Master's Degree from the University of Michigan's School of Public Health.

Professor Chon's presentation this morning is entitled "Network Effects in the Digital Marketplace of Ideas," and she will focus on gender and race critiques, specifically market failures in our marketplace of ideas in cyberspace.

We welcome Professor Chon to Mercer Law School. And now we will begin this morning's presentations with Mr. Greg Lefevre.

MR. LEFEVRE: Thank you, Sheri, for that brief introduction. That's all we have time for today, folks. One of the fun things that we get to do in my business is to wander into circumstances like this where everybody in the room is smarter than we are. I, however, am unfettered by the fact that I am not a lawyer. I don't speak lawyerwise, which allows me some particular freedom in a forum such as this, and I enjoy it particularly.

What are we doing here? We are trying to protect this precious, precious frontier. What I do near Silicon Valley, it's not very far away, because the Internet can be anywhere. We think of some of the things that come from the Internet and how quickly they emerge upon all of us. A few headlines from the Internet that may indicate how silly and how
fun it can be. The dateline is Chico, California, where it's a college town north of San Francisco—the City Council there has passed a nuclear free zone ordinance providing a $500 civil penalty for anyone who sets one of those devices off.

Of course, when you think about what you do on the Internet, of course you have to think of the father of the Internet, Vice-President Al Gore. Well, now, wait a minute. Stop and think about it for just a moment, you know. The Internet is based on computer technology based on code, based on "Al Gore" rhythms. He didn't like it either.

What are we doing here on the Internet? Why are we having this discussion? We are here to defend truth and justice, and for those of us over fifty, the "American Way." You know the phrase. The thing is, stop and think, the "American Way?" Who are we to impose our particular culture on the Internet? Who are we, as I think Margaret was saying last night in one of her questions, to impose our particular ideals and ideas on the rest of the world?

John Perry Barlow, one of the founders of the Electronic Frontier Foundation, this week talked about Internet freedom and the rules that the world seeks to impose upon it. It's out there. We've got to do something about it, not necessarily do something with it, but do something about it. I am distinctly coming from a libertarian point of view.

We in this country see hate sites on the Internet. We spoke of that last night. But if you're the cultural minister of Ku Klux Klan, this is probably a site of national worship. If you are a member of the Black Panthers, who were in the news again this week, this is anathema. This cannot be. And what we see in my industry, the view from the left, is that really shouldn't be out there. That information should not be. It's just not fair that it should be out there.

In San Francisco, we are sensitive to the gay community, and Dr. Laura Schlessinger, the talk show advice-giver lady, is about to go on television, and she has made some remarks critical of gays, and there is a movement among the gay community to keep her television show from being on the air. The view from the left is that these things should not be spoken.

We see in the abortion rights debate the view from the right that abortion is wrong and that it should not happen. The view from the right often is you should not do these things. Which of these makes its way onto the Internet? The view from the left that this should not be spoken, this should not be seen; the view from the right that this should not happen. When you get to the Internet, the Internet says, bring it all on. Let us all look at this, discuss this, and see this.
One of the topics that we brought up last night was John Rocker. Professor Abrams was asked, “What are we going to do about John Rocker?” Well, I believe that exposure is good for things. I have that libertarian view and I don’t apologize for it.

I remember some years ago there was a big controversy in Gary, Indiana, over whether or not the Ku Klux Klan was going to be allowed to march in public in Gary, Indiana. And of all the groups to support this particular march was the American Civil Liberties Union, who, as an organization, had opposed the Ku Klux Klan in a number of landmark civil battles. But the ACLU said these people have the right to get out there and say what they have to say. And somebody thought of something really smart. They said, let’s expose this for what it is. I, in particular, have a very specific view about the KKK, and I do not hide that view. I don’t think it’s a good organization. But what these people wanted to do with the ACLU was expose this, bring this out in the open. Oxygen unfesters a wound I was told.

The same with John Rocker. John Rocker, his remarks are well known, his attitude, as perceived by the writer of that article, was well known, and the society in general was saying, “how can this be?” We must, what, subject this fellow to reprogramming at a psychiatric clinic? My gosh. But what it did was it provoked another public debate. And, if you will, over time it unfestered that wound. Exposure oxygenates these issues and the bad ones oxygenate, they burn up, they dispose. We learn from these things. We enhance our lives by being exposed to these things.

All across the world we are seeing date rooms, chat rooms, romance rooms, on the Web sites. I don’t think any of us has not wandered onto AOL and been quizzed to join a chat room or join a date room or go over to this romance site and, you know, flirt a little bit or whatever.

All across Southwest Asia the governments there are trying to screen for PDAs, public displays of affection. PDAs are offensive to many in the Muslim culture. No place at all there for Cupid.com. Whose community, whose culture will it be that sooner or later imposes its laws on the Internet? Someone will. Mr. Barlow gave us an interesting take this week in an on air discussion. His fear was not that it would be a government that would impose its view on the Internet, but that it might even be a corporate entity or a civil entity. He named Microsoft in particular. He said Microsoft has the ability and the possibility to impose its own standards, and perhaps force us to conform to some form of proprietary system in order to use the Internet, in order to get on the Internet, in order to even speak on the Internet.

Remember the generic GUI, graphical user interface, that started off as a research project at Xerox, went on to be adapted by Apple in its
MacIntosh computers, and then co-opted by Microsoft, and it's now Windows, and it's now standard practice? It was generic and now it is proprietary.

Remember JAVA, the universal plug-in and how it was nearly subverted into an entirely proprietary system? So we have two lessons here. As Barlow concluded, he took a line from the movie trailer, "Be afraid. Be very afraid." Your freedom is at risk.

Anyone who lives in a city and spends Saturdays painting that fence along the back alley of your house can relate to this next occurrence. You toil, you sweat, you work all weekend and you put up your Web page. Me.com, here I am. This is me. I'm really proud of my Web page. And then someone comes along and smears it with virtual spray paint, software called Third Voice, or another product called UTOK, spelled U-T-O-K. You can look them up. "This sucks" splattered across your Web page. "Who does this guy think he is" splattered across your Web page. These are software products that allow public commentary on your Web site. Just psssst right across your Web site. Whose freedom is it that is being abused? Whose freedom is it that is being used in this circumstance, leaving the equivalent of yellow stickies all over the front page of your Web site. There ought to be a law against this. Should there? We wonder.

Have you been to a concert lately when the chatterbox behind you won't shut up? The music is beautiful. The orchestra is just gorgeous. The soprano just knocks you out. Chatter, chatter, chatter, chatter. Chatter, chatter, chatter, chatter. Chatter, chatter, chatter, chatter. Shut up! I paid my eight bucks. I can sit here with everybody else. I have the right. Two products call ODIGO and GUI do just that. I love these software names, ODIGO and GUI. It sounds like two cartoon characters you don't want your kids to see. They allow people to chat on your Web site. You go to your Web site, Me.com, and up pop two little screens, little instant messenger screens, people chatting to each other. "This site sucks." "No, I think he's all right." "No, this site sucks."

I'm waiting for the equivalent of Horsetail.com to invent software that takes its cue from a horse shaking off the flies and shake those notes off your Web site.

What are we doing here? We are trying to protect this precious freedom called the Internet. We're trying to get others at the same time to be the way we want them to be.

Let's talk about business on the Internet. When I was researching for today, about every ninety minutes I came across an effort to write new regulations for the Internet. Every other site had something to talk about new regulations for the Internet. Who will regulate the Internet? Well, never has buyer beware been more relevant. Some well meaning
folks want the Internet to have, quote, "The same rules of enterprise that we have in the real world. The same rules of enterprise that we have in the real world."

So, a well meaning California columnist came up with a sample set of codes. Have respectful information practices. You mean like used car people do in the real world? Hmmm. Tell the truth and the whole truth. Like Al Gore and George W. Bush? Take special care with and do not exploit children. You mean like Toys R Us doesn't do that in the real world? Think about that.

May I suggest a simpler rule if we're going to impose a rule on the Internet. Don't get into a car with strangers. Don't get into a car with strangers. For example, if you give your credit card to "This is too good to be true.com," you deserve what you're going to get, and you will get taken.

Los Angeles columnist Suzanne Choney writes of Internet oxymorons, you know, those mutually opposite words, like honest advice, amicable divorce. Another one, Internet privacy. Picture this. You log on to the Internet and you go to Bassfishing.com. There probably is a Bassfishing-.com. I don't know. I'm not a very good fisherman. What you've really done is you have stepped out into virtual traffic on the information superhighway with a big sign with your name, address, telephone number and credit card and said, "Hook me, hook me!"

Out West, the California Legislature, that should have run out of ideas long ago, has come up with some new ones for the Internet. The Select Senate Committee on Internet Privacy solicited testimony. So who is it that comes to testify? People who have had their privacy violated. "So, tell me, how did it happen?" And there becomes this show and tell at this committee meeting on how to violate someone's privacy on the Internet. Thank you California Legislature.

But the real stinger came about two-thirds of the way through the hearing when, I quote, one of the Legislators said, "What civil liberties would you give up in order to gain more peace of mind in cyberspace? What civil liberties would you give up?" And the hair stood up on the back of my neck. And I'm thinking, wait a minute. Wait a minute. Why should I have to give up my rights on the Internet? Why should I have to surrender to the bad guy? One of the big lessons from this particular session was stay away from clueless legislators.

Maybe it was the same well meaning folks who put out the census who then also said, you can sign up on the Internet, submit your census form on the Internet. Just log in and tell the government all about yourself. Do you really want to do this? It is not anonymous, despite what some people will tell you. You still need the paper form that comes in the mail, despite having that extra digit in the address that somehow made
its way. The tiny print of the label of the census form contains a twenty-two-digit code number that identifies you, and you need that twenty-two-digit code number in order to successfully log onto the Web and complete your census form on the Web. Now, mind you, as that census form that you fill out on the Web goes to the government, it is not anonymous. It's got you you, you you, you you, you you, yourself and your family written all over it, which perhaps may explain the awful response that the Census Bureau has had on the Internet. As of the middle of last week they had two and a half million Census forms sent back in. Of that only 1,000 came in over the Internet.

What are we doing here? We're putting up bars on our windows to keep the bad guys out. What we're really doing is we are building cages around ourselves and imprisoning ourselves in this new virtual world.

Let's get back to some of those well meaning legislators. The Cox News Service reported that the top ten legislators in the West who align themselves with technology issues describe their own attitudes toward technology in words like, "opposes taxes," "encourages innovations," "gets it with technology," "backs expansion," "encourages Internet training." The New York Times then went and surveyed thirty current pieces of legislation in Washington, and in that legislation are words such as "outlaw," "limit," "filter," "limit again," "forbid," "restrict," "limit," "require," and "forbid." Be afraid. Be very afraid. Do these people really want to help you? Congress returns to session soon. Be afraid.

While we may feel that the Web is free to roam and we are free to roam the Web, it is not free. It is controlled by a very few, very large organizations. PC World commented recently that UUNET, a part of MCI WorldCom controls, owns, about a third of the Internet infrastructure. We all pay them, or our bosses pay them, or our universities pay them, to put our ideas on the Internet. That no one owns the Internet is taken as a truism, but it is not, in fact, true. The infrastructure is controlled by a very few organizations. The influence that these companies exert, some industry insiders fear, may strangle smaller companies and reduce customer choice and reduce customer freedom.

