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## The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet, 15 J. Marshall J. Computer & Info. L. 361 (1997)

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## COMMENTS

# THE SCIENTOLOGICAL DEFENESTRATION OF CHOICE-OF- LAW DOCTRINES FOR PUBLICATION TORTS ON THE INTERNET

### I. INTRODUCTION

Two years ago, from out of the Wyoming sage brush, a digital prophet came to announce to the tribes of cyberspace that everything they knew about intellectual property was wrong.<sup>1</sup> Cataloging the inadequacies and wrong-headedness of the law of the Internet,<sup>2</sup> John Perry Barlow urged his followers to reconceptualize their notions of property and information.<sup>3</sup> He argued that the advent of digital communication

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1. See John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property is Wrong)*, WIRED ONLINE, (Mar. 1994) <<http://www.hotwired.com/wired/2.03/features/economy.ideas.html>>. Mr. Barlow is a retired cattle rancher and former lyricist for the Grateful Dead, and he is co-founder and executive chair of the Electronic Frontier Foundation. *Id.*

2. This Article presumes a general familiarity with such concepts as the "Internet" and "cyberspace," a term credited to William Gibson in his novel *Neuromancer*: "Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators in every nation . . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity." WILLIAM GIBSON, *NEUROMANCER* 51 (1984). For a general discussion of the global Internet, see generally *GLOBAL NETWORKS* (Linda M. Harasim ed., 1993). For the most recent judicial exploration of the technical capacities of the Internet, see *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 830-49 (E.D. Pa. 1996) (listing the three-judge panel's findings of fact). See also *Shea v. Reno*, 930 F. Supp. 916, 925-34 (S.D.N.Y. 1996) (discussing the Internet's capabilities in decision striking down provisions of the Communications Decency Act of 1996).

3. Barlow, *supra* note 1. While the Internet may never include every CPU on the planet, the system continues to double in size every year and is expected to become the principal medium of information conveyance, and perhaps eventually, the only one. As Barlow explained:

Once that has happened, all the goods of the Information Age—all of the expressions once contained in books or film strips or newsletters—will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions that one might behold in effect,

via the Internet profoundly shifts the way humans relate to each other, and because the law in many respects is the organizing principle for those human relations, the law too must change:

The economy of the future will be based on relationship rather than possession. It will be continuous rather than sequential . . . . [I]n the years to come, most human exchange will be virtual rather than physical, consisting not of stuff but the stuff of which dreams are made. Our future business will be conducted in a world made more of verbs than nouns.<sup>4</sup>

Barlow's essential message—the virtual world is different—has, for him, specific legal consequences: Our “accumulated cannon of copyright and patent law” is unfit to navigate this new world.<sup>5</sup>

In the two years since Barlow's essay, the *zeitgeist* he heralded seeped into the academic discussion of almost every legal aspect of the Internet.<sup>6</sup> The impulse to disparage the effectiveness of old legal rules is particularly evident in discussions of publication torts on the Internet, especially with respect to the old choice-of-law doctrines that control how courts determine which state's law to apply to a particular libel or breach of privacy or trade secret disclosure.<sup>7</sup> Commentators argue that the old choice-of-law doctrines fail to provide any meaningful guidance in the virtual world because these doctrines depend on notions of physical location. According to their critiques, because there is no “there” in the virtual world, the doctrines are virtually useless. In response to this perceived inadequacy, commentators propose various evolutions in the law, such as creating a federal common law of the Internet that would eliminate any need for consulting different states' laws,<sup>8</sup> or transforming medieval notions of a *lex mercatoria* into a compartmentalized law of the

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as glowing pixels or transmitted sounds, but never touch or claim to “own” in the old sense of the word.

*Id.*

4. Barlow, *supra* note 1.

5. Barlow, *supra* note 1, at 15.

6. See, e.g., I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993 (1994). Professor Hardy acknowledges that many issues in cyberspace do not require new legal rules, but he firmly believes that “many of the circumstances of cyberspace do indeed give rise to new legal questions.” *Id.* at 995; see also R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, 68 WIS. LAW. 10, 56 (1995) (noting that “the issues created by the growth of the Internet are *sui generis* and ultimately must be addressed by legislative action recognizing the unique attributes of cyberspace”).

7. See *infra* Part II (discussing criticisms and proposed reforms of Internet choice of law).

8. See John D. Faucher, Comment, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1051 (1993). See *infra* Part II.B. for a discussion of Mr. Faucher's thesis.

Internet, similar in many ways to admiralty law.<sup>9</sup>

All of the proposals for changing choice-of-law principles for Internet torts rely on a notion that communication in cyberspace is different and therefore this form of communication needs different rules. This notion, however, ignores the fact that no matter how long an Internet user floats in the ether of electronic communication, she *exists* in the real world. Her reputation, her privacy, her economic well-being all are directly attributable to her concrete presence in the tangible world. Although there is no "there" for where her communications are located, the keyboard she taps to create those electronic connections and the screen she watches are firmly rooted in the material world. Cyberspace is a "consensual hallucination," but even hallucinations occur in a particular, material place.

This fundamental fact of life about the Internet influences the way courts approach Internet torts. Rather than follow academic suggestions to create new paradigms for Internet torts, most courts apply old doctrines and old analogies to their Internet cases.<sup>10</sup> This conservative response is especially pronounced with respect to choice-of-law issues.<sup>11</sup> Instead of following a virtual path for these Internet cases, most courts travel the well-worn path of traditional choice-of-law principles. Although these decisions lack the attention-grabbing appeal of bold new doctrine, they provide predictability in an arena where such a commodity is most valuable, in the still-nascent Internet community.

However, a pair of recently decided cases<sup>12</sup> involving the Church of Scientology may suggest that some courts are moving away from the old principles.<sup>13</sup> In these cases, without explicitly rationalizing their choice-of-law decisions, courts chose to apply the forum state's substantive law in contravention of traditional choice-of-law principles. These new

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9. See Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 108-10 (1996). See *infra* Part II.B. for a discussion of Mr. Burnstein's thesis.

10. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794, 1995 WL 323710, at \*10 (N.Y. Sup. Ct. May 24, 1995) (holding that the commercial on-line service was a "publisher" of defamatory material, as distinguished from a local television affiliate which retransmits network broadcasts without editorial control); *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991) (analogizing the commercial on-line service to a newsstand or library that did not exercise editorial control over the content of its books).

11. See discussion *infra* Part III.B. As of November 15, 1996, only a handful of reported court decisions involving torts on the Internet still existed. A search of the "All-states" and "Allfeds" databases of Westlaw showed only 13 separate cases dealing with publication torts committed via the Internet. See *infra* Parts III and IV for a discussion of each of those cases.

12. *Religious Technology Ctr. v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995); *Religious Technology Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995).

13. See discussion *infra* Part IV (discussing choice-of-law doctrines applied to Internet torts utilized by courts in the *Church of Scientology* cases).

Scientology cases defenestrated<sup>14</sup> the previously emerging pattern of choice-of-law for Internet torts, and suggested that Internet users are not able to predict accurately which law will apply to their interactions in the virtual world. Because of the infancy of this communication medium, this unpredictability, more than any particular choice-of-law doctrine, is the greater threat to the virtual world.

