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Dinner Speech - Reading Too Much Into Nothing: The Metaphor of Place and the Internet

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The Internet: Place, Property, or Thing—All or None of the Above? October 29, 2003

Dinner Speech

Reading Too Much Into Nothing: The Metaphor of Place and the Internet

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This is the text of the dinner speech I gave at the Mercer Law Review annual Symposium dinner. While I am sure I did not read this verbatim, the only additions I have made are the footnotes, the headings, and the title. The title comes from "Too Much Into Nothing" by John Wesley Harding, off the compact disc THE CONFESSIONS OF ST. ACE (Mammoth 2000). I struggled with several themes for this speech, which was designed to provide an introduction to the topics that would be discussed at the Symposium, but which did not trespass too deeply into anyone's area. I highly recommend that anyone investigating the role of metaphor on the Internet consider Italo Calvino's novel, IF ON A WINTER'S NIGHT, A TRAVELER (Harcourt, Brace Jovanovich 1979), which was, for a time, a substantial part of this speech.

I would like to thank Professor Linda Jellum for some superb improvements to an earlier version of this speech.

I. INTRODUCTION

When I was asked to speak at this dinner, I realized I was doing something I had never done before. Normally, I am given the task of speaking for ninety minutes early in the morning at Continuing Legal Education (CLE) conferences for patent lawyers. The challenge is always first, how to wake them up, especially when they are often tired and may have had a heavy dinner and drinks the night before with other attendees and, next, how do I keep them awake for ninety minutes?

With this speech, I realized I now faced those same challenges, but at night, after a heavy meal.

I am kidding. I am not speaking for ninety minutes—just about twelve. But they are twelve packed minutes.

I am going to make only three basic points tonight. My first point is this: Metaphor and analogy play a large role in disputes involving the Internet, and there is nothing wrong with that. I will show you that courts not only regularly rely on metaphors, but they are influenced by metaphors and analogies as well. Metaphors matter. But there is nothing wrong with analogy and metaphor in the law. Metaphor and analogy are the way we explain that which is unfamiliar—by comparing it to that which we know. Metaphor and analogy are the meat and potatoes of legal reasoning.

My second point is this: Even though they matter, courts have regularly recognized that metaphors are not controlling. Courts regularly look past the metaphors to the realities of the Internet. They know they are not bound by words but by realities.

Third, I will get to my real point. My real point is that the danger the Internet faces is not that the metaphors are imperfect, or that they are given too much weight, but that the Internet is in many ways unlike anything before. Yet rather than analyzing the underlying policies that a rule of law would impose, courts too often treat the Internet as if it is no different than that which has come before it—it is.

Let us get started.

II. METAPHORS MATTER, BUT THERE IS NOTHING WRONG WITH THAT

My first point is that metaphor and analogy matter, but there is nothing wrong with that.

I ran a Westlaw search on a fairly narrow query of "analogy or metaphor" in the same sentence with "Internet." That search brought up 26 cases and 700 law review articles. I brought all 726 cases and articles with me, and I would like to read every one of them to you.

Kidding. The shear number of cases and articles retrieved in that simple search shows that courts rely on metaphor.

I will read you only a couple. Here is the first case. Let me quote it to you:

> The Internet can be described by a number of different metaphors, all fitting for different features and services that it provides. For example, the Internet resembles a highway, consisting of many streets leading to places where a user can find information. The metaphor of the Internet as a shopping mall or supermarket, on the other hand, aptly describes the Internet as a place where the user can shop for goods, information, and services. Finally, the Internet also can be viewed as a telephone system for computers by which data bases of information can be downloaded to the user, as if all the information existed in the user's computer's disc drive.[1]

Courts are clearly applying metaphor to legal disputes involving the Internet. In fact, according to reports about oral arguments in a case before the United States Supreme Court, the "[j]ustices seemed bent on finding the appropriate analogy which would tie the Internet to some existing line of First Amendment jurisprudence: is the Internet more like a television? a radio? a newspaper? a 900-line? a village green?"[2]

The law uses metaphor in dealing with the Internet, but there is nothing pernicious about the use of metaphor and analogy in developing the law of the Internet. Analogy and metaphor are how the common law has, and likely always will, develop. We use these linguistic tools to help us relate the familiar to the unfamiliar. But the law must choose its metaphors wisely. Why? Because metaphor has power. Metaphor matters.