If you want your enterprise on the Internet, sometimes you have to make deals. They're called pairings. I'll put my product on the Internet and you give me a break on servicing me, or I'll share my information with you, if you give me a break on getting my information out there. The bigger you are, the bigger I am, the easier it is. But what if you're the small guy? What if the Internet, or this particular large company, is loaded up with other enterprises that got there first, and perhaps more importantly, have made more of these co-location and pairing deals with MCI, AT&T and the others? You carry my product. I'll feed my information to you. And the little guy, the yous and mes, the individuals
who thought the Internet was free, lose out. It is legitimate. It is fair business. It is an honest business practice. But our freedom to express ourselves, to be seen, to be heard on the Internet, is at risk.

So what are the big guys doing about it? We're back to business. I read with amusement this week comments by Microsoft's new CEO, Steve Balmer, "Mr. Bite Your Head Off Competitor." I wish Balmer could be—could solve some of the other world problems because he is an aggressive competitor. He told PC Forum recently that the Internet is now controlled by software and by Web site producers, that much of the information you see on the Internet is produced by corporate entities, large or small, sometimes associations, large and small, that there is very little individual input to the Internet. And he says, all of this is going to reverse. That very soon it will be controlled by the yous and mes, that the ease with which we put up a Web site or the ease with which we send messages back and forth across the Internet, will drive the Internet. Balmer, always the corporate competitor, said, "The industry's challenge now is to help consumers gain control of the Internet, to help consumers be the company that helps consumers." And Balmer said, "I want Microsoft to be the company that helps these consumers do this." And I thought, wait a minute. Wait a minute. "Mr. Competitive," in a company run by Bill Gates, "Mr. Control," wants to give up control? It ain't going to happen.

I'll conclude with a couple of thoughts. We need to constantly remind ourselves of the question, "Why do they call it the First Amendment?" Think of it as the first. When the Amendment reads: "Congress shall make no law," start with "no" and work from there. Congress did not say, we shall make a law when, Congress said we "shall make no law."

I testified at a change of venue hearing in a trial not long ago where a judge was worried about pre-trial publicity in a particular case. And he said, in so many words, we don't believe the people of this community can make a rational, informed decision about this case. I was insulted by that, and I hope you would be, too, if someone said that about you. We go back to the First Amendment, and I remind you, why do they call it the First Amendment? Thank you.

MS. CHON: Good morning. I think we're perfect foils because, actually, my assumption is that people are irrational and uninformed decisionmakers; and, so, because we have such different assumptions, I think we reach very, very different conclusions. My talk is called "Network Effects in the Digital Marketplace of Ideas, Cultural Pluralism and Common Currency."

The question of equality on the Internet is often evaluated in terms of access. Who has access? The assumption is that as long as certain
groups have access to the Internet, whether it be women or teenagers or senior citizens or racial minorities, then we’ve addressed the equality problem. As Greg’s remarks suggest, with his examples of media concentration, the question of equality or what constitutes a level playing field on the Internet is actually quite a bit more complex than purely the simple question of access.

Many of us who teach and write in the area of cyberlaw teach it as if cyberlaw is separate from the realm of society. There is also a strong belief that the technology of the Internet erodes traditional boundaries defined by geographical and political entities, and, thus, the legal mechanisms that are bound to those territorial markers.

Let me give you one quick example. If someone posts a defamatory comment to a newsgroup for dog breeders, where is that comment published? In Canada, the jurisdiction where the author of the comment resides? In Washington state where the target reads it? In California where the Web server is located? In every jurisdiction where someone reads the comment? In no physical realm but in some mythical place called cyberspace? (This is actually not a hypothetical problem that I made up. It’s based on a real issue posed to me a few years ago by a lawyer who had decided to represent dog breeders because she thought she was moving into an easier area of law than family law!)

Because digital networks are simultaneously nowhere and everywhere, people who write in the area of cyberlaw are quick to claim that there are no meaningful boundaries anywhere, and, thus, there is less ability to regulate social behavior through law. I argue that boundaries still exist but are shaped relatively more now by social rather than geographical or territorial markers. The challenge, then, is to define these social boundaries and decide whether and how they can be regulated by law. I call this the boundary evaluation issue.

As Ethan Katsch states, “We are in an interconnected and overlapping set of spaces rather than in a world where territory discreetly and definitively separates sovereign states.” The issue of boundaries and the impact of new media on boundaries of all kinds is one of the core issues of cyberspace. New spaces are being created, and with considerable imagination, new maps will be drawn to represent new spheres of authority and new models of state/nonstate relationships.

The boundary evaluation problem that I address today is: what are the limits of the marketplace of ideas metaphor as it relates to the Internet? It’s true that in the abstract the Internet creates one huge global marketplace, but is there a common currency in this marketplace that functions as a fungible common unit of exchange, or are there multiple currencies in which exchange value is weighted heavily in favor of one side or the other, places in which only one type of currency is the
currency that really matters in this marketplace? In other words, are there boundaries within the marketplace, zones of less than free market exchange, in which exchange means an assertion of power and control on the part of one of the participants and an acquiescence to that power on the part of the other?

With respect to both the boundary evaluation problem and the marketplace metaphor, one should note that in the actual global marketplace different currencies have different relative values attached to them. Examples abound in the former Soviet Union. In Uzbekistan, for example, the official currency is the sum, but it is a very devalued unit of exchange. Everyone there would prefer to be paid in dollars. An even better example is Cuba, where the dollar is legal, and that has created a class distinction between those with family in Miami who can pay with dollars and those without who must pay with pesos. Certain stores will accept only dollars, and, thus, only typically inferior goods are the ones available to be purchased by pesos.

So is this global marketplace of ideas facilitated by the Internet one in which local values and local culture will retain its integrity? (And I'm reminded of that by travelling to Macon and seeing the geographical local difference here, a very charming difference compared to places in the North). And is this marketplace one in which cultural diversity, that is pluralism, and most importantly, tolerance, are leading principles of communication in this important new medium: not just freedom, but equality?

Or will it be a place in which local currency increasingly becomes more devalued and degraded compared to the relative power of other currencies? I suggest here that we should be especially skeptical of the marketplace concept as it is applied across cultures, whether subcultures in the United States or cultures in the global village. The marketplace works very well if there's a common currency of exchange. It works much less well and works to the detriment of certain groups of people when different currencies with different values and, more importantly, different relative power with respect to each other circulate. It's crucially important in this increasingly globalized communications environment that we pay attention to these disjunctures.

In contradistinction to the quote that I gave you before to Katsch's emphasis on new boundaries created by cyberspace, I would say that social boundaries that are created by cyberspace or defined by cyberspace are not new, but rather follow predictable patterns. I will develop this somewhat fatalistic claim later in this talk.

My standard disclaimer when I give a talk as a cyberlaw expert is IANAFAE, which translates to "I'm not a First Amendment expert," and I do not claim to address this topic from that doctrinal perspective. But
the marketplace metaphor allows us to make a certain set of inquiries about the discourse of the First Amendment—the freedom discourse—the First Amendment being first in our Bill of Rights. And the marketplace of ideas is a wonderful connective tissue even though it's highly flawed as a metaphor.

It's clear that many judges, as Floyd Abrams last night reminded us, including those on the Supreme Court, see the Internet in a very optimistic way, as a, "dramatic expansion" of the marketplace of ideas—to use Justice Stevens' words in Reno v. ACLU,¹ majority opinion, which, and that optimism in part justifies the hands-off approach the courts are willing to take towards the regulation of speech on the Internet.

And from the perspective of users who historically have been shut out of traditional communications media, including even face-to-face communications (think, for example, of how many female law professors there might have been fifteen or twenty years ago) digital network technology such as the Internet represents the promise of greater equality, a more level playing field for points of view that might not otherwise be heard. Because its many-to-many model is highly decentralized compared to the one-to-many model characteristic of traditional broadcast media, such as radio or television, it has the potential to be a democratizing influence: to allow lots of previously unheard points of view to be aired.

From a powerful female Internet player, Esther Dyson, comes this observation. Quote, “As a communications media where personal presence is primarily text and sex differences are not immediately visible, the Internet is tailor made to help women finally find their voices. On these networks women write in the same variety of ways as men, but you can say your piece and post it without being interrupted midway." (Interruption happens more in the northern states, I think, than in the southern states.) “The Net enforces a certain fairness by putting everything up on the screen without fear or favor. Yes, there are filtering tools, and there are certain people many people filter out, but that usually has to do with content, not gender. On-line I'm sure some people filter me out, but it doesn't happen the way it does off-line, unconsciously. Yes, people may discount what women write, but they are more likely to read it. My on-line voice does not have the kind of high pitch that many men find hard, for whatever reason, to hear. Another common experience for women, having your good idea picked up later and attributed to someone else is less likely to happen on the Web.”

While I believe that Esther Dyson is onto something, I also think that the greater freedom to be taken seriously on content and merit alone is somewhat illusory. Even within a communications medium that is decentralized and stripped of major social cues, such as gender or race, there are biases and cultural scripts that work against the free flow of information and, more importantly, the acceptance of certain ideas. By this critique, I don't mean to downplay the importance of the decentralizing, democratizing and individually empowering effects of the Internet, and I'm a believer in these effects as well. But I think it's important to examine how and when market failure might occur in this particular communications medium, even if it does promise a greater ability to deliver the goods, if you will, that are a necessary precondition for a vigorous and healthy democratic exchange of views.

When free markets are not operating according to fair rules of play, antitrust law exists to intervene in and equalize the playing conditions. So for my particular market failure critique, I will borrow a new metaphor from antitrust law. In the computer and information industries, the Justice Department has taken an approach, most evident in the Microsoft antitrust litigation, that of so-called network effects. So let me explain what network effects are. And here I'm quoting, actually, from a critic of this type of antitrust theory; an antitrust lawyer by the name of William J. Kolasky. "Network effects, according to the economic literature, exist when the utility that a user derives from the consumption of a good increases with the number of agents consuming the good. In other words, when a product becomes more valuable as greater numbers of customers use it." The most obvious example is a communication network where the value to each customer increases exponentially the more friends and family that are on the same network, and you can think of telephone networks as an example—a good example of that. These are generally referred to as real networks with direct network effects.

A less obvious type of network is a group of users who have adopted a compatible technology. The examples most frequently cited are IBM compatible PCs, and those of you who have tried to work between Macs and IBM computers understand that particular effect, or owners of VHS format VCRs. I don't know how many of you are old enough to remember Beta Max, but that was a different format in the '80s.

Why are network effects bad from a competition policy perspective? Well, actually, not all network effects are bad. It's good when a user gains more value as other users join a network or adopt a standard. We all have experienced, I think, the empowering effects of being able to use the Internet to communicate with a larger audience than we normally would in our nondigital interactions. But it is considered to be bad,
although perhaps debatably bad, as a matter of competition law and policy, if network effects lead to an undeserved and unfair benefit to the provider, and that’s typically measured in the form of unfair market power.

For example, when markets for computer operating systems are locked into predominant technology, such as DOS or Windows operating system, that market is vulnerable to monopolistic advantage because users are going to be disinclined to choose a different technology over the existing standard. You know how hard it is to learn a new computer program, right? And/or providers are going to be unable to break into the market with any new standard even if it’s an improvement over the old technology. Well, that’s network effects in a nutshell.