This Comment charts the evolution of the Internet's choice-of-law problem. This Comment first reviews the academic literature disparaging the old choice-of-law doctrines, including new approaches suggested by commentators to allay fears that current tort doctrines expose Internet access providers to unreasonable and exorbitant liability.<sup>15</sup> Next, this Comment examines a series of recent libel and copyright cases suggesting that courts are quite unimpressed by the uniqueness of the Internet and are willing to apply traditional choice-of-law doctrines to Internet torts. These cases all involve interstate torts in which courts chose the law of the state where the plaintiff resided. Finally, this Comment focuses on the coast-to-coast legal war mounted by the California-based Church of Scientology to prevent the distribution of its sacred texts over the Internet. Two of these cases upset the emerging trend of choice-of-law decisions by applying the law of the state where the defendants resided rather than the law of the state where the harm occurred, which is the state where the Church's books were located. By upsetting the predictability of choice-of-law issues, these courts disserve the very community they seek to protect. Perhaps just as importantly, the ambiguity injected into the Internet choice-of-law issue by these cases threatens to invite legislative or political tinkering, a prospect that does not bode well for Internet autonomy.

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14. The concept that a judge should not "defenestrate" (toss out the window) an existing legal doctrine without good reason owes much to the writing of First Circuit Judge Bruce M. Selya. See, e.g., *United States v. 29 Cartons of \*\*\* An Article of Food*, 987 F.2d 33, 39 (1st Cir. 1993) (holding that the government's argument concerning the interpretation of the Federal Food, Drug, and Cosmetic Act "perverts the statutory text, undermines legislative intent, and *defenestrates* common sense") (emphasis added). Judge Selya's opinions alone comprise more than two-thirds of the cases in which the concept of judicial defenestration is mentioned.

15. Congress's passage of Internet liability reform in its omnibus Telecommunications Act of 1996 directly addresses this fear. See Pub. L. No. 104-104, § 509, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. § 230). However, the Act does not dispose of the need for clear choice-of-law principles to govern Internet torts. See *infra* Part II.B. for a discussion of proposals for new choice-of-law approaches for Internet tort cases.

## II. CONSTERNATION OVER CHOICE-OF-LAW FOR THE INTERNET

### A. CURRENT CHOICE-OF-LAW PRINCIPLES

Choice-of-law issues arise with respect to torts committed via the Internet because interstate communication is so much more prevalent and effortless in that network of networks. When an Internet tort involves communication across state lines, the court with jurisdiction over the claim must decide which state's law applies to the claim.<sup>16</sup> In many contexts, the choice of a particular state's law has a dramatic effect on the outcome of the case. For example, a defamation action against a periodical in Wisconsin must begin with a demand for a retraction,<sup>17</sup> but the law in other states may impose no such precondition. Also, the punitive damages for publishing a trade secret over the Internet are capped at \$350,000 in Virginia,<sup>18</sup> but not in other states. Thus, in many cases, choice-of-law matters.

In general, two major doctrines exist for choosing which state's law applies to an interstate tort: the "*lex loci delicti*"<sup>19</sup> (the law of the place of the wrong) approach and the "most significant relationship"<sup>20</sup>

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16. One should distinguish here between the "jurisdiction" of a court to hear a claim, and the "choice-of-law" that the court applies to the claim. A court has jurisdiction over a claim when the parties to the case had sufficient contacts with the jurisdiction to suggest that they had purposefully availed themselves of the privileges and protections of that jurisdiction. *See, e.g., Keeton v. Hustler Mag.*, 465 U.S. 770 (1984); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *see also CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (holding that the district court in Ohio had jurisdiction over the author of computer software in Texas in part because of the author's Internet contacts with CompuServe in Ohio).

On the other hand, a court must choose which law to apply when the conduct at issue has "a significant relationship to more than one state." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 1 (1971). Choice-of-law issues arise in federal court when the court is hearing diversity actions based on state-law claims. (No choice-of-law issue with respect to federal-question cases because the only law to apply is federal law.) A federal court sitting in diversity must apply the choice-of-law rules of the state where the court sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Depending on the application of these choice-of-law rules, the court's choice may result in applying the substantive law of the forum state or the law of some other state.

Several cases discussed in this Comment involve disputes based on both the federal Copyright Act and state-law trade secret doctrines. In such cases, no choice-of-law issue exists with respect to the copyright claims. Nevertheless, the courts still must engage in choice-of-law analysis to determine which state's trade secret law should apply to the trade secret claims.

17. *See WIS. STAT.* § 895.05(2) (1995); *see also infra* Part III (discussing this statute in detail).

18. *See VA. CODE ANN.* § 59.1-338 (1995); *see also infra* Part IV (discussing in detail Virginia's version of the Uniform Trade Secrets Act).

19. *See RESTATEMENT (FIRST) OF CONFLICT OF LAW* §§ 377-79 (1934).

20. *See RESTATEMENT (SECOND) OF CONFLICT OF LAW* § 6 and § 6 cmt. c (1971).

approach.<sup>21</sup>

The *lex loci delicti* approach calls for a court to choose the law of the place "where the last event necessary to make an actor liable for an alleged tort takes place."<sup>22</sup> In the context of most publication torts, the last event necessary to make a person liable is the reading of the publication by a third party. For example, suppose a student at the University of North Carolina posts an e-mail message to the university's bulletin board that truthfully reveals for the first time a married professor's sexual indiscretions with one of his students.<sup>23</sup> When another person reads this posting, the writer of the e-mail message may violate the professor's interest in freedom from unwarranted invasions of his privacy.<sup>24</sup> The professor, however, is barred from bringing an action for this tort under North Carolina law.<sup>25</sup> The professor, nevertheless, may be able to bring his suit for public disclosure of private facts if, instead of being posted to the university's internal bulletin board, the message was posted to a bulletin board read by someone in a state that subscribes to the *lex loci delicti* rule and allows tort actions for public disclosures of private facts.

The harshness of this result, in which it is possible for an e-mail posting to be non-actionable where written but actionable where read,

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21. Most states subscribe to either of these two approaches, although a few states may follow hybrids that have been proposed in response to either of these approaches. See Faucher, *supra* note 8, at 1056-66 (discussing proposals by Professors Brainerd Currie, William F. Baxter, and Robert A. Leflar in addition to the approaches described in the First and Second Restatements of Conflict of Laws). Although most states follow the alternative approaches of the two Restatements, at least a few states have adopted other approaches. See *Gifford v. Nat'l Enquirer, Inc.*, 23 MEDIA L. REP. 1016, 1018 (C.D. Cal. 1993) (describing the "government interest" approach of Professor Currie that California courts follow).

22. RESTATEMENT (FIRST) OF CONFLICT OF LAW § 377 (1934).

23. Cf. Laurie Willis, *UNC-CH Disciplines Professor Who Had Affairs With Students*, NEWS & OBSERVER, June 7, 1995, at A1 (reporting on the discipline imposed on a married professor at the University of North Carolina at Chapel Hill after he had an affair with one of his students). The controversy surrounding Professor James Williams prompted widespread discussion on campus, *see id.*, but there was no litigation by Professor Williams arising out of this discussion. The facts of that case are used here merely for illustration, not as a suggestion that tortious conduct actually did occur.

24. See RESTATEMENT (SECOND) OF TORTS § 652D (1971). The tort of public disclosure of private facts is established when one "gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.*

25. See *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988) (rejecting the adoption of the tort of disclosure of private facts); *see also Renwick v. News & Observer Pub. Co.*, 312 S.E.2d 405, 412 (N.C. 1984) (rejecting the adoption of the tort of false light in large part because the doctrine does no more than "add to the tension already existing between the First Amendment and the law of torts").

has led commentators to criticize the *lex loci delicti* rule.<sup>26</sup> In contrast, the “most significant relationship” test of the Second Restatement provides more flexibility for a court to choose the most suitable substantive law.<sup>27</sup> In addition to the specific factors for tort cases listed in section 145, the Second Restatement also provides a series of additional factors for courts to consider in determining which law applies to a case.<sup>28</sup> These factors are intended to help courts answer the question of whether justice is furthered by the application of one state’s law to events that occurred in a different state.<sup>29</sup> Even as the restaters acknowledge, however, these principles do not lead to clear-cut rules.<sup>30</sup> The choice-of-law process under the “most significant relationship” test is administered on a case-by-case, ad-hoc basis.