Once a metaphorical link between something familiar and something new is made, then rhetorically it is as if a burden-shifting occurs. If the law says that the Internet is an information superhighway, then someone who is arguing it is not has the burden to prove otherwise—to prove that the analogy is inappropriate. We will see an example of that burden-shifting effect in a moment when I talk about metatags and a Ninth Circuit decision analogizing metatags to billboards.

The fact that the metaphor becomes the presumptively correct starting point is why, I am sure, the Supreme Court Justices were so diligently

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1. EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 419 (D. Ariz. 1996) (footnotes omitted).

2. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997) (citing Linda Greenhouse, *What Level of Protection for Internet Speech? High Court Weighs Decency-Act Case*, N.Y. TIMES, Mar. 24, 1997, at C5).

searching for what each believed was the best metaphor. If metaphor had no power, they would not have cared. Choice of metaphor matters.

I think the fact that the Supreme Court Justices were so focused on the appropriate metaphor proves that fact, but let me give you just one case that presents a clear example of how the metaphor chosen carries real power.

This case addressed whether a state statute that made it a crime to distribute obscene materials to minors, through a computer, violated the Commerce Clause. The court was very clear that the metaphor mattered:

> This case, too, depends on the appropriate analogy. I find, as described more fully below, that the Internet is analogous to a highway or railroad. This determination means that the phrase "information superhighway" is more than a mere buzzword; *it has legal significance*, because the similarity between the Internet and more traditional instruments of interstate commerce leads to analysis under the Commerce Clause.[3]

In a moment, we will see another example of the power of the metaphor, but my first point is done. Metaphor and analogy are invoked by the courts when addressing the Internet. That is how legal reasoning works. There is nothing pernicious about metaphor, but we must recognize that the acceptance of a particular metaphor has an impact on the law. Metaphor matters.

III. COURTS KNOW METAPHORS DO NOT CONTROL

My second point is that courts recognize that though they matter, metaphors do not control. The courts typically recognize that the metaphor or analogy, while it is a starting point and so carries with it that power, is not controlling.

Just two cases.

The first example is from a case analyzing the role of metatags in causing initial interest confusion in trademark cases. To some of you, that is Greek, so let me give some background.

Suppose I put up a sign on Interstate 75 here in Macon that says, "McDonald's Restaurant at Exit 5." In fact, the McDonald's is not until the next exit, exit 6. When people pull off at exit 5, they will not find a McDonald's, but they will see David Hricik's Burger Joint. As a result, I may steer business from McDonald's to my burger joint. I will have

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3. *Id.* (emphasis added).

created initial interest confusion, and McDonald's might have a trademark suit against me.[4]

What is a metatag? A metatag is text that is invisible to web users but is seen by search engines like Google or Yahoo!.[5] So, I could put "McDonald's burgers" in metatext on my website. If people run a search for "McDonald's burgers" through a search engine like Google or Yahoo!, they may end up going to my site before they go to McDonald's.

Now that you understand what a metatag is and how it could create initial interest confusion in a trademark case, I can talk about a case that demonstrates the power, but lack of conclusiveness, of the metaphor.

In 1999 the Ninth Circuit analogized metatags to billboards.[6] The Ninth Circuit reasoned that using someone else's metatag on a website to steer traffic to that site, instead of to the trademark owner's site, could cause initial interest confusion just like a billboard could.[7]

A year later, a district court faced precisely the same issue. It used the same metaphor but realized it was not perfect:

> Use of the highway billboard metaphor is not the best analogy to a metatag on the Internet. The harm caused by a misleading billboard on the highway is difficult to correct. In contrast, on the information superhighway, resuming one's search for the correct website is relatively simple. With one click of the mouse and a few seconds delay, a viewer can return to the search engine's results and resume searching for the original website.[8]

This is just one of the cases I found which shows that courts recognize that the metaphor is not controlling. The factual realities underneath the metaphor are what count.