How does this new antitrust theory apply to the First Amendment metaphor, the marketplace of ideas? Network effects are just a type of market failure that might occur with respect to global Internet communications. One way of looking at ideas is that they are not worth much unless they are shared, but they cannot be shared unless there is at least one other person to share it with. And, of course, the power of the idea will grow with the greater number of people who are exposed to the idea, and, so, these are good network effects.

There will be ideas that many people will share, not necessarily because they’re good ideas in the abstract, but because that idea has captured a large network base, a large constituency, if you will, of people for whom the idea functions and—this is very important—for whom the idea functions not only as a signifier of some rational impulse (which is really one of the fundamental assumptions of the marketplace of ideas metaphor), but also as a signifier that one belongs to a certain community that has shared assumptions and shared values.

A good example of a bad idea that has a large network base is the idea of white supremacy. On a number of different levels white supremacy is a bad idea and many people react to it as a bad idea, but it continues to exist within the marketplace of ideas. Indeed, proliferates wildly on the Internet, even if it’s not a truth that most people would admit to accepting on a rational basis.

As Professor Jack Balkin put it in his book, *Cultural Software*, increasing the amount of available information does not necessarily increase knowledge or understanding. We filter information through a cultural cognitive apparatus such as shared cultural and historical associations, some of which are irrational but powerful nonetheless. In the United States this includes a long and ignoble tradition of associating white skin with insiderness and nonwhite skin with outsiderness. This tradition will not go away simply because there are more access points to the Internet. Our collective cognitive apparatus is an installed
base, if you will, of cultural operating system software that makes it very difficult to run a program with the message that nonwhites are insiders. So we are susceptible to ideas such as white supremacy, ideas that are not truthful in either an objective or even postmodern subjective sense because our operating system software, if you will, has been installed to receive certain messages as more plausible and others as less plausible. And this installed base is so powerful that race theorists posit with great sadness and resignation that most racism in the U.S. today is unconscious. Most people do not intend or want to be racist, but it is an unfortunate fact that everyone is racist because of a larger cultural matrix in which information is circulated. Thus, it is simply not possible to escape the cultural equation of black with inferiority even if one is African-American (that's called internalized racism).

So the network effects metaphor thus tells us that there may not be a simple linear relationship between the number of access points to the communication infrastructure and diversity of viewpoints. There may be market failure because of what network effects theorists call path dependence, that is, small differences in early investment patterns or historical accident will often produce large differences in final outcome.

Information providers with received points of view, views that do not challenge to an uncomfortable and intolerable degree our existing cognitive frame, will have much more success in the marketplace of ideas because of these network effects.

Now I'd like to turn away from a domestic U.S. example towards an example that has more global ramifications. I've talked about U.S. racism. I'd like to talk more about global trade. Some of you may be aware of the fact that the World Trade Organization had its Third Ministerial meeting in Seattle last fall. Because I was in Seattle at the time, it was a tremendous learning experience for me. People from all over the world converged upon Seattle with concerns and perspectives that ranged all over the map. It was incredibly intellectually stimulating.

My favorite quote was from a Korean delegate who, when interviewed as he was leaving to go home, stated, "Your tear gas is a lot weaker than ours." And my second most favorite quote was from Michael Moore, the film maker of Roger & Me fame, not Michael Moore, the WTO Director. After talking with some of the police who had been called in to fire tear gas and shoot rubber bullets, his comment was, "They've been working twelve hours without a bathroom break." He's ever the labor organizer.

What was fascinating about this event was how the mainstream information providers utterly failed to capture the diversity, the multiplicity, and pluralism of interests and ideas that were represented.
At the most extreme end, the week was reduced to the battle in Seattle (and I'm assuming that's why you laughed when I said some of you are aware that this meeting happened).

Because there was no central spokesperson or central sound bite, there was a lack of ability by even the most powerful news outlets to capture the essence of the event. This would seem to be an event, then, in which the Internet would be a superior means of conveying information, in part because the information that needed to be conveyed was highly decentralized, and in part because the concerns being raised were concerns that crossed national borders. Indeed, I came across a lot of excellent Web sites with tremendously nuanced and detailed information about different issues. However, the plain fact of the matter is that the vast majority of folks who learned about the WTO Ministerial Meeting learned about it not by cruising the Web, but by what was portrayed on the five o'clock news that evening. So it's important to remember that the Internet is not only connected to pre-existing cognitive apparatuses, as I just argued, but it's also just one part of a much larger media picture.

What we forget about when we analyze the Internet as a new, different, and special communications medium is that it is strongly shaped by other communications media. And I would argue that images generated by television news have much more impact on our cultural substrate than the communicative subcultures nurtured by the Internet. There are some people who do research on Internet fan sites, people who put up sites that express their enthusiasm about stars such as Antonio Banderas or shows such as Star Trek, but even these fanzenes or fan sites still begin with Antonio Banderas or Spock as constructed by Hollywood. So this is still another kind of network effect. It stems from the fact that the most powerful cultural images are still ones conveyed by the mainstream press, and the Internet is reactive rather than proactive in shaping this cultural imagery. And from the fact that if someone is going to get news about the WTO from the Internet, it's likely to be from the CNN Web site, which is simply an extension of CNN, the broadcast station. The Internet is not as proactive as we'd like it to be in shaping the cultural software that we use to evaluate ideas.

Now, this might change with the latest generation of children who have grown up since they were in diapers with Internet technology, but even they, and I use my own children as a nonrandom example—sample—find much more of their information on mainstream media than they do on the Internet. So, if that's so, then the different interests represented in Seattle will still have difficulty in being heard despite the decentralizing and democratizing impetus of the new technology.
It's too early to tell, but a network effects metaphor would predict that rather than an increase in cultural diversity and pluralism, the Internet may not significantly increase, or may even flatten, that diversity. Others have made the critique of the marketplace of ideas metaphor with respect to traditional communications media in ways that are much more thorough and incisive than the small contribution I make here.

One might ask why this metaphor has had and continues to have such a grip on the American legal imagination and whether other cultures would invest it with such emotional and symbolic significance. According to Paul Brietzke, a real First Amendment scholar, in his article, *How and Why the Marketplace of Ideas Fails*, “the symbolic and educative functions of law could now be used a little more actively to help create the society we can and should become. Absent a reformulation, the marketplace of ideas analogy serves to celebrate failures of legal imagination.” His challenge to the marketplace metaphor is even more important in the context of the Internet because the First Amendment may begin as a local U.S. ordinance, but because of the nature of Internet technology it becomes a global norm, and we've alluded to this fact a couple times already.

The normative consequences of the First Amendment then affect many, many communities outside the United States, including those whose cultural currency is far less valuable than the dollar based, English language based, power base of the United States. If we are to adhere to the marketplace metaphor, as it appears we are with the current Supreme Court's approach to the Internet, then at least we should be aware of, if not actively ameliorating, the potential market failures that can accompany the exchange of ideas in these new communication spaces. Thank you.

**MS. LEWIS:** I'd like to thank both Mr. Lefevre and Professor Chon for their very insightful comments. At this point, we have some time for discussion and questions. This program this morning is being taped, so we would ask that you please go to one of the two microphones to pose your question. And I think I'll begin by asking a question from a librarian perspective, and I will try to make the question more brief than my introduction was.

As a librarian, or as we sometimes like to call ourselves, information professionals, one of the issues that we struggle with as we look at information is how to evaluate it for accuracy as well as how current and up to date the information is. And when you look at the Internet, it's a wonderful source in terms of currency because information can be made available almost instantaneously, but when you look at the information in terms of how accurate it is and whether you can rely on it for
whatever purpose you may need it for, there are real concerns as to how you evaluate it for accuracy. And my question, really, for anyone on the panel, is can our marketplace in cyberspace really help the information consumer to evaluate the quality of information that’s on the Internet?

MR. LEFEVRE: I’ll start by suggesting that as with all of the sources of information that you always have, you consider the source. If it is the New York Times, or if it is my company, I would hope that you would be able to rely on that information. But it also forces the Internet user to develop his or her own critical thinking about what you have received. And if what you are looking at is too good to be true, chances are it is too good to be true.

MS. CHON: Again, I would agree to a large extent with what was just said, but I think that there is sort of a false assumption that rational, critical thought can always evaluate—be used to evaluate—information on the Internet. A good example of this is the World Church of Creation, which is one of the hate groups that has a large Internet presence. If you go to their Web site, it seems very rational, and even to, perhaps, an adult, but clearly to younger folks. Evaluating this Web site on the criteria purely of rationality is not going to help that person decide whether this is a good idea or a bad idea. And this goes to my thought that a lot of the way we evaluate ideas has emotional and sort of a nonrational component to it. We tend to forget that in the law world because we are so skewed towards the sort of rational evaluation of ideas.

MS. LEWIS: Question?

PROFESSOR BLUMOFF: While I agree with a great deal of what Professor Chon said, it strikes me that whether the Internet expands the market, flattens the market, or even depresses it is really a matter of perspective. If you’re in Eastern Europe, and having lived under a Communist nation, a Communist rule, and you’re now getting Western information and ideas, the Internet has expanded your horizons. Similarly, if you’re in parts of Africa where women are routinely brutalized, it may have expanded your horizons. That doesn’t mean that there aren’t dangers down the road that our currency in this country will come to dominate other currencies and we want to be—take care to preserve those local currencies that are worth preserving. But it seems to me it’s all over the place, whether it flattens, expands or depresses.
MS. CHON: I agree with that. I think that both processes are happening simultaneously, and it's a question of being aware of and sensitive to the impacts that American media or American-based media, such as Internet technology, have on these other cultures. Clearly there's some very positive aspects to the Internet access by people from those other countries. But I'm sort of sounding a cautionary note here.

MR. LEFEVRE: One of the side events I think of the Internet, and one of the very subtle ones are the links at the bottom of the page. When I would read a New York Times article or read a copy of Time magazine, what you see is the entirety of what that reporter or what that editor is presenting to you. But now a routine practice on the Internet is that at the bottom of an article there are links to other sources of information, and perhaps to the kind of diversity that Professor Chon is talking about, that you at least have the opportunity of witnessing some of these other, some of these other cultures. The Internet is really Marco Polo all over again. And just as we saw an infusion of different cultures across the world, west to east and east to west in that case, we're seeing the same thing again here, only it's happening at breakneck speed.

MR. JAFFE: Let me ask Professor Chon. I was very interested in your talk and some of the things you said are very worth thinking about. I just don't know where they take you, and I'd like you to maybe expand a little bit on it. I remembered as you were talking a thing that Winston Churchill said, which was that "democracy was the worst political system except for all the others." In the same sense that I think that I understand that we all must be aware of a great deal of irrationality in the world and we shouldn't over—it is irrational for us to actually mesmerize ourselves into thinking that everything follows logical patterns. But, still, in trying to view with ideas, what is the opposite of the marketplace of ideas?

I mean, in other words, what is the better system that one would be aware of. In other words, it's one thing to say that the marketplace of ideas doesn't work perfectly. That Adam Smith's theories may be just theories and in reality there is divergence, but what do you put on the other side? What would we do? Democracy really depends on some belief in the rationality, or at least the willingness to act as if people are rational, because otherwise you can't really have a system of democracy because either the people are too stupid or too irrational to be trusted. So I wonder, you didn't spell out what the other system that you think would be better in its place, a better metaphor.
MS. CHON: Yeah, that's a really good question. What would be the metaphor that would be more apt than the marketplace metaphor? I actually hadn't thought of that. I was really thinking just of why the marketplace actually fails in this particular context. But I would point out, and I loved last night's talk. I thought that many of the points that were made last night were very, very good, but that was a very First Amendment absolutist position, and many people have made the critique of that position that it really does not necessarily lead to an increase in the amount of democratic discourse or the amount of sort of rational discourse. But, in fact, what we see on the Internet, as a matter of fact, and our last night's speaker pointed this out, is pornography. So we have this culture of porn rather than a culture of sort of, you know, rational exchange of viewpoints that occurs. He mentioned hate speech, and he mentioned some other aspects that are less than savory.

And, so, what happens, I think, when one takes a totally absolutist libertarian marketplace perspective, a laissez faire marketplace perspective, is that we allow these externalities to go unchecked. I'm not quite sure that that's where we have to be. And I think last night I mentioned that there are other Western democracies that have made a very, very different—they've struck a very different balance with respect to things such as hate speech so that you can be a Western democratic country and at the same time regulate certain forms of speech on the Internet or off the Internet.

I'm not answering your question about what would be a better metaphor, but I'm simply here to kind of say, well, I think that we can't rely on—we can't assume a can opener as sort of the classical economic theory might assume. We can't assume complete rationality. We can't, and even in the United States the Justice Department Antitrust Division does not assume a can opener.

MR. LEFEVRE: I need to add that one of the points that we haven't discussed yet here this morning, and it's number one on my list, is access. One of the things that Professor Abrams said last night was anybody with a phone line can get on the Internet. Well, what if you can't afford a phone line? And I think perhaps part of the answer to your question is to improve the marketplace is to put more people in the market, to find ways, to devise ways to get more people out there, to get more people familiar with, comfortable with, expressive with the Internet. And by expanding the marketplace, by simply putting more people in it, you by the very nature get more ideas into the Internet. And, perhaps, perhaps get a better democratization, he said carefully, of the Internet.
QUESTION FROM AUDIENCE: I just wanted to ask whether something like the antitrust laws could be analogous, or something analogous to the antitrust laws would be better than the complete laissez faire. I don't know exactly how to describe it, but it seems like that's what the antitrust laws are designed to do. The two alternatives are laissez faire and direct regulation, but we have antitrust laws to come somewhere in between those, and it seems to me something like that could be used in this area.

MS. CHON: Sure. That's precisely what I'm trying to argue here is that if we're going to talk about this marketplace, that we can then analogize to regulation of actual markets through antitrust law, and there are lots of different kinds of market failures. The one that I talked about today was network effects. And there are lots of different forms of regulation of speech, although we tend to try to ignore those, but we don't allow defamatory speech, we don't allow obscene speech, we don't allow threats to the President. And, so, there are lots of ways in which speech, in fact, is regulated despite the fact that we do have a very strong First Amendment tradition.

So the idea of regulating speech is not an anathema to the United States, you know, the First Amendment idea of free speech, but it's actually—it has actually—speech has always been regulated. It's a matter of degree. And it's a strike—a balance is struck among different social values.

I think the perspective that Greg expresses is a very common perspective on the Internet. It's very libertarian-driven, a very freedom-driven perspective, and I'm suggesting that one of the other values that we might want to throw into the mix and perhaps give a higher value to is the value of equality, the value of human dignity. These kinds of values which don't necessarily—are not necessarily in conflict all the time with the idea of freedom of speech, but there are times when there is a conflict and we need to then recognize that explicit conflict and do an explicit balancing. And that can lead, then, to a decision perhaps to regulate certain forms of speech in addition to what's already on the table.

MR. LEFEVRE: May I come from a slightly different perspective that perhaps what we need to do is obviate the need for antitrust regulation by finding ways to enhance the openness of expression on the Internet, to find ways to bring those other views to the Internet. And, if you will, defuse this issue before it becomes more serious.

MR. JAFFE: That hasn't worked in the economy.
MR. LEFEVRE: It has not worked to some degree in the economy, but as the price of getting on the Internet, the actual dollars and cents of getting on the Internet goes down and has plunged in the last year or so, the economic issue is much less significant than it was before and will become less and less so. But I think we need to radically accelerate that process to head off just the very issue that you're discussing.

QUESTION FROM AUDIENCE: I'm unclear what barriers to access egalitarians, humanitarians, and critical race theorists face that hate groups do not face in getting on the Internet?

MS. CHON: Well, those groups, I assume that you're talking about fairly affluent people within those groups. Civil libertarians, humanitarians, and race theorists are people who presumably have enough income so that they can think about the world enough to have a theory, or to have a stance about hate speech. But I think that there is a demonstrated—what's called a digital divide, which the NTIA, the National Telecommunications and Information Administration, one of the agencies. The Clinton administration has found through this agency, and has published pretty much every year studies that have indicated a dramatic difference in Internet access between White households and Asian households, on the one hand, and Black and Hispanic households on the other hand. A very, very dramatic divide in terms of access. There's also very much a divide in terms of income. There's a direct correlation between one's household income and Internet access. And, so, people who are at the bottom of the ladder, typically female-headed, single parent households, either Black or Hispanic, tend to fall, of course, at the very bottom of that access measure.

Now, this is a crude measure for diversity of viewpoint, but I think it's close enough so that we can then argue that these are people who are not going to be on the Internet with their presence, with their Web pages, to project their particular perspective.

But my argument was a little bit more subtle than that. Even assuming there is access, even assuming that we give each of these people who don't have a computer, a brand new computer, which is what Bill Gates is doing in the Seattle school system right now. He's sort of giving the school system a lot of money so that all of these terrible schools have computers for the kids in the schools. Even assuming that, there are going to be structural barriers to hearing those points of view because we're not used to hearing the voice of a fifteen-year old Black kid as being the voice of authority. We're not used to crediting the experience of someone who is a homeless person as opposed to someone like me, who is a law professor. And, so, there are sort of built in
barriers regardless of the actual, you know, the actual computer access issue, that impedes certain ideas from really being heard, and others—other ideas get a lot of air play, almost too much.

**QUESTION FROM AUDIENCE:** Your response, though, makes me remember that the same economic observations have been made about white supremacists, that they tend to be drawn from—

**MS. CHON:** Increasingly—

**QUESTION FROM AUDIENCE:** — lower economic groups than the white population at random or other segments at random.

**MS. CHON:** Yes.

**QUESTION FROM AUDIENCE:** And I’m wondering about how many speakers does it take on such issues when you can have so many receivers to have a marketplace of ideas there, and how is this worse, how is the relative balance of access, communications access, worse now with the Internet than it was before. The other, on your second point, David Duke and his thoughts are not typically received as authoritative by most Americans either.

**MS. CHON:** That’s true, but his Web site gets thousands of hits a week, thousands. And, so, he—I think most people in this room, I would venture to guess everyone in this room, would say that they are not going to subscribe necessarily to the views that he espouses, but there are quite a few people out there, outside of this room, who do, in fact, visit the Web site, and not just out of curiosity.

**QUESTION FROM AUDIENCE:** Then why does the traditional First Amendment answer fail that those with contrary points of view need to put those yellow stickies on that Greg Lefevre was telling us about earlier?

**MS. CHON:** Well, one thing that’s really interesting about your observation about white supremacy is that we tend to focus on that as the incarnation of racism within the United States, the one that we really care most about, and there are two things about that. One is that, in fact, there is evidence that white supremacists are becoming better educated. The person who is sort of founding, I don’t know if I want to say a founding father, but one of the founders of the World Church of Creation, for example, is a college-educated, very well educated person,
and there is a trend now for that type of very, very pathological type of
racism to be found, and found respectable, even among educated people.

But the other thing that I would say is I'm concerned not so much
about that, that's just an indicator of perhaps an underlying pathology
which is harder to get at and which I sort of described in my talk as
unconscious racism. That is very hard—it's very, very hard to disrupt.

**QUESTION FROM AUDIENCE:** And has been hard before the
Internet as well.

**MS. CHON:** Uh-huh (affirmatively).

**MR. LEFEVRE:** To continue, there is a demonstrated cultural bias
against technology among many African-American and Hispanic
segments of our society in part because technology has for years been
perceived as the white person's invention, the white person's tool. That
has been perpetuated by the impoverishment, deliberate or not, of many
of the minority communities who did not have access to these technolo-
gies. And, so, you have economic and cultural issues that deprive
significant segments of our society, consciously or unconsciously, from
access to the Internet. And I think the Internet, as we see it, is
something bold and creates great opportunities, whereas many others
simply can't get to the door either by cultural or economic circumstances.

**MS. LEWIS:** I'd like to follow up on that comment with a question
purely from the technological standpoint. When the Internet first came
into existence in the late '60s and '70s and early '80s, it wasn't accessible
to most of us, not just because it wasn't widespread but because
technologically it wasn't an accessible means so that we could use it. It
was graphical. It wasn't in the user GUI interface that we all know and
it's very easy now, and I'm wondering if from a pure technology
standpoint if as the computers become more sophisticated, as the way
the technology is used becomes more advanced, if that might not cure
some of the defects in the marketplace and make it more accessible to
people in spite of the socio-economic barriers that may exist.

**MR. LEFEVRE:** I think absolutely. The automatic transmission
liberated many of us who still have a difficult time with three pedals on
the floor, and the same I think is true with the GUI interface. And at
the same time, as the prices physically, or realistically, as the prices
drop it just gets a whole lot easier. But I think the answer is absolutely
yes.
MS. KESSLER: I think another thing that we need to keep in mind when we think about some of the ways that we try to address the digital divide is that federally Congress has made a pretty serious commitment to try to wire public schools, private schools, libraries, through the so-called E-rate. But the E-rate is also being, I don’t necessarily want to use the word attacked, but I can’t think of a better word, from a First Amendment point of view with a number of different proposed riders to this saying if a school or library gets federal funds to wire a low income community and to provide this kind of access for folks who may not have access in the home, they must install and use filtering programs. And while I have no issue with filtering programs being used as an individual decision in a private home, I think one of the things that people need to keep in mind about filtering programs is that they are not metered to a test of objective obscenity that would be recognized under the law. They are subject to the same kinds of cultural interpretations that Professor Chon was discussing in her talk. And I’ll talk about that a little bit more when I speak longer. But it just seemed relevant at this intersection.

MR. LEFEVRE: I want to add something to, I believe the question was raised about the egalitarians and libertarians seemed to have a better voice on the Internet, or don’t seem to be as prominent on the Internet as they are. They’ve had plenty of access to the mainstream media, and if there is a balance there, that may be it. That that particular point of view, I think, has been well expressed and continues to be well expressed in the larger mass media, and perhaps those organizations have not felt the need to go to the Internet, much as we found what we call the hate groups or the minority opinion groups have fled to the Internet because it is perhaps their only way of getting out there, having been effectively filtered out by organizations like mine.

MS. LEWIS: Are there any other questions? We are back on schedule. We will take a fifteen minute break and reconvene at 10:45.

(BREAK 10:30 A.M. TO 10:45 A.M.)

MS. LEWIS: We’ll continue our excellent program this morning with two provocative presenters. One is an industry advocate who is a frequent speaker on commercial speech issues before the national news media, and the second is an attorney who has worked extensively as an advocate on the issues of free speech and the Internet.

Mr. Daniel Jaffe is currently the Executive Vice President of the Association of National Advertisers. Mr. Jaffe joined the ANA in 1983
and held the position of Senior Vice President and head of the Washing-
ton Office before being promoted to his current position in 1989. For those of you who may be unfamiliar with the Association of National Advertisers, as I was recently, it is that industry's oldest trade association. The ANA is comprised of nearly 300 companies and represents the interests of 8,000 separate brand entities, which is a majority of all national and regional advertising in this country.

As a leader for the ANA, Mr. Jaffe directs its government relations program and monitors federal, state, and legal initiatives that may impact upon the advertising industry. In this vein he has participated in many of the major commercial speech cases in the past decade and has worked with leading constitutional scholars and advertising advocates.

Prior to his work with the ANA, Mr. Jaffe spent several years with the American Advertising Federation. He also has extensive experience on Capitol Hill, having spent eleven years on U.S. House and Senate staffs. Additionally, he was committee counsel to the Senate Commerce, Science and Transportation Committee.

Mr. Jaffe holds a Master's Degree in Public and International Affairs from Princeton and a law degree from the University of California at Berkeley. His talk this morning is entitled, "Advertising, the Marketplace, and the Marketplace of Ideas," and we look forward to his views.

Our final speaker of the morning is Ms. Liza Kessler. Ms. Kessler is presently staff counsel for the Center for Democracy and Technology in Washington, D.C. In that capacity she is primarily responsible for representing the CDT on Internet free expression issues. Among her projects has been coordinating industry and nonprofit organizational efforts in developing the content of family Internet safety resource known as "GetNetWise." She has appeared in various public fora on behalf of the Center for Democracy and Technology and was an advocate for the Internet industry, a nonprofit sector, in a recent challenge to the Children's On-Line Protection Act.

Ms. Kessler is an experienced lawyer in civil rights and First Amendment litigation, having previously practiced in those areas with the Jeff Scott Olson law firm in Madison, Wisconsin. She has written several articles on First Amendment and the Internet, and is co-editor of the periodical called Rights, which is a publication of the Wisconsin Bar.

Ms. Kessler has used the Internet for on-line communications for over a decade, longer than any of us have even known about the Internet. And for much of that time she has been a telecommunications policy advocate, working on these issues with the consulting firm Leslie Harris
and Associates, with the Center for Public Representation, and with the office of former Wisconsin State Senator Lynn Adelman.

Ms. Kessler did her undergraduate work at Smith College and received her law degree from the University of Wisconsin School of Law. This morning she will speak about “The Internet, Community Standards and the First Amendment: Why Empowering the End User is the Only Legal (and Effective) Way to Control the Internet.”

Our final two speakers of the morning are strong advocates who will no doubt share some interesting views on the marketplace of ideas in cyberspace, and it is now my pleasure to invite the comments of Mr. Daniel Jaffe.

MR. JAFFE: Thank you very much, and I want to thank all of you for being here on such a beautiful day. When I was in law school, I don’t think I would have been here, but I really do appreciate your having done that. And I want to say when I came down here, I asked some people, I had never been to Macon, about it, and they said, “Oh, that is a place that really still does have the Southern hospitality.” I come from a city where John Kennedy described it as having Northern efficiency—I mean Northern—Southern efficiency and Northern charm. And, so, coming to a place that actually has Southern charm is a great experience.

And I’ve been very interested in the talks so far because we really are a very diverse group, and the ideas that have been expressed, some of them are really quite new. I think that the speech that Floyd Abrams gave, I had talked to Floyd many times on these issues because he’s actually been one of our lawyers on a number of advertising cases, and he was really breaking some new ground there. And what he was basically saying, as you remember, is that while everybody is enamored of the Internet and sees it as a great opening for freedom, that this very freedom and difficulty to harness it may lead to actually diminishing not only the freedom on the Net but for the normal and everyday media that we see all around us. That if everybody is a publisher, who is a journalist? And if all these great ethical requirements that some of our better media groups have developed are not seen as anything but part of a great mass of journalists, maybe nobody will be given that protection. And in the same sense, if every person’s information can be really easily accessed, will you have less information be allowed to be put out than more? And I’m going to talk today a little bit about those privacy issues and a little bit about how advertising relates into this whole mix, because my general feeling is that the Internet rests on a very unstable foundation, a very unstable economic foundation, and that
that unstable foundation may be very seriously threatened by some of
the reasonable concerns that we have about privacy in our society.

I'm going to take a very positive, you'll be surprised, I'm going to take
a very positive side to the value of advertising in our society. You know,
representing the association that represents the largest advertisers in
this country, I'm sure you're surprised that I would do a thing like that.
Our members do about a hundred billion dollars worth of advertising
every year, which is about half of all the advertising done in this
country. But I want to make it clear that I am skeptical about
advertising, as you should be, as you should be for any other powerful
institution in this society, and I'll be glad in the question and answer
period to go into that if you want, but I first want to lay out the pretty
picture, and then we can look a little bit at some of the warts that may
be lurking there as well.

Today we face a pivotal time in the history of cyberspace. Five years
ago there was a raging debate within the advertising community. Was
the information superhighway merely an amusing marketing toy or
would it irrevocably change the advertising world as we knew it? I can
remember very well going in and talking to two of the major leaders of
the advertising community about a symposium I wanted to have held on
the Internet, and what they said to me is, "Oh, we can't do that. Nobody
in the business who really counts cares at all about the Internet. It's not
a medium. No one is spending any money on it. Don't waste your time."
Well, we held it anyway. I was persuasive, but it was really a major
argument.

I was also successful in getting our association and the American
Association of Advertising Agencies, which represents the large and
medium-sized advertising agencies in this country, to put together a
group called CASIE, the Coalition for Advertising Support Information
and Entertainment. And the purpose of CASIE was simple: to try to
convince Netisans that there was a key role for advertising in cyber-
space. I don't know if you remember, but if someone put an ad on the
Net and tried to sell something they were likely to be flamed. They'd get
thousands, sometimes hundreds of thousands, nasty little notes saying
how could you possibly do a terrible thing like that? How can you
commit capitalism on our wonderful, pure Net?

Well, what a difference a few years make. The Internet now is the
fastest growing medium in history. Radio took thirty-eight years to
reach an audience of fifty million people. It took television thirteen
years to reach thirteen million viewers. It took Cable ten years to
accomplish this feat. But it took the Internet in the United States only
three years to reach this same goal. It's absolutely unprecedented. And
these numbers keep exploding. In 1998 there were 128 million people
on the worldwide Net. One year later there were 171 million. And there is really no end in sight.

In 1996 only 300 million dollars was spent on the Internet. That was when I was trying to put this conference together, which is just chicken feed as compared to all other media. By 1998 it had reached 1.6 billion dollars, and by 1999 it was 3 billion dollars, which is more than all the advertising on outdoor advertising in this country, a very old and established medium. So it's already overtaking some of the earlier media and it's quite likely to be projected to take up more and more advertising as time goes on. And this is a cyberspace revolution.

Advertising, as I just said, was first considered an anathema on the Net. Now the subscription pay as you go model, which originally financed the Internet, has virtually vanished and been totally eclipsed by advertising support. So the title of today's session, "The Marketplace of Ideas in Cyberspace," clearly should be amended to take into account the fact that the marketplace of ideas now is being underwritten by the marketplace itself. And I would argue that the growth of free speech can become too expensive to sustain unless it rests on a firm economic foundation, and that's true, in my view, of both on-line and off-line, because obviously advertising pays for all of the news that you get on CNN and all the programming, and for broadcasts it's the total funding, and for newspapers and magazines. They, generally from what they get from the payment of the magazine or newspaper would pay for the printing but would not pay them for people such as yourselves who actually do the work. And, obviously, the more advertising they have, the more articles and the more stories, et cetera, that they can produce. So advertising is a critical foundation of information transfer, not only on economic issues but across the board.

My view, again, these economic developments should be cause for relief. I gave a speech about five years ago saying that when the subscription model was at its height that we had to be very, very concerned about this because what this meant was that those who had the money were going to have the information, and those who didn't have the money were going to be priced out of the marketplace of ideas, a very undemocratic, a very unequalitarian way of doing things. So because advertising provides information cheaply, it potentially enables everyone to have more information at lower cost than at any time in history. It just boggles my mind to see the kinds of information you can have whenever I go up on the Net on almost any subject. What it is is trying to find through that mass what information you're not going to look at rather than what information you can find. No longer must any part of the world be so remote or so destitute as to be cut off from the information revolution.
The digital economy also can solve a major and growing marketing dilemma. Recently the consumer audience has been fragmenting enormously. Now it is more and more difficult for companies to reach a mass market. Back in the 1950s and 1960s there were three networks. Now there are five or six, mattering on how you count, and there are hundreds of cable channels, increasing numbers of segmented magazines to the bass fisherman, to whatever your particular interests are, and this means that marketers have to chase more and more after these elusive consumers. They are paying far more for their ads while reaching a far smaller audience. It creates a huge waste of time and money to advertise diapers to a family with no children or to advertise aluminum siding to apartment dwellers. And, obviously, I'm sure with your own imagination you can list hundreds of ads that you see every day, and you say, "Why are they sending that ad to me? It means nothing to me."

The Net, through personalization, can have a potential impact on increasing economic efficiency and the stimulation of worldwide price, product, and service competition. In other words, now every store in this country is competing potentially with all of the marketplaces all around the world, and this clearly has a tremendous impact already on price. I can give you a whole list of examples in my own personal life from my son finding a yo-yo at $50 less than, he looks at pretty expensive yo-yo's, to my wife finding a watch at one-third the price of what she has seen it in the store that day. So this can have a tremendous real life impact. And here's to the meat of my talk.

But before we become really excited about it and say, "Alleluia, the heavens have arrived and we're in perfection," this whole system is under very serious threat, and the threat is because of the loss, the potential loss, of personal privacy in cyberspace. As Commerce Secretary William Daley stated at a recent forum, "privacy is the make or break issue for all electronic commerce." And a number of congressional leaders warn that the time for action is running out. Either we take care of this problem or they're going to have to step in and take very serious control.

A recent Wall Street Journal-NBC poll is very instructive about how the public feels about this. They were asked this question: In the new millennium, what threats do you fear the most? It might be interesting to ask this group that question. But at least surprisingly to me the answer was not global warming or World War III or over-population or terrorist acts on American soil. Instead the answer was loss of personal privacy. If you're a politician, I can tell you when you start seeing polls like that and you see this is the number one concern somebody is going to the staff and saying, let's do something about this. Let's solve this society's number one concern.
In fact, what we're seeing in the polling is what I would call, if I can pronounce this, statistical schizophrenia. And what statistical schizophrenia means is that if you ask people if they are afraid about losing privacy, the answer, not surprisingly, is yes. I mean if you know anything about the Net, then you should be worried about loss of privacy. But once you drill down below the global questions and provide consumers real world choices, the results are quite different. Alan Weston, who is one of the experts on privacy at Columbia University, has carried out several recent polls, and what he has asked is a little different question. He says, if advertisers were to provide—the question is—would you be willing to provide personally identifiable information to advertisers if in return they were willing to provide a choice as to how this information would be used and would provide you economic benefits including more personalized ads? Over and over again, again by strong majorities, the answer is yes. So people are terribly concerned about privacy, but when they see an economic advantage, they're willing to say that they will give personally identifiable information.

In addition, more important than these surveys is what people actually do. You find that forty-five percent of those people who are now on the Net, approximately fifty million people in this country, have made purchases on the Net within the last years. So despite what people say that because of concerns about privacy people won't come on the Net, and if they come on the Net, they won't make purchases, in fact, real behavior says that doesn't seem to be true. Now don't ignore the fact that there are plenty of people who are not coming on the Net and who aren't making purchases who are concerned about it, but it's not quite as big a problem as people have spelled it out to be.

So will this relentless march of commerce plow over privacy concerns? And I don't think that it will. I just think that these concerns are too real and too important. And, so, the future of the Net, the future of advertising, the future of target marketing, all depend on our finding a solution to the legitimate privacy concerns of consumers. There's got to be some sort of agreement, deal, made between consumers and business on this issue if we're going to really make this system work, because if you don't have that economic foundation, as I said before, a lot of this information is going to start evaporating, or you're going to have the government step in and provide the money through taxes or otherwise, and then you're going to have to wonder what the government is going to do about this information as well.

The on-line community and government are walking a very narrow tightrope. Overly-restrictive privacy rules will cripple the Net. Too little privacy protection and many consumers will continue to stay away from E-commerce.
We need to put the privacy debate into some context. This is nothing new for this country. By the very beginnings of our country, the Fourth Amendment to the Constitution demonstrates that from the very beginning there has been a deep concern in this country about the protection of privacy, that we saw this as a very fundamental aspect of humanity and personhood.

Now, in the famous case of Olmstead v. United States, Justice Louis Brandeis extended the concept further when he described, quote, "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." He put it at the pantheon, the top, of all values. Much later Justice William Douglas stated in Osborne v. United States that "we are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government." In fact, when he said that it was probably not true. The question is whether the Net may make this more true. And this is where the Internet has really altered the picture. In the past big brother was synonymous with government. Now big brother in many minds is not the government, but big business.

Now, frankly, I don't believe most consumers fear or care that a marketer will be able to know what cereal or toothpaste you or I use, and there are millions of facts like that. However, all information is not created equal. Health records, financial data, and information provided by children, just to name a few, are considered, and rightfully considered, by many individuals to be very sensitive. And already we are taking major steps to try to solve these most sensitive privacy data concerns. The Congress, with the support of the advertising community, has passed the Children's On-Line Privacy Protection Act. I was very active in working on this law because we believed that unless people felt that their children were safe on the Net, that obviously you were going to have government—drastic government intervention. And what that Act says is that if you're a child under thirteen years of age, no personally identifiable information can be collected without parents or other appropriate guardians being directly involved in making this decision. In other words, we were saying, kids, at least to that age, do not have the ability to make a clear and sensible choice. And, therefore, parents have to be interposed into this decision.

Secondly, the Administration has just recently passed extensive new regulations on the use of health information, and they said they were

2. 277 U.S. 438 (1928).
3. Id. at 478.
5. Id. at 341.
going to pass more legislation in that area. Also, in the last Congress a major financial services act was passed to layout ground rules as to the use and control of financial data.

But now we come to the crux of the matter, which is what rules do we need to have in place for adult privacy protection in general? Now, our industry has taken the position that we believe that self-regulation must be a critical component of any solution. In fact, a lot of our industry thinks that only self-regulation should be the way to go, that if the government gets into this process that they are likely to mess it up, that they don't know enough yet, and that this is too fast a moving target and it will miss the target. But I think all of our community believes that self-regulation has to be part of that solution because no government can any longer really completely control the Net. It's too vast. You're talking about trying to, and for the first time, regulate a worldwide marketplace in which you're going to have to have harmonization of regulation for all the countries of the world. The lowest common denominator country can set up sites and put them onto the Net, and everybody in the whole world can get them, and the FTC or any other regulator is not going to be able to get to them if Mongolia says, "Sorry, we're not going to let you in." I could give you all sorts of horribles about how people, you call up to one site and suddenly you're put on somebody else's, the Bosnian phone line, and you find that you have $300 worth of phone bills and you didn't even know it had happened. And then when people try to enforce against it, it was not terribly effective.

That's why we set up what's called the On-Line Privacy Alliance. And what the On-Line Privacy Alliance is is a group of eighty companies and associations representing most of the major business groups that believe that if personally identifiable information is collected, consumers must be given clear notice of this fact. It's got to be clear, not just somewhere in the boilerplate somewhere that you can't really understand, and must be given the ability to opt out of its use and transmission, which opt out means just simply that, that if you don't take an affirmative action, nothing happens, but you will always be given the right to say "No, I don't want you to take our information. No, I don't want you to send your information to these and these and these parties."

Furthermore, once a company states its privacy policies, it is legally required to adhere to them under the FTC's false, deceptive, and unfair acts or practices authority. This is an important point. Most people have argued about this as self-regulation versus regulation, and that's not a clear system that's partitioned off. Once people take a positive statement and say where their views are, then regulation is automatically clicked in because you can't say something false, deceptive, or unfair.
It's when you're silent that there may be a problem. And the question is whether you want to force people to talk.

Also, we must not allow the privacy issues that we face to be oversimplified. There's data out there showing tremendous growth among the major companies as to notice and choice, telling people whether they're taking your information and giving people choice about it. What people then say is, the critics say, "But, gee, you don't meet the four criteria," or some people talk about the "five criteria of privacy." And the things that they're really probably focusing on most often is that there's not enough access and security of data. But this is not a simple privacy choice unlike notice and choice. I think everybody agrees that if you're going to be fighting fair with consumers, you've got to let them know what you're doing and give them some choice about it. You can't just steal their information, ship it off, and then take advantage of them.

But when you start talking about access and security, at least at this point in our technology, it's not so clear cut because if I lower the barriers of access so that it's easy to get my information that the business groups have collected, it's not only easy for me, it's also easy for somebody who may want to do identity fraud. Or it may be very easy for somebody who wants to hack into the system and steal everybody else's information.

On the other hand, if I make it very hard, so that you have to have a whole set of criteria before you can get to your own information, then that's a problem, too. It is not one of those things where everybody can agree that there is a simple area. We really are going to have to make some breakthroughs, I believe, both in technology and thought. You've got to watch out that if you set up these systems too high, also you create enormous barriers to entry because when Amazon.com can come in and start competing with Barnes and Noble, a group that's had a hundred years to create its name, and effectively start creating that price competition, if you start creating incredible requirements right from the get go, the guys in the garage aren't going to ever get to be Amazon.com, or be an effective company.

And remember one thing, which is a very critical point about this whole process, very few companies, even though the stock market is going crazy over them, are making money. There is going to be an enormous shake out. And, so, just assuming that you can slap on any kind of restriction on groups and not have very serious economic effects is just wrong.

So let me just conclude now by going over a few of what I think are the important issues still to be decided. I'm sorry that I can't give you the answers to each one of these. I can give you a reaction to each one of them, but these are the things that now still need to be decided.
First, we must decide whether privacy regulation encompasses nonpersonally identifiable information. When you go on the Net and you have an unstable I.P. number, that's an identification number from your computer, I don't know who you are, but I know you're—I can track you. I can put a cookie on you right away. Does everybody know what a cookie is? A cookie is an electronic identifier. So you come to a site and just go to your browser and you can ask your browser to show this. Most browsers will do this. You'll see that someone is putting a cookie on you automatically and starts tracking you as you're in those sites. I see some people shaking their heads. This is probably the biggest problem in this area is that lots of people are using the system and don't understand how the architecture of the system works, and it's our business, the business community is going to have to start teaching people because that's part of fair play. So once you have that cookie, they can follow you. They do not necessarily know who you are.

This may change very quickly if everything starts going through Cable, because if you go through Cable, you'll have a stable I.P. number. In other words, that number will be for your house. So while they won't know who is doing it, they'll know that it's somebody in that house. If there's only one person in the house, the odds are high that they know who it is. People come over and visit, it's not perfect, but they'll have a pretty good idea who you are.

But the question is do you have to tell people up front when they're just tracking and they don't know who you are? We've never done that anywhere else. Maybe we haven't done it anywhere else because it's not—we're not collecting as much information. Our view generally has been that nonpersonally identifiable information does not raise a privacy concern until it's merged, until we do know who you are. And, therefore, the protection should be in regard to merger and whether the government can come in and subpoena and take nonpersonally identifiable information and connect it to personally identifiable information and hurt you, and that we don't need to be constantly giving people notice.

Giving people notice every second is not necessarily a favor. Anybody who has been on it with a slow system understands that one of the most important things about a good computer and making it effective is being able to use it interoperably and in an effective way. So you've got to think about that.

And that gets to my second point. We must decide how to give consumers choice in the on-line world. Is always requiring an affirmative action by consumers, in other words, opt-in, or can information be collected until a consumer opts out? We must be very careful that we do not barrage consumers with a thousand points of choice during their everyday on-line surfing experience. We must not turn the information
super highway into a slow residential street with speed bumps and stop signs at every intersection.

Now, I don't believe that for sensitive data. I mean if data is sufficiently sensitive where somebody could obviously be immediately hurt by it, then you may want to have a higher standard. I mean when I say that I don't believe that, I think you at least have to consider whether you want to have a higher standard. But for general use an opt-out system we believe is more effective and, in fact, will provide all the protection that grownups need.

Third, we must be careful not to allow Internet to become Balkanized, and this is a tremendous danger in this area. If every jurisdiction begins to impose different privacy and Internet rules, the value of the Internet can very easily be destroyed, and this is very real. If any advertiser, or you, decide to put up a Web page and then start to sell from it, you immediately become a local, state, federal, international advertiser. And at every one of these points somebody can start putting regulations on you. If those regulations are divergent, and they are likely to be divergent, then the group with the strongest requirement is likely to make the law. So Massachusetts then becomes the federal government, or Maine or Montana or whoever puts in the strongest law. This is a disaster in the off-line world, and it would be even more of a disaster on the on-line world because you then start throwing in other problems such as international law.

Now, the courts have made clear that the Internet privacy issue is not merely a question of policy. A lot of people just talk about it, is this a good idea, should we do opt-in/opt-out, should we require nonpersonally identifiable information to be included or not? The courts are starting to make clear that there is at least a First Amendment aspect you've got to think about.

On August the 10th of last year the Circuit Court of Appeals in *U.S. West v. the Federal Communications Commission*, in the Tenth Circuit, held that government mandated privacy restrictions are highly suspect. The court made it clear that an opt-in approach which requires the consumer to affirmatively agree to use of his personal information or be assumed to object to such use was likely to suppress speech and to violate the narrow tailoring requirements of the *Central Hudson* test. The *Central Hudson* test is the primary test for advertising which says you have to have a substantial interest directly advanced in a narrowly tailored way to regulate truthful and nondeceptive speech.

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6. 182 F.3d 1224, 1239 (10th Cir. 1999).
7. *Id.*
8. *Id.* at 1234-35.
Fifth, we must decide whether the privacy regimes applied on the Internet also will be applied off-line. FTC Chairman Pitofsky stated that he wants to examine this issue carefully. What's happened is most people in this country really didn't know what business was doing in regard to collecting information about them, but when the Internet came into play people started saying, "Hmmm, very interesting. I didn't know about that. Oh, they're collecting my..." And then they started thinking, "Well, what is happening in my Safeway, with my Safeway Card, what's happening with my credit card, what's happening when I go to get my driver's license?" All these issues have been threshed up. And, so, we're going to have as a society for the first time a comprehensive look at privacy, either right away or certainly down the road. And there is a question, maybe one of the key questions for all of us is is the Internet different and is it sufficiently different so that we should have different rules?

Finally, and we have to, and I've already mentioned this, think about the fact that the European Union, which has privacy requirements both for on-line and off-line information gathering, are demanding that no information be able to be transferred from these fifteen European countries to any other country that doesn't have adequate privacy protection. And, so, we have to in this area certainly start thinking about harmonization between our country and all of the other countries of the world, and that's really not true for television, for radio, for any other medium in the past. You hear about cultural imperialism with the movies in France, and they say you're destroying our culture by the fact that all we can see is your film coming in. They try and put up restrictions on it. Canada has some rules on that. But this is going to be a very significant issue.

So, in conclusion, we must realize that privacy issues will play an enormous and increasing role and substantially impact the marketplace of ideas. The Internet has facilitated the growth of a worldwide information community and a worldwide network of intercommunication and conversation unprecedented in history. Therefore, enhancing and protecting these interests is essential, not only for the business community, not only for the consuming public, but for the future democratizing forces of worldwide rapid communications and debate. Thank you.

MS. KESSLER: Good morning, and thank you all for staying so long and being such a very attentive audience on a Saturday morning.

The first thing that I want to talk about is the Internet as a global decentralized and small "d" democratic medium. Professor Abrams yesterday talked a lot about how the court is in love with the Internet
and that he thought that that was in part because they didn't know what was on the Internet. But I think a part of why the court is in love with the Internet is because of its global and decentralized nature and the fact that anyone can be a publisher.

Now, most of the discussion we've had about that over the course of this conference has focused implicitly on the fact that anybody can put up a Web page. But I think actually that the fact that the Internet is so global and so decentralized has a lot more to do with the ways in which we create community on the Internet, not merely publishing Web pages, but the fact of, there are, I believe the last time I checked this was several months ago, there were over 20,000 different e-mail list serves listed on List.com that anyone with an interest in feminist librarianship, Christian quilting, dog breeding, bassfishing, or any other niche interest can find a community of people who may not exist where they live but who share some common interest that they have. List.com also lists about 10,000 fewer chat rooms that are thematically oriented and may also provide communities for the same kinds of range of interests. The Internet, as was described by the Supreme Court in the Communications Decency Act decision contains information as diverse as human thought.

Now, Web pages may also form communities, perhaps to a greater or lesser degree than the kind of interactive discussions of list serves or chat rooms, perhaps more analogous to a community of people who subscribe to the same newspaper or magazine, although even Web pages can have a very interactive component. Last year, in the post-Columbine High School tragedy, in the wake of that the community of slash-dot-dot-org, which is a, quote, "geek oriented" news Web site, was practically overwhelmed with discussion and reports and comments about what was being called geek profiling going on in high schools, where kids who might be black trench coat wearing, anti-social outcasts were sort of being descended upon en masse by school guidance counselors and their worried parents who may have had legitimate concerns about what was going on with their kids, but who may also have been targeting some kids inappropriately who were not necessarily any kind of threat to their community but were simply kids who were different and didn’t fit into the mainstream of their communities. And there were probably 15,000 responses on the slash-dot-dot-org, it's harder to say than you would think, Web site related to that, and John Katz, who was the primary author of the original story on geek profiling was interviewed on NPR and CNN and sort of all over the place talking about this outpouring of community in what had up until that point been a fairly narrow niche and small interest community on the Web.
That being said, there are also attempts to restrict content on the Internet from a variety of different points of view and in a variety of different venues. In this country, no attempt to restrict content on the Internet has been found to be constitutional, starting with the Communications Decency Act, which would have criminalized indecent speech on the Internet.

Right now the Children's On-Line Protection Act, not to be confused with the Children's On-Line Privacy Protection Act that Mr. Jaffe spoke about, Congress passed two very similarly named bills in the course of about a month, and it has led to an enormous amount of confusion on the part of people with interest in children and the Internet. But I am talking about COPA, not COPPA. The Children's On-Line Protection Act, which would have criminalized knowingly putting material that was harmful to minors for a commercial purpose out on the Internet was somewhat more narrow than the Communications Decency Act, but has still been found at the district court level to be unconstitutional because there are less restrictive means available to protect children on the Internet.

In the meantime, regulations in Singapore and Australia have been enacted that prohibit different levels of obscenity or harmful to minors speech. Recently, Germany has decided that they were requiring server level filtering of MP-3 music technology, and we're seeing different kinds of attempts to filter different forms of speech. There's obviously been a great deal of discussion of hate speech, which I think largely has been an issue where we're trying to translate rules that apply in different countries from the off-line world into the on-line world.

But the fact is that these means have not thus far been particularly effective. In Australia, the Australian Broadcast Authority has quietly been saying, "We know we can't enforce this law. We're requiring all Australian ISP's to offer filtering technology to their users, but we're not going to run around trying to figure out whether people are secretly downloading material that would violate this law because we know we can't." Now, in cases like China where encryption technology and other kinds of software has been more, in fact, restrictive, we see that there are going to be, and there are, you know, more effective attempts to actually filter out access to information.

But as we move into a broad band world where wireless access to the Internet becomes a more real and more affordable and more commonplace thing, where everyone's Internet access doesn't go from their phone to a central server and then out into the real world so that there is no bottleneck upon which a filter can necessarily be placed by a government, I think we're going to see that this technology is, its inherent chaos will continue making blocking of access to information or
government censorship a very difficult thing to, in fact, do, which does not mean that attempts will not be made or that those attempts will not chill speech. But there's sort of an underlying hope in the libertarian chaos of the Internet, in my opinion.

Another thing to think about in this area is that there are international movements to try to address what is being called self-regulation but which may not be what we, in the United States, mean by self-regulation where groups like the on-line privacy alliance and other trade association types of organizations say we're going to develop the rules for our industry, and once we've developed the rules we're going to, you know, there will be a government role in enforcing them. In a European context, self-regulation often has a much more active hand of the government involved in developing the rules, and there are current efforts being sponsored primarily by the Bertelsmann Foundation, which is the nonprofit arm of the Bertelsmann German multi-media conglomerate, to require, for example, labeling of all Internet content that would then allow consumers to set the filters in their browsers, picks based filters, to allow in or block out different kinds of information based on how it was labelled by the authors. Mandatory something like that in the United States would obviously raise First Amendment issues of compelled speech. But there is no First Amendment in many other locations. And so, this is an issue that the outcome of which is absolutely unclear still at this time, and it's something that my organization and a lot of other companies and public interest organizations around the world are struggling with and trying to figure out how can we put people in control of their Internet experiences and what happens in their homes without limiting free access to information and freedom of expression for adults and access to material that is at the very least legal where the people who are looking at it are trying to look at it. Which brings me to my second point of contemporary community standards and the Internet.

In the United States, traditional First Amendment law requires that we look at contemporary community standards when we try to decide whether material is obscene. Now, in some communities, contemporary community standards are fairly easy to understand. I learned before the talk yesterday that on this campus there's some controversy about whether it's appropriate to show R-rated movies on campus or using student funds, and that there is controversy because some of the sort of traditional Baptist leadership in the community is uncomfortable with that, and that's sort of where the level of discussion is in terms of whether this violates community standards or not.

Now, obviously, in a public university setting the question is going to be a little bit different. In a community like New York or Los Angeles,
the outcomes are going to be very different than in a community like Macon, and those analyses are not easy to make. They require certainly a great deal of careful and specific thought within the community and debate within a community, but they are manageable processes. We have a legal structure wherein if an obscenity charge is being brought against a bookstore or a video, a jury watches the video, listens to or does not listen to expert witnesses discussing whether or not it’s obscene, and comes to a decision based on the community that they are rooted. But whose community standards apply on the Internet? And this is an issue that really the answer is almost impossible to determine.

The local prosecutor wants to bring a case against a local Internet service provider who has put up pictures that they locally—were taken locally and are being viewed locally, then the same analysis that would apply in the off-line world would apply. But can a Utah prosecutor bring an obscenity action against a Web site that’s hosted in Los Angeles or that’s hosted in the Caribbean but owned by an American company? These questions are a lot more difficult and so far have not really come to any—there’s no consensus on what the answer should be.

Now in the Children’s On-Line Privacy Protection appeal, the Third Circuit Court of Appeals, neither side briefed the issues of community standards at all. The only questions that were being discussed in the briefs by either side were whether material that was harmful—whether harmful to minors was a meaningful national standard and whether there were less restrictive means, and whether there was going to be, in fact, a chilling effect on speech. But at the oral arguments last November, one of the judges on the three judge panel asked immediately the attorney for the government whose standards apply? And I felt actually terrible for this attorney. If it would have been me, I probably would have been in tears at the end of it, because the judge spent about fifteen minutes of what was supposed to have been a twenty-five minute argument, which was about a thirty-five minute argument, really asking very difficult questions, and finally breaking it down to the point where he wanted to know if Saudi Arabian standards that would call it obscene for a woman’s face to be showing should apply or whether we would be limited to just the standards of a prosecutor in Utah or Indiana or Tennessee.

The only case that the folks who have been thinking about this and that the attorney for the government was really able to look at was a Sixth Circuit decision, United States v. Thomas, 9 which was not a World Wide Web decision at all, but a pre-Web bulletin board decision wherein

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9. 74 F.3d 701 (6th Cir. 1996).
a couple in Milpitas, California ran an adult oriented dial-in subscription bulletin board that was charged with obscenity in Tennessee by a Tennessee federal prosecutor. In that case, the underlying facts revealed that the couple in Milpitas, California, had advertised their product in Tennessee and required registration, including name and address, of all of their subscribers, so they had actual knowledge that they had subscribers in Tennessee. And under those circumstances it was found that they were subject to Tennessee jurisdiction and Tennessee obscenity prosecution.

In the World Wide Web it’s very unclear that a Web host or a Web site publisher would have that kind of actual knowledge. Now, again, in the world of Cable that might become less true and we may be looking at a situation in which that kind of knowledge will be impartible, but at this time it is not the case, and we may end up with architecture that continues to protect privacy in that way. As the standards for intellectual property and the further development of the Internet continue to be debated and discussed by both the policy community and the engineering community, it’s not yet set in stone how much information and personally identifiable information or aggregate information that may be geographically based will be rooted in the technology. And my organization is involved in advocating that as little of it as possible should be built into the architecture, but that’s obviously also a debate that’s unsettled.

Most Internet communities are just purely interest based, and that makes the question of jurisdiction one that’s very much more difficult and very much more chaotic, but that does not mean that there is nothing that we can do about trying to avoid or limit access to material that we find offensive on the Internet. I think as lawyers we often tend to think, well, the answer must be to pass a law or that we must look at the legal system to provide a structure for the answer to all of our problems.

I’m certainly not going to tell you that I like everything on the Internet. We know that there is violent material on the Internet, hate material on the Internet, sexually explicit material on the Internet that almost everyone would find offensive. There’s drug information on the Internet. There’s hacker information on the Internet. And parents rightfully, parents, in particular, although users of all kinds, rightfully feel that they want to be able to do something about that. And I would argue that they can. There is no silver bullet, but groups like the American Library Association, and a number of Internet companies,

10. Id. at 709-10.
11. Id. at 710.
have put together tutorials for their users and for people who use their resources to gain access to the Internet.

Education is absolutely the most important piece of this question. But it's not the only piece. And what makes it very interesting is that the Internet, reflecting the diversity of human thought, has also produced tools that try to reflect the diversity of human values. This is the demonstration portion of my talk. We're going to cue the . . . .

This is a site called GetNetWise, www.getnetwise.org, which was put together by a number of public interest organizations and Internet companies and trade associations that was designed last summer to try to take a major step in public education about what kind of resources are out there for families to think about child safety and also about material on the Internet, and controversial material on the Internet in particular.

The main focus of GetNetWise is, as you see, the on-line safety guide. I think it's a little bit hard to read up here, but that's the top caution sign. The second piece which I'm going to focus on is called "Tools for Families." And right now there's a searchable database on this Web site of 110 different kinds of tools that are out there designed to help families take control of their Internet experiences. They include information on filters, monitoring tools, time limiting tools, browsers oriented towards children, contracts that parents and kids can sit down and sign together so that everybody is clear on what the rules are in our house for what's acceptable use of the Internet. We also have information on how to report on-line trouble, because certainly there is a serious problem with child pornography and the sexual exploitation of children on the Internet, and parents need to understand, first of all, in the safety section how to teach their kids to avoid unsafe situations to the best of their ability. But in the event that that fails, that there is a gap there, that their children are victimized or targeted, what they can do about it. And then we also wanted to include a sort of more reassuring segment of the site reminding people that there are a lot of wonderful resources on the Internet oriented towards kids.

But the key thing in terms of using these kinds of tools is understanding what it is as a family that you are getting. Because American values are so diverse and families have such different priorities about what they think is or is not appropriate, in order for these kinds of tools to be meaningful or useful, families need to know what they are getting. Now, there may be complete consensus that nobody wants their children exposed to child pornography, but consensus probably doesn't extend very far beyond that. Some families may not worry particularly about their young children going and looking for sexually explicit material, but they may be very concerned about their kids being exposed to a lot of violent material. Other families may be particularly concerned about
their children being exposed to hate speech, for example, or gambling material, or drug information. And there are different kinds of tools designed to help families filter out access to information on all of those different lines of thinking.

Now, none of them even purports to be a silver bullet solution, and, in fact, almost all of these companies agree that education and talking with your children about what your expectations are is the most important facet of all of this. But just to give you all an example, what we have here is a searchable database that would allow a parent to go through and figure out what their priorities are and then compare the different kinds of tools that are available that more or less reflect the issues they’re concerned about.

So let’s say I was sort of a civil libertarian parent. Oops, I don’t know what’s happening there. I just want to limit the amount of time my child can spend on-line because what I would rather do is have the computer in my living room and kind of walk back and forth and keep an eye on what my child is doing rather than put a content limitation on it. And I’m not really all that worried about what they’re doing in terms of I know, I’ve already set my limits on what they can—who they can e-mail and I trust that they’re going to do that, but I’m concerned about what they might see on the Web and my computer runs on Windows ’98. There are sixteen tools in this database that would allow me to just set those kinds of limits. And scrolling down a little bit you can see that there’s an enormous amount of information that is available for parents saying, okay, SafeConnect applies to all these different categories of information. It applies to different kinds of filtering. I can use it, only the company gets to decide what products, or what information will be filtered so it’s not customizable by me as a parent. All kinds of decisions that a parent may reasonably want to make about their children’s Internet experience. And what we’ve tried to do is to gather all of this information to help parents who we know have different kinds of values.

What I think I’d like to do is actually have you just go back up to regular light and we’ll turn this off for the moment. I think the key thing to understand here is that government mandated use of this kind of technology is a very different decision than the decision that takes place in a private family home. There are movements, as I said earlier, in Congress, and a number of efforts on different state levels, to require that schools and libraries use these kinds of products.

And the only test case thus far was in Virginia, Lowden County libraries, which is sort of suburban Washington, D.C. area, installed a mandatory filtering—had a mandatory filtering policy on their Web site, or on their Internet access, and that was actually found to be unconstitutional at the district court level. It was not appealed, but the issues that
were raised there was that there was an excessive limitation and prior restraint on adult access to information that was, in fact, constitutionally protected. The compromise that the Lowden County libraries came to with Mainstream Lowden, the citizens group that brought the suit, was again focused on parental control of the decisionmaking process. They have decided to use a “smart card” technology wherein every parent who signs their child up for a library card in Lowden County has to tick off a box when they apply for the library card that says my child can have unfiltered access to the Internet or my child can have filtered access to the Internet, and then adult users also make the same decision on their own behalves.

There may be constitutional concerns with that. Nobody is challenging that ultimate outcome, but there is certainly some precedent for recognizing the First Amendment rights of particularly older minors. It’s not totally clear that that would be a solution that would work under every community, but it’s a community decision that was come to and everyone was satisfied with in that community, and that’s a better decisionmaking process than Congress deciding we need to have a “one size fits all” national filtering policy where local communities can decide which product they want, but they’ve got to pick a filtering product.

The bottom line is that because of the decentralized technology and the decentralized decisionmaking power and the fact that Internet users, for the most part, still need to go out and seek information, it does not come involuntarily to them, makes it different from traditional media where under the traditional—traditional model broadcasts someone decides what is going to go out to you and you take it or you turn your TV off. The user empowerment model of the Internet says end users, first of all, need to be educated as to how to use the technology, including being educated as to how to use the technology effectively and run narrow searches so they get what they’re looking for instead of lots of other stuff that’s not related to what they’re looking for. And, where they have the power to make additional decisions if they don’t feel that that is enough of a safeguard for their own comfort level or for their comfort level with regard to their children. And that is the least restrictive means that is available to teach, to protect children from material that may be harmful to minors or otherwise inappropriate. It puts parents in the driver’s seat as the teachers of values in their homes, and it respects the First Amendment in a way that maintains the diverse potential of the Internet and its power as a medium of communication.
MS. LEWIS: I'd like to thank Mr. Jaffe and Ms. Kessler for their presentations, and we do have a few minutes left for questions.

QUESTION FROM AUDIENCE: I'd appreciate it if Mr. Jaffe could react to this. If I understand Ms. Kessler's position, it's one of parental or user decisionmaking, and I'd like to try to apply that to the privacy area in products and advertising which you talked about. Is it possible that government regulation of the kind you're suggesting, that is a one layer, federal layer, would lead to less privacy than if we had no federal regulation at all? We have a model that we saw a lot in the '70s and '80s, one layer of federal regulation sometimes banning private lawsuits so that the only regulations would be administrative pre-emption of local regulation. And then the administration becomes captive or beholden through the political process to an advertising group. You could have the entire—you could have almost no effective regulation of privacy either by the government or through private lawsuits, and perhaps if the answer here is competition we ought to have competition among advertisers for privacy. They ought to be offering different layers of privacy to consumers. I wondered how you would react to that.

MR. JAFFE: You're making an interesting point. Generally, advertisers have taken the position that we have a responsibility to solve these problems and to certainly set up a baseline of self-regulation but that there should be a lot of competition in regard to privacy. And there is already a great deal of competition in regard to privacy. A number of major companies have said they will not go on various sites unless the sites themselves have various privacy standards. What I think is going to happen is if the states and localities come in and start to regulate, whether we like it or not, at some point then it's almost inevitable that there will be a federal rule. We're not pushing for federal rules, we're just saying that if you have multiple rules that are all over the lot, almost always in these situations where this really can make it hard to communicate at all, you're going to find that the federal government comes in and then you will have a federal mandate. And, often, at least we think that at this point in time it's probably going to be a very restrictive rule that's going to slow the growth of the Net. I don't know if I'm answering your question, but—so we're not enthused yet about allowing federal regulation or local regulation to come in, not because we don't think that maybe sometime we'll all know enough about this to do it right, but that we all need to learn a great deal more. And there's a lot of technology that needs to be developed here.

For instance, I went and testified at a recent hearing at the FTC, and what they were saying was you have to have your privacy disclosure on
the first screen, that you can't scroll down at all. And as I pointed out to them, I didn't take it to this thing because I didn't want it to start ringing on me while I was talking, but I carry this little device, and lots of other people are going to on their phone or whatever, to get their information and it's got a screen about that big (demonstrating). If you're going to start having multiple warnings on that screen it's going to be very difficult. Also, the whole idea of scrolling is quite possibly going to vanish. That's an artifact of the present architecture, but there's nothing inherent about this architecture that you will always be scrolling through. You may have, once we get all these fiber optic lines in the country, we may get something that's much closer to television as to how you get your information.

And, so, it's very, very dangerous to start locking in proposals that are bound to the moment when things are moving as quickly as they are. Now, some people say, "Ah, well, that's just you because you don't want any kind of regulation." That has not been, in fact, the advertising communities views because generally advertisers, at least honorable advertisers, if that's not an oxymoron, and I know that a lot of people think it is, but are more hurt by people saying false, deceptive, unfair things about their products. And, so, they want somebody out there as a referee.

But just as we pushed for the Federal Trade Commission in the early days of the last century, we may push for regulation here, too, but I think it is premature to have these comprehensive rules.

QUESTION FROM AUDIENCE: You referred before to a form of existing regulation, Section Five of the Federal Trade Commission Act, but, of course, I think you would agree that only a very, very small percentage of false and misleading advertising has ever become regulated through enforcement action under Section Five.

MR. JAFFE: Yeah, and there's also the Lanham Act. There are other means. But at least people always have, they can go to the government and say, these ads are false, deceptive, and unfair. That at least sets some general rules of the road. You're talking—

QUESTION FROM AUDIENCE: I take it the opposition is to certainly multi-layer regulation and perhaps even federal regulation and that would also include, you would not be seeking regulation then in private lawsuits over breach of contract in—

MR. JAFFE: No, we have not proposed that. And, clearly, again, if people make a promise, not only is the government able to try to enforce
it, so can private parties. Now one of the problems in privacy is do you—how do you find out that you've been injured? That's one of the big problems in this area. That's a problem in other areas as well, but it's a very big problem for the privacy. So that whether people will have an effective remedy is one of the things we're going to have to work on.

MS. LEWIS: Are there any other questions? I'd like to thank our four panelists today and invite members of the Mercer Law Review to come up and make a presentation.

MR. JAFFE: And we'd like to thank you for sitting through all of this, and as we've said before, on a very beautiful today. So, thank you.

NICK IVEZIC: On behalf of Mercer University, the Walter F. George School of Law, and the Mercer Law Review, we'd like to thank Mr. Lefevre, Professor Chon, Mr. Jaffe, and Ms. Kessler for their participation in the 1999-2000 Oliver Wendell Holmes Symposium and Lecture-ship. As a token of our appreciation, I'd like to present each of you with a gift. Thank you very much.

MR. JAFFE: Now, when we get to the plane they're going to ask us did you get anything from people. I hope they'll let us on. But thank you very much.

MS. LEWIS: Thank all of you for attending.