In situations involving multi-state publication torts, such as the interstate privacy claim discussed *supra*, the Second Restatement suggests that the state with the most significant relationship usually will be the state where the plaintiff was domiciled at the time the publication was made.<sup>31</sup> Thus, if the e-mail message were posted in North Carolina but read by someone in Florida, the professor might try to bring his case for

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26. See Faucher, *supra* note 8, at 1057 (“[T]he First Restatement gives a rigid rule which fails to consider the content of a state’s law or its fairness if applied. This rule may not work well for any kind of tort, let alone computer bulletin board defamation.”).

27. See RESTATEMENT (SECOND) OF CONFLICT OF LAW § 145 (1971). The state with the most significant relationship will be determined on the basis of four factors, depending on the nature of the tort involved:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

*Id.* § 145(2).

28. *Id.* § 6(2). Those factors include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

*Id.*

29. See *id.* § 6 cmt. c.

30. *Id.* In cases dealing with torts or contracts, the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. . . . In these areas, courts must look in each case to the underlying factors in order to arrive at a decision which will best accommodate them. *Id.*

31. *Id.* § 153; see also *id.* § 150(2) (noting the same rule with respect to multi-state defamation cases).



public disclosure of private facts in Florida, which recognizes the tort.<sup>32</sup> Florida, however, would apply its "most-significant relationship" rule<sup>33</sup> and probably choose North Carolina law as the substantive law of the case, even though such a determination would terminate the cause of action. An opposite result, however, might occur if the professor were domiciled in Florida and taught in North Carolina on a visiting basis, and if the professor could point to specific harms in Florida flowing from the reading there of the message posted in North Carolina. Ultimately, the highly specific circumstances of each case, rather than precedent, would control the outcome as to the extent of liability for other e-mail postings.

This indeterminacy and lack of predictability has prompted some commentators to suggest that the entire choice-of-law regime today fails to address the needs of the Internet.<sup>34</sup> As Mr. Burnstein argues, the "geographically oriented principles" of the various choice-of-law doctrines "are confounded by cyberspace."<sup>35</sup> So too does Mr. Faucher argue, noting that the process of making a choice-of-law decision is so "long, difficult, and murky," that today's choice-of-law doctrines can offer little help in dealing with Internet torts.<sup>36</sup>

#### B. PROPOSALS FOR NEW CHOICE-OF-LAW APPROACHES

Mr. Burnstein, Mr. Faucher, and others propose a variety of new ways for dealing with the inadequacies of today's choice-of-law doctrines. Although no courts apply these notions, a survey of the various theories

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32. See *Cape Publications, Inc. v. Hitchen*, 549 So.2d 1374 (Fla. 1989) (adopting the cause of action for public disclosure of private facts, as enumerated in the RESTATEMENT (SECOND) OF TORTS); *Cason v. Baskin*, 20 So.2d 243 (Fla. 1944) (recognizing the tort of invasion of privacy for the first time).

33. See *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980) (adopting the test as described in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS).

34. See Burnstein, *supra* note 9, at 94-97; Faucher, *supra* note 8, at 1066-72.

35. Burnstein, *supra* note 9, at 94. Mr. Burnstein's indictment, like the complaints of other commentators, is predicated on the notion that torts committed via the Internet do not occur in the tangible world, but instead are injuries in the virtual world. Absent a 'place of injury', there can be no *lex loci delicti* or any "significant relationship" to govern the choice of which law to apply. See *id.* at 93 (noting that "If injury occurs in cyberspace, it can be said that the place of the wrong is cyberspace itself").

Mr. Burnstein's complaint, however, fundamentally misunderstands the nature of a publication tort. To say that the injury in a defamation or privacy claim occurs "in cyberspace" is incorrect. By definition, a defamation or invasion of privacy can occur only in real space. Such claims are based on injuries to the reputations or personal interests of people who have a material existence in the tangible world. The harms they suffer will exist in the analog world, regardless of whether the means of causing those harms travelled through the digital world.

36. Faucher, *supra* note 8, at 1064.

proves invaluable because they highlight the intellectual landscape confronting courts that must actually decide Internet tort cases.

Mr. Burnstein's suggestion is to make choice-of-law issues virtually irrelevant by having courts recognize a new kind of law, a "*lex cyberalty*," modeled on the medieval *lex mercatoria* that regulated the relations between merchants who travelled between the trade fairs of the Middle Ages.<sup>37</sup> The "*lex mercatoria*" was "an enforceable set of customary practices that inured to the benefit of merchants, and . . . was reasonably uniform across all the jurisdictions involved in the trade fairs."<sup>38</sup> This regulation relied on the standard practices of merchants within the trading community to define the standards of behavior, and adapted to commercial developments much more quickly than the non-merchant common law with which the regulation coexisted.<sup>39</sup>

Mr. Burnstein argues that the same dissonance between merchant and non-merchant law characterizes the friction between cyberspace standards of behavior and real-world legal doctrines: "In this age of cyberspace and global connectivity, reliance on statutes and stare decisis simply cannot keep up with a rapidly evolving technological environment. Traditional law . . . might condemn rules regulating conduct in cyberspace to perpetual obsolescence."<sup>40</sup> To avoid this danger, Mr. Burnstein argues that courts hearing Internet cases should look to "the Law Cyberspace," which he also calls "*lex cyberalty*," to choose the appropriate substantive standard of behavior.<sup>41</sup>

A manifestation of this desire to have Internet disputes adjudicated by someone "in the know," or at least someone sympathetic to the needs of the community, is the "Virtual Magistrate Project" at the Villanova Center for Information Law and Policy.<sup>42</sup> This site on the World Wide

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37. Burnstein, *supra* note 9, at 108-10. Mr. Burnstein's proposal builds on a suggestion offered earlier by Professor Hardy that Internet users should develop their own "Law Cyberspace" to deal with commercial transactions on the Internet. See Hardy, *supra* note 6, at 1019-21. Mr. Burnstein's proposal suggests that the "Law Cyberspace" might be used for defining all standards of behavior, not just commercial conduct, on the Internet. See Burnstein, *supra* note 9, at 110.

38. Hardy, *supra* note 6, at 1020.

39. Hardy, *supra* note 6, at 1020-21.

40. Burnstein, *supra* note 9, at 110.

41. Burnstein, *supra* note 9, at 110. Mr. Burnstein does not address the mechanics of how such a body of legal principles be developed, by either real-world judges or by Internet denizens. (Professor Hardy notes that the judges who developed the *lex mercatoria* were merchants themselves and were selected on the basis of their experience and seniority in the community. See Hardy, *supra* note 6, at 1021.) Mr. Burnstein also does not address whether such private adjudications would implicate the Due Process Clause of the Fourteenth Amendment. Burnstein, *supra* note 9, at 110.

42. See Mark E. Staib & Michael Yablonski, "Virtual Magistrate" Offers Alternative Dispute Resolution for Internet Disputes: Project Offers Parties a Chance to Avoid the Uncharted Terrain of "Cyber" Law, *LITIG. NEWS*, Sept. 1996, at 6.

Web<sup>43</sup> provides arbitration for disputes arising through Internet communications, including questions of whether an Internet system operator should be allowed to delete or modify a person's bulletin board message, or whether an Internet user's identity should be disclosed to someone other than the government.<sup>44</sup> Organizers of the project even hope to use the private arbitration system to resolve copyright infringement questions arising from Internet postings.<sup>45</sup> The project's arbitrators, selected jointly by the American Arbitration Association and the Cyberspace Law Institute, are not necessarily lawyers, but are familiar with the capabilities and conventional community standards of cyberspace.<sup>46</sup> As yet, no court has ruled on the enforceability of the project's arbitration decisions,<sup>47</sup> and the project's proponents concede that the arbitration system cannot be used to resolve all Internet disputes.<sup>48</sup> Perhaps most importantly, this system of private adjudication—dominated by Internet-sympathetic arbitrators—probably is incapable of remedying the kinds of injuries found in private tort actions, such as suits for libel or invasion of privacy. This handicap becomes insurmountable when the arbitration involves a tort plaintiff who did not agree in advance to arbitrate this kind of dispute with the defendant.<sup>49</sup>

Another proposal from a choice-of-law reformer similarly seeks to obliterate the need for choice-of-law decisions, this time by federalizing the law of the Internet and allowing judges to develop a new common law for dealing with Internet disputes.<sup>50</sup> Mr. Faucher does not explain exactly how those judges should divine the rules of conduct to apply to Internet disputes. Instead, he suggests that federal judges “engage in a process of creating substantive rules to create a body of federal common law.”<sup>51</sup> Such a process is more efficient, Mr. Faucher argues, because “judges will spend less time analyzing choice-of-law questions,” and better laws will “result that reflect the considered wisdom and common

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43. See Villanova Center for Information Law and Policy, *Virtual Magistrate Project*, (May 21, 1996) <<http://vmag.law.vill.edu:8080/>>.

44. See Staib & Yablonski, *supra* note 42, at 6.

45. See Staib & Yablonski, *supra* note 42, at 6.

46. See Staib & Yablonski, *supra* note 42, at 6.

47. See Staib & Yablonski, *supra* note 42, at 6. As of September 15, 1996, the project's homepage listed only one decided case. See Villanova Center for Information Law and Policy, *Virtual Magistrate Project*, (May 21, 1996) <<http://vmag.law.vill.edu:8080/>>.

48. Staib & Yablonski, *supra* note 42, at 6.

49. See Staib & Yablonski, *supra* note 42, at 6. The “Virtual Magistrate Project” relies on arbitration consent forms provided in the contracts that an Internet-user signs with his Internet-access provider. *Id.* These consent forms, however, do not envision disputes between third parties outside this contractual relationship. *Id.*

50. See Faucher, *supra* note 8, at 1066-72.

51. See Faucher, *supra* note 8, at 1071-72.

sense of judges."<sup>52</sup>

Mr. Faucher argues that federal courts are authorized to create a federal common law of Internet liability despite the *Erie*<sup>53</sup> doctrine because Internet cases involve uniquely federal interests.<sup>54</sup> These interests hinge on the federal government's role in regulating and protecting the national telephone network and the emerging National Information Infrastructure: "In the case of a libellous bulletin board message sent via telephone line to users all over the country, contacts with the entire country would . . . overshadow contacts with individual states."<sup>55</sup> Mr. Faucher suggests that both the "shared national culture" of Internet users and the fact that "[e]lectronic messages and conversations respect no state borders" underscore his conclusion that a unique and preeminent federal interest exists in regulating the Internet.<sup>56</sup>

Mr. Faucher's argument, however, is flawed in its reliance on a federal interest in protecting the National Information Infrastructure. This federal interest involves the technical capacity and security of the system. The federal interest does not involve the content of messages transmitted over the infrastructure. Because any tort claim with respect to messages sent over the Internet will necessarily be content-specific, the federal interest in the "hardware" of the National Information Infrastructure cannot justify a regulation of the Internet's "software." Furthermore, the mere fact that a tort may have a relationship with the entire country—its "contacts" are national rather than local—does not justify the obliteration of choice-of-law doctrine.<sup>57</sup>

Finally, two different scholars independently offer a reform proposal that has less to do with choice-of-law principles than with constitutional-

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52. See Faucher, *supra* note 8, at 1072. Mr. Faucher does not explain why he believes that judges in particular, or more correctly the adversary system, will arrive at wise results.

53. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts sitting in diversity to apply the substantive law of the forum state).

54. See Faucher, *supra* note 8, at 1072-74.

55. See Faucher, *supra* note 8, 1075.

56. See Faucher, *supra* note 8, at 1075-76. Congress seems to agree with Mr. Faucher, at least with respect to its interest in regulating the content of some messages on the Internet. See Communications Decency Act of 1996, Pub. L. 104-104, §§ 501, 110 Stat. 56 (to be codified at 47 U.S.C. §§ 223). However, the fact that Congress chose to exempt only certain interactive computer services from state-law liability suggests by negative implication that Congress did not intend for a new federal common law to abrogate state-law liability for other aspects of Internet disputes. See *id.* § 509(c)(1) (to be codified at 47 U.S.C. § 230(c)(1)). See *infra* Part II.C. (discussing this section of the Telecommunications Act of 1996).

57. Cf. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (denying certification of a class under FED. R. CIV. P. 23(b) in part because the tort claims of the individual class members would be controlled by state law, and the court necessarily would be forced to determine which state's law should apply to each claim).

izing Internet libel actions; the proposal, nonetheless, would result in significant changes to the choice-of-law equation for Internet publication torts.<sup>58</sup> Messrs. Brooks and Weber suggest that Internet denizens should be treated as "public figures" for purposes of any libel actions they bring based on defamatory comments published via the Internet. They argue that these plaintiffs have a direct and effective ability to respond to such comments.<sup>59</sup> As putative "public figures" in the Internet world, these Internet plaintiffs would be required to meet the "actual malice" standard under *New York Times v. Sullivan*<sup>60</sup> in order to secure any recovery.

Messrs. Brooks and Weber acknowledge that no court that reviewed an Internet libel case extended the public-figure doctrine in the manner they propose; they agree that the doctrine would not apply to plaintiffs who are defamed via the Internet, but have no access to the medium themselves.<sup>61</sup> Nevertheless, this proposal to constitutionalize a significant aspect of Internet tort liability would have a dramatic effect on choice-of-law considerations. By raising Internet libel requirements to a new First Amendment standard, that standard eliminates the need for courts to choose a particular state's law. The proposal, however, does not fully address choice-of-law difficulties because many aspects of libel law remain untouched by constitutional standards. For example, the Supreme Court never suggested that the First Amendment controls the applications of a state's statute-of-limitations provisions, its *libel-per-quod* rules, or its demand-of-retraction provisions. Thus, although the

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58. See Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995) (proposing to apply First Amendment "public figure"/"actual malice" standards to libel actions based on Internet communications); Jeremy S. Weber, Note, *Defining CyberLibel: A First Amendment Limit for Libel Suits Against Individuals Arising From Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235 (1995) (proposing same).

59. See Brooks, *supra* note 58, at 489-90; Weber, *supra* note 58, at 237-38.

60. 376 U.S. 254 (1964). Under the *New York Times* standard, a libel plaintiff who is a public official may not obtain damages against the defendant unless he shows that the publisher acted with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Curtis Publ'g Co. v. Butts*, the Court extended this standard to include "public figure" plaintiffs as well. 388 U.S. 130, 155 (1967).

61. See Brooks, *supra* note 58, at 480-83; Weber, *supra* note 58, at 267-69; see also *Cyber Promotions, Inc. v. America Online, Inc.* Nos. Civ. A. 96-2486 & Civ. A. 96-5215, 1996 WL 633702 (E.D. Pa. Nov. 4, 1996) (refusing to invoke the protection of the First Amendment for e-mail advertisements sent by Cyber Promotions to America Online subscribers, but which were intercepted by America Online. The *Cyber Promotions* court found no state action in America Online's conduct, *id.* at \*10, and as a consequence, the court refused to impose any First Amendment filter on the claims of interference with contractual relations, unfair competition, false advertising, invasion of privacy, or the other claims in the case. *Id.* at \*1, \*12.

proposal by Messrs. Brooks and Weber would help some Internet defendants avoid liability for their Internet statements, the proposal would not relieve courts of the task of choosing which state's law to apply to the dispute.

### C. CONGRESS' REFORM OF LIABILITY FOR INTERNET ACCESS PROVIDERS

One of the themes that underlies the argument for reforming Internet law is a fear of liability for Internet access providers.<sup>62</sup> Commentators decry the decision in *Stratton Oakmont v. Prodigy*,<sup>63</sup> which suggests that commercial on-line services could be held liable for the information they provide to subscribers.<sup>64</sup> Commentators also see in the *Stratton Oakmont* decision a warning that other courts might decide such cases similarly, and as a consequence, Internet access providers appear to be at risk for unforeseen liability.<sup>65</sup>

Congress specifically responded to this fear and the *Stratton Oakmont* decision in its Telecommunications Act of 1996<sup>66</sup> by seeking to preempt any state-law liability for Internet access providers.<sup>67</sup> The language of this provision is sweeping, declaring that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>68</sup> The Act defines an "information content provider" as any person or business "that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."<sup>69</sup> This language suggests that Congress intended to provide broad protection to on-line services for the ma-

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62. See, e.g., Brooks, *supra* note 58, at 467; Weber, *supra* note 58, at 256-57.

63. 23 MEDIA L. REP. 1794, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *renewal denied*, 24 MEDIA L. REP. 1126, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995).

64. See, e.g., Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/PAT 9 (1995) (providing an example of some of the negative commentary on the *Stratton Oakmont* decision). The *Stratton Oakmont* court ruled that Prodigy was liable as a publisher of statements posted on its "Money Talk" bulletin board because it "held itself out to the public and its members as controlling the content of its computer bulletin boards" and because Prodigy "has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards." 23 MEDIA L. REP. 1794, 1995 WL 323710, at \*4.

65. See, e.g., Jessica R. Friedman, Report, *Defamation*, 64 FORDHAM L. REV. 794, 800 (1995) ("[T]he *Stratton Oakmont* decision . . . may force online service providers to choose between risking publisher status by exercising some level of editorial oversight, and completely abdicating editorial control of their networks to avoid being vulnerable to the payment of large damage awards in libel suits.").

66. Pub. L. 104-104, 110 Stat. 56.

67. Pub. L. 104-104, 110 Stat. 56, § 509(c)(1) (1996) (to be codified at 47 U.S.C. § 230(c)(1)).

68. *Id.*

69. *Id.* § 501(e)(3) (to be codified at 47 U.S.C. § 230(e)(3)).

terial that they simply transmit to their customers through the Internet, but not the material that is developed in whole or in part by the on-line service itself.

The Conference Committee Report that accompanied the Act explicitly announced that the purpose of this section was "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions."<sup>70</sup> Thus, Congress eliminated one of the underlying bases for calls to reform Internet liability—there is no need to create specialized common law or constitutional doctrines to protect Internet access providers because Congress did the job for them. However, the question of choice-of-law for Internet torts still remains. Most Internet tort cases that recently reached the courts did not involve suits against access providers, but rather revolved around disputes between individual users of the Internet.<sup>71</sup> In these contexts, the dilemma of how to choose the appropriate law to govern an interstate Internet tort remains.

### III. THE EMERGING PATTERN OF CHOICE-OF-LAW FOR INTERNET CASES

Although the requirement to choose a substantive law for interstate Internet cases is ever-present, no court as yet has explicitly explained how it reached its conclusion. The choice simply is applied, *sub silentio*. However, a pattern of choice-of-law decisions is emerging, a pattern that resembles the Second Restatement's suggestion that in most multi-state publication torts, the most appropriate state law to apply is the law of the state where the plaintiff was domiciled or had its principal place of business.<sup>72</sup>

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70. H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. § 509 (1996), reprinted in 142 CONG. REC. H1078, 1130 (daily ed. Jan. 31, 1996).

This Conference Report, however, appears to misunderstand the essential nature of the *Stratton Oakmont* decision. The report suggests that the *Stratton Oakmont* decision was based solely on Prodigy's efforts to "restrict[ ] access to objectionable online material." The conference report reveals that "[t]he conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." *Id.* This language appears to suggest that the conferees did not intend to waive liability for Internet access providers whose screening mechanisms are not geared to protect children. For example, a bulletin board service that specifically selects pornographic pictures for its subscribers might not be viewed with as much charity by members of Congress as they extended to Prodigy.

Nevertheless, despite these contrary suggestions in the legislative history, the language of the statute appears to plainly and unambiguously protect all Internet access providers regardless of their reasons for selecting the information they provide to subscribers. As long as the online service does not prepare or edit its information content, the service is not be liable under any state's liability laws.

71. See *infra* Part III (discussing tort suits between Internet users).

72. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 (1971).

## A. EARLY CASES

The earliest and most famous Internet cases,<sup>73</sup> *Cubby, Inc., v. CompuServe, Inc.*<sup>74</sup> and *Stratton Oakmont v. Prodigy Services Co.*,<sup>75</sup> did not involve any choice-of-law issues because the defamation claims in those cases were not interstate.<sup>76</sup> All parties were domiciled or had their principal places of business in New York,<sup>77</sup> and the courts applied New York libel law to the cases. Two other early Internet cases did involve interstate libel claims—*Medphone Corp. v. DeNigris*<sup>78</sup> and *Suarez Corp. In-*

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73. Although *Cubby, Inc. v. CompuServe, Inc.* generally is regarded as the first Internet libel case, *Daniel v. Dow Jones & Co.*, 137 Misc. 2d 94 (N.Y. Sup. Ct. 1987), probably better deserves that distinction. In *Daniel*, a law student who also was a securities investor sued Dow Jones for negligently allowing the publication over Dow Jones' information service of false statements concerning the corporate restructuring of Husky Oil Corp. *Id.* at 95. Dow Jones' service mirrored what today is described as a commercial on-line service: Dow Jones provided subscribers with a telephone number through which they could use a modem and dial into Dow Jones' database of news information. *Id.*

Despite a concern that the "inexorable march of time has [brought] an age of technology of previously unimagined dimensions," *id.* at 94, the *Daniel* court ruled that Dow Jones' retail-level computerized news service was as entitled to full protection under the First Amendment as any traditional publisher: "News services, whether free to the public, as are television or radio, or more expensive, specialized media, such as defendant's computerized database, are instruments for the free flow of all forms of information and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press." *Id.* at 102.

74. 776 F. Supp. 135 (S.D.N.Y. 1991).

75. 23 MEDIA L. REP. 1794, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *renewal denied* 24 MEDIA L. REP. 1126, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995).

76. A similar lack of any interstate issue exists in one of the most recent Internet cases: *Intermatic Inc. v. Toeppen*, 40 U.S.P.Q.2d 1412 (N.D. Ill. 1996). In *Intermatic*, the court enjoined Dennis Toeppen from using the name "Intermatic" in any domain names on the World Wide Web. *Id.* at 1423-24. The court issued the injunction under both the federal Lanham Act and the Illinois Anti-Dilution Act. *Id.* No interstate choice of law question exists in this case because Mr. Toeppen resides in Illinois, where he operates an Internet access business, and Intermatic, although a Delaware corporation, has its principal place of business in Illinois. *Id.* at 1413-15.

77. *But see Cubby*, 776 F. Supp. at 137. One of the defendants in that action was Don Fitzpatrick, a resident of San Francisco, and who originally created the defamatory statement at issue in the case. *Id.* at 137-38. He transmitted the material in his "Rumorville USA" newsletter to the "Journalism Forum," an information service run by Cameron Communications, Inc. *Id.* at 138. In turn, Cameron supplied the "Journalism Forum" to CompuServe, and CompuServe retransmitted the forum to its subscribers. *Id.* The *Cubby* decision involved a motion for summary judgment by CompuServe, and the court ruled that CompuServe was not liable for defamatory statements contained in the "Rumorville USA" newsletter. *Id.* at 140-41. The court never addressed the potential liability of Mr. Fitzpatrick, and no subsequent decisions were recorded in the case. It appears that any residual claims against Mr. Fitzpatrick were settled without addressing the issue of whether California or New York law should apply to this separate liability.

78. See Amy Harmon, *Millions of American Swap Information—And Barbs—On Computer Bulletin Boards*, L.A. TIMES, Mar. 19, 1993, at A1 (describing the case, which has no



*dustries v. Meeks*<sup>79</sup>—but these cases were settled without a court ever deciding their choice-of-law issues. Interestingly, none of the parties in those cases raised a choice-of-law issue even though that issue was highly relevant to the cases.<sup>80</sup>

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reported decision but is docketed as Civil Action No. 92-3785 (D.N.J. 1992)). *Medphone* involved accusations by a Babylon, Long Island resident against Medphone Corp. in Paramus, N.J. *Id.* Mr. DeNigris, an administrator for the Suffolk County Board of Elections, was a Prodigy subscriber, and he posted a series of comments about Medphone Corp. to the "Money Talk" forum, the same forum at issue in *Stratton Oakmont*. *Id.* Mr. DeNigris' postings said that Medphone was on the brink of financial collapse, and that "[t]his company appears to be a fraud." *Id.* Medphone responded by filing a lawsuit in federal court in New Jersey asking for \$40 million in damages. See Joshua Quittner, *Bulletin Board Libel? Company Says Prodigy User Posted Lies*, NEWSDAY, Mar. 30, 1993, at 37. The case was settled a year later with a payment of \$1 by Mr. DeNigris to Medphone. See Fred Vogelstein, *Computer Libel Suit Settled; Issue Isn't*, NEWSDAY, Dec. 28, 1993, at 19.

79. See Jared Sandberg, *Computers: Newsletter Faces Libel Suit for "Flaming" on Internet*, WALL ST. J., Apr. 22, 1994, at B1 (describing the case, which has no reported opinion but is docketed as No. 267513 (Ct. of Common Pleas, Cuyahoga County, 1994)). *Suarez* involved accusations published in an electronic newsletter by a Fredericksburg, Va., journalist concerning Suarez Corp. Industries' advertisement posted to various Internet bulletin board services. *Id.*

Mr. Meeks, a reporter for the trade paper *Communications Daily* who runs his "Cyberwire Dispatch" electronic newsletter on his own time from home, reported that Suarez's Internet pitch was a "direct mailing scam" and that readers should "flip this latest Internet scam on its back and gut that soft white underbelly. Gloves please." *Id.* Benjamin Suarez responded with a libel suit filed in Ohio state court. *Id.* The case was settled after Mr. Meeks agreed to pay Suarez's filing fee of \$64 and to fax any questions concerning the company to the company's North Canton, Ohio headquarters. See Jared Sandberg, *Suarez Corp. Settles Defamation Lawsuit Against Newsletter*, WALL ST. J., Apr. 24, 1994, at B6.

80. For example, in *Medphone*, a serious issue exists as to whether Medphone Corp.'s status as a corporate plaintiff alters its burden of proof: New Jersey and New York libel law differ with respect to whether corporate plaintiffs are to be treated as public figures who must prove actual malice as an element of the case. See LIBEL DEFENSE RESOURCE CENTER, LDRC 50-STATE SURVEY 1995-96, CURRENT DEVELOPMENTS IN MEDIA LIBEL LAW, 626, 652. New York's standard is generally more lenient than New Jersey's. Compare *Ithaca College v. Yale Daily News Publ'g Co.*, 433 N.Y.S.2d 530 (N.Y. Sup. Ct. 1980), *aff'd* 445 N.Y.S.2d 621 (N.Y. App. Div. 1981) (holding that a corporation may be deemed a public figure generally because of its size, influence, or actions taken to invite public comment) with *Turf Lawnmower Repair v. Bergen Record Corp.*, 655 A.2d 417 (N.J. 1995) (holding that a corporation is a public figure only when it deals in matters concerning public health, a highly regulated industry, or if the defamatory material concerns the corporation's sales of goods or services to the public).

In *Suarez*, Virginia and Ohio law differs with respect to the extent of liability for a statement of opinion that implies an underlying assertion of fact. Compare *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182 (Ohio 1995) (relying on the Ohio Constitution to reject the Supreme Court's narrow reading of an opinion privilege in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)) with *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32 (Va. 1987) (holding that only expressions of pure opinion not laden with factual content are entitled to an opinion privilege).

On the other hand, the choice-of-law question in one of the most recent Internet cases initially was resolved as moot. See *Cyber Promotions, Inc. v. America Online, Inc.*, Nos.

## B. THE EMERGING CHOICE-OF-LAW PATTERN

In two reported Internet tort cases the facts of the disputes directly presented choice-of-law issues. Although the courts did not announce the rationale for their choice-of-law decisions, the results of those choices conform with the traditional rules of the *Restatement (Second) of Conflicts of Laws*.

1. *It's In The Cards*

The first case, *It's In The Cards, Inc. v. Fuschetto*,<sup>81</sup> involved accusations of false dealing between two sports memorabilia enthusiasts. It's In The Cards, Inc., was a Wisconsin trading card business run by Jeff Meneau, a Wisconsin resident.<sup>82</sup> Mr. Meneau was a subscriber with SportsNet, a commercial on-line service that had a private e-mail function and a public bulletin board service.<sup>83</sup> Through the bulletin board, Mr. Meneau met Rosario Fuschetto, a sports enthusiast who lived in New York. Messrs. Meneau and Fuschetto arranged through a series of e-mail messages that Mr. Meneau and his wife would visit Mr. Fuschetto in New York in January 1994.<sup>84</sup> Mr. Fuschetto canceled the plans for the trip, however, when he and his wife contracted mononucleosis. Messrs. Fuschetto and Meneau subsequently had a series of disagreements conducted by e-mail over who was responsible for the cost of Mr. Meneau's airline tickets, as well as the tickets Mr. Fuschetto bought for a New York Knicks basketball game and the David Letterman television show.<sup>85</sup> Mr. Fuschetto eventually posted a note on the bulletin board side of SportsNet describing the argument with Mr. Meneau, and Mr. Meneau responded with a libel suit in Wisconsin state court.<sup>86</sup>

At the trial level, in an unreported decision, the court granted summary judgment against Mr. Meneau's claims for defamation, negligence, and tortious interference with business relations on the grounds of Wis-

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Civ. A. 96-2486 & Civ. A. 96-5213, 1996 WL 633702 (E.D. Pa. Nov. 4, 1996). In *Cyber Promotions*, the court held that neither the Pennsylvania Constitution nor the Virginia Constitution privileged Cyber Promotions' practice of sending millions of e-mail advertisements to America Online subscribers. *Id.* at \*11-\*12. The court was not forced to choose between the state where the e-mail originated or the state where they were received because no difference in practical application of the state constitutions existed. *Id.* The court, however, will be forced to confront this choice between Pennsylvania and Virginia law when it deals with the tort claims raised by America Online. *See id.* at \*12 (reversing for future decision all questions on the tort claims in the case).

81. 535 N.W.2d 11 (Wis. Ct. App. 1995).

82. *Id.* at 13.

83. *Id.*

84. *Id.*

85. *Id.*

86. *It's In The Cards*, 535 N.W.2d at 13.

consin's mandatory demand-of-retraction statute.<sup>87</sup> The statute requires as a condition precedent for the filing of any libel suit against a "newspaper, magazine, or periodical" that the plaintiff give the publisher "a reasonable opportunity to correct the libelous matter."<sup>88</sup> The trial court barred Mr. Meneau's suit because Mr. Fuschetto's bulletin board posting fell within the statutory term "periodical" and, thus, Mr. Meneau was required by Wisconsin law to demand a retraction before bringing suit.<sup>89</sup>

The Wisconsin Court of Appeals, however, reversed the trial court's finding, holding that a bulletin board posting could not be considered a "periodical" publication.<sup>90</sup> The court relied almost completely on the dictionary definition of a "periodical" as being a publication whose issues "appear at stated or regular intervals."<sup>91</sup> Because an electronic bulletin board is more like a public bulletin board, where messages do not appear at regular intervals, Mr. Fuschetto's posting was not considered a "periodical" under the statute.<sup>92</sup> The court also noted that Wisconsin legislators in 1951, when the statute was drafted, could hardly have conceived of nor imagined that the demand-of-retraction requirement should apply to a form of communication not yet even devised.<sup>93</sup> The court held that

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87. *Id.* at 12-13. The mandatory demand-of-retraction statute is WIS. STAT. § 895.05(2) (1995).

88. WIS. STAT. § 895.05(2) (1995).

89. *It's In The Cards*, 535 N.W.2d at 12-13.

90. *Id.* at 15-16.

91. *Id.* at 14 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1680 (1976)).

92. *Id.* at 14.

93. *Id.* Earlier this year, in an international trademark case, a New York federal court decided a similar issue exactly opposite the holding held by the court in *It's In The Cards*. See *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.* No. 79 Civ. 3525 SAS, 1996 WL 337276 (S.D.N.Y. June 19, 1996).

The *Chuckleberry* case involved Playboy's efforts to enforce a 1981 permanent injunction, won in a previous trademark suit, against an Italian publishing company's use of the magazine title *Playmen* for its Internet site. *Id.* at \*1-\*2. Under the 1981 injunction, the Italian company, Tattilio Editrice, was barred from using the "Playmen" mark in connection with the sale or distribution in the United States of any "English language publications and related products." *Id.* at \*2. The *Chuckleberry* court held that the non-existence of the Internet as we know it today was immaterial—the applicability of the injunction would not turn on such historical facts. *Id.* at \*5. Instead, the court ruled that the 1981 injunction applied to the Internet transmissions by Tattilio because those transmissions were "publications and related products," even though, in 1981, the court could not have conceived of those transmissions. In this case, unlike the court in *It's In The Cards*, the court did not allow the march of technology to outstrip the flexibility of language. Here, the court upheld the enforcement of an injunction against a mode of communication that did not exist and had not yet been devised when the crucial language was drafted.

The *Chuckleberry* court argued that the *It's In The Cards* decision was inapposite to Tattilio's case because the issue in *Chuckleberry* was the interpretation of a court's injunction, whereas the issue in the earlier case was the interpretation of a statute. *Id.* at \*6. This argument, however, misses the point. The decision in *It's In The Cards* hinged on the intention of the legislators in choosing the word "periodical." The *Chuckleberry* court failed

the demand-of-retraction statute did not apply to Mr. Meneau's suit, and reversed and remanded the case.<sup>94</sup>

Although the court of appeals never explicitly addressed the choice-of-law issue in *It's In The Cards*, the decision to apply Wisconsin law to the case rather than New York law was central to the outcome—reversing summary judgment and allowing the case to proceed—because New York has no demand-of-retraction requirement, either by statute or by common law.<sup>95</sup> If the court had determined that New York law applied because New York was the state where the speaker wrote and transmitted the defamatory material, then there would have been no need to address the definition of “periodical” under the Wisconsin statute.<sup>96</sup> The court, however, applied the law of the state where the plaintiff resided, which was the same state where his business had its principal operations. The court made this choice *sub silentio*, even though SportsNet's subscribers, nationwide, could have read the allegedly defamatory material, and any subsequent harm to Mr. Meneau's reputation was national in scope rather than limited to the borders of Wisconsin. Nevertheless, the appellate court's choice-of-law decision conforms identically with the Second Restatement's rule that in cases involving multi-state defamations, “the state with the most significant relationship will usually be the state where the [defamed] person was domiciled at the time, if the matter complained of was published in that state.”<sup>97</sup>

## 2. *Tamburo*

The second recent Internet case that directly presents choice-of-law issues is *Tamburo v. Calvin*,<sup>98</sup> a *pro se* lawsuit by John F. Tamburo involving claims of copyright infringement, breach of contract, product disparagement, unfair competition, and invasion of privacy.<sup>99</sup> Mr.

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to cite any indication that in the 1981 injunction the drafters intended the words “publications and related products” to reach those forms of communication that had not even been devised yet. The *Chuckleberry* court's implicit argument that a court has more discretion to divine the intentions behind another court order, rather than a statute, also is without support.

94. *It's In The Cards*, 535 N.W.2d at 15. No report of any subsequent decision in the case exists.

95. See LIBEL DEFENSE RESOURCE CENTER, *supra* note 80, at 656; see also *Kerwick v. Orange County Publications*, 420 N.E.2d 970 (N.Y. 1981) (holding that under New York case law, a publisher's retraction is insufficient to show a lack of actual malice as a matter of law).

96. *It's In The Cards*, 535 N.W.2d at 14. The court in *It's In The Cards* noted that despite the 44-year history of the statute, the question of the definition of “periodical” was one of first impression. 535 N.W.2d at 14.

97. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 150(2) (1971).

98. 1995 WL 121539 (N.D. Ill. March 17, 1995). Following this report, no subsequent decision in this case exists.

99. *Id.* at \*4.

Tamburo's dispute with Richard D. Calvin, a Washington resident, arose some time after the two men worked out a deal by which Mr. Calvin would market computer software known as "The Breeder's Standard."<sup>100</sup> Mr. Tamburo developed software for dog breeders that would help the breeders keep records required by breeding certification agencies and for operating kennels.<sup>101</sup> Several conditions of the licensing agreement between Messrs. Tamburo and Calvin required Mr. Calvin to sell "The Breeder's Standard" only under the auspices of Mr. Tamburo's company, Man's Best Friend Software, and prevented Mr. Calvin from competing with Mr. Tamburo's company for ten years after termination of the licensing agreement.<sup>102</sup> These provisions were guaranteed by liquidated damages clauses that imposed \$100,000 fee for any unauthorized copying or use of Mr. Tamburo's software and a \$1.5 million fee for a violation of the noncompetition provisions.<sup>103</sup>

During the summer of 1993, the parties disagreed over how much Mr. Calvin owed Mr. Tamburo for the copies of "The Breeder's Standard" that were already shipped to Mr. Calvin.<sup>104</sup> In August 1993, Mr. Tamburo learned that Mr. Calvin posted a message on a Prodigy computer bulletin board offering to sell an "upgraded" version of The Breeder's Standard for \$5 even though Man's Best Friend did not develop the software and Mr. Tamburo had not authorized the upgrade.<sup>105</sup> Mr. Tamburo canceled the licensing agreement with Mr. Calvin and demanded the return of the Breeder's Standard software for which Mr. Calvin had not yet paid.<sup>106</sup>

Mr. Calvin responded by posting a message on a CompuServe computer bulletin board that alleged Mr. Tamburo stole \$2,000 in sales from him.<sup>107</sup> Moreover, Mr. Calvin allegedly recruited Elizabeth Brinkley, a resident of Mississippi, to post messages on Prodigy's computer bulletin boards that alleged that Mr. Tamburo's operations were financially risky; that he was under investigation in Texas for consumer fraud; and that he was mentally unstable.<sup>108</sup> Mr. Calvin also allegedly sent letters to customers disparaging Mr. Tamburo and The Breeder's Standard software; he allegedly filed complaints regarding Mr. Tamburo with state and federal regulators in Texas and Illinois; and he allegedly contacted a software company that was negotiating a licensing deal with

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100. *Id.* at \*1.

101. *Id.*

102. *Id.*

103. *Tamburo*, 1995 WL 121539, at \*2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Tamburo*, 1995 WL 121539, at \*2-\*3.

Mr. Tamburo.<sup>109</sup> The company attempted to rescind its contract with Mr. Tamburo after hearing from Mr. Calvin.<sup>110</sup>

The district court dismissed Mr. Tamburo's claims of copyright infringement on grounds of copyright misuse—the court said Mr. Tamburo's effort to prevent future use of The Breeder's Standard software through the liquidated damages provisions constituted an illegal attempt to overextend his copyright privileges.<sup>111</sup> The court also dismissed the unfair competition and invasion of privacy claims.<sup>112</sup> The court ruled on the defamation and breach counts that Mr. Tamburo stated claims on which relief could be granted under Illinois law.<sup>113</sup> In addition, the court had subject-matter jurisdiction over these state-law claims on the basis of diversity jurisdiction.<sup>114</sup>

Once again, this court did not explicitly discuss the reasons for choosing Illinois law as the substantive body of law to apply, even though the offending statements were written and transmitted in different states and were available to CompuServe and Prodigy subscribers all across the nation. The court decided the case on the basis of Illinois law, despite the nationwide damage to Mr. Tamburo's reputation and the invasion of his privacy. This decision appears to flow from a conclusion that Illinois is the state with the most significant relationship to the events.<sup>115</sup> As with *It's In The Cards*, *Tamburo* shadows the Second Restatement—the law to apply is the law of the state of the plaintiff's domi-

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109. *Id.* at \*3-\*4.

110. *Id.* at \*4.

111. *Id.* at \*7.

112. *Id.* at \*13-\*14.

113. *Tamburo*, 1995 WL 121539, at \*14.

114. *Id.* at \*15 (citing 28 U.S.C. § 1332(a) (1995)).

115. The choice-of-law issue in this case is not completely an abstract exercise. One of the invasion of privacy claims—based on a false-light theory—stemmed from statements that Ms. Brinkley posted to Prodigy's computer bulletin board. If the court had applied Mississippi law to this claim, because that is the state where Ms. Brinkley wrote the message, the claim would have been barred at the outset. Mississippi courts do not recognize the tort of false light. See BRUCE W. SANFORD, *LIBEL AND PRIVACY* 570 n.155 (2d ed. 1996 Supp.).

Similarly, the choice-of-law analysis between Washington and Illinois defamation law is important because Illinois maintains the common law distinction between libel *per se* and libel *per quod*. See LIBEL DEFENSE RESOURCE CENTER, *supra* note 80, at 393. If a complaint fails to allege libel *per se*, the plaintiff is entitled to recovery only if he proves special damages. See *Colucci v. Chicago Crime Comm'n*, 334 N.E.2d 461, 468 (Ill. Ct. App. 1975). This rule imposes a heightened pleading standard in defamation cases, requiring the plaintiff to plead facts sufficiently particular to show libel *per se* or special damages. See *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1206 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985). In Washington, however, courts do not recognize such pleading requirements based on the libel *per se* versus libel *per quod* distinction. See LIBEL DEFENSE RESOURCE CENTER, *supra* note 80, at 860-61.

cile or principal place of business.<sup>116</sup>

Although these few Internet cases cannot yet illustrate a well-defined, predictable doctrine for choice-of-law issues in cyberspace, the cases discussed thus far demonstrate two important patterns. First, courts do not choose to engage in any discussion of the possibility that the Internet dictates a special choice-of-law regime. Rather, courts appear intimidated by the "newness" of these cases and, instead, have fallen back on traditional legal paradigms. Second, courts have made their choice-of-law decisions—albeit without explanation—in conformity with the principles of the Second Restatement. Thus, courts seem to be content to apply the law of the state where the plaintiff is domiciled or where his principal place of business is located.

#### IV. THE SCIENTOLOGY CASES

Despite the emergence of this tentative pattern of choice-of-law decisions for Internet torts, a pair of cases last year involving the California-based Church of Scientology upset the developing trend, and directly conflict with the Second Restatement's suggestions for multi-state publication torts. The two cases, *Religious Technology Center v. Lerma*<sup>117</sup> and *Religious Technology Center v. F.A.C.T.Net, Inc.*,<sup>118</sup> are just a couple of the cases filed by the Church of Scientology<sup>119</sup> across the country in its more than decade-long legal war with the Church's dissidents.<sup>120</sup> One aspect of this struggle is the Church's efforts to maintain the secrecy of its sacred texts, particularly the documents known as the "Advanced Technology" manuals. An understanding the *Lerma* and *F.A.C.T.Net* cases necessitates an understanding of the legal history of that battle.

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116. See RESTATEMENT (SECOND) OF CONFLICT OF LAW §§ 150, 153 (1971).

117. 908 F. Supp. 1353 (E.D. Va. 1995).

118. 901 F. Supp. 1519 (D. Colo. 1995).

119. Many of these cases are filed in the name of the Religious Technology Center, one of the organs of the Church whose mission is the protection of the Church's secret texts, particularly its training manuals known as the "Advanced Technology" documents. Other cases are filed in the name of the Church itself or Bridge Publications, Inc., another Church subsidiary that holds the copyrights for the Church's published texts. For the sake of convenience, this Comment refers to these parties collectively as the "Church," except where the individual parties are relevant.

120. See Marc Fisher, *Church in Cyberspace; Its Sacred Writ Is on the Net. Its Lawyers Are on the Case*, WASH. POST, Aug. 19, 1995, at C1. The *Post's* story also describes one of the Church's directives concerning the use of litigation to prevent the unauthorized use of Church's texts:

The purpose of the suit is to harass and discourage rather than to win. The law can be used very easily to harass and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.

*Id.*

A. THE