A second example.

This is from a case analyzing whether a website should be treated like a billboard for purposes of determining personal jurisdiction. Was the website "in" the foreign state for purposes of determining personal jurisdiction? Listen to how the court first relied upon analogy but then looked to the realities behind it:

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4. This example is based upon the example in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999). That court analogized metatags to billboards. *Id.*

5. *Id.* at 1061-62 n.23.

6. *Id.* at 1064.

7. *Id.*

8. Bihari v. Gross, 119 F. Supp. 2d 309, 320 n.15 (S.D.N.Y. 2000).

> An internet posting shares attributes of several traditional methods of commerce. It is posted at a web address and to the extent it is not interactive is analogous to magazine or interstate billboard advertising. *One difficulty with using this analogy to automatically conclude such advertising is targeted at the forum's internet consumers, however, is that the internet is worldwide and any company advertising on it would be subject to every law of virtually every jurisdiction in the world.*[9]

My second point is over. There is no doubt that metaphor and analogy are affecting judicial analysis and the understanding of the Internet. Metaphors matter because they create a starting point for the courts. But metaphors do not control. The realities control. That leads me to my third and final point.

IV. ALHOUGH COURTS LOOK PAST THE METAPHOR, THEY DO NOT FULLY APPRECIATE THE UNIQUE NATURE OF THE INTERNET

Although courts properly strip away the metaphor, they too often apply existing common law rules without considering whether the unique nature of the Internet warrants a different rule.

The reality of the Internet is that the Internet is different. It is different from anything else for many reasons: It is instantaneous. It is global. It allows for universal, synchronous access to the same materials. Not everyone in the world can simultaneously read the same book, but they can read the same web page. Not everyone in the world can attend an auction, even at the Rose Bowl, but they can peruse eBay.

The Internet is unique.

Too often, however, courts are failing to fully appreciate its unique nature. Instead they are treating it as if it were no different than that which has come before it.

Let me put this in terms of one of the issues we will hear about tomorrow, and then I will shut up. We are going to hear about how courts are addressing trespass theories on the Internet. The issue is this: Under most state laws, an injunction against trespass to land does not require a showing of damage. You can have someone tossed out of your house merely because he interferes with your right of possession. There is strict liability for trespass to land.

But the same is not true for trespass to chattels. You must establish harm to the chattel. So if a website is real property, trespass to it may be enjoined without a showing of damages; if it is personal property, there must be proof of damage.

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9. Origins Natural Res., Inc. v. Kotler, 133 F. Supp. 2d 1232, 1236 (D. N.M. 2001) (emphasis added) (citation omitted).

Most courts are correctly recognizing that websites are not real property. Websites are not land. They are code stored on servers. Because websites are not real property, the courts conclude they are chattels. Because they are chattels, there must be proof of damage to get an injunction against trespass.

I submit that this approach is more misguided than the use of metaphor. A website is not land, and arguing by metaphor that it is land is fruitless.

But simply because in the past damages have been required in trespass to chattel cases should not mean that the same rule should apply to websites. Instead the questions must be: Are the same or similar policies that are furthered by application of strict liability to trespass to property furthered by application of that rule to websites? Why or why not? What are the consequences to the Internet of requiring proof of damage?

Only a few courts are addressing these issues. Yet only by stripping away metaphor and looking to the unique real world nature of the Internet can the law be crafted in a way that will further the growth and breadth of this remarkable technological creation.

That is why the issues this Symposium will address are so critical. If we get it wrong, if we rely on metaphors rather than reality, or if we apply existing law without recognizing the unique nature of the Internet, we can do harm.

Above all else we should do no harm.

Thank you.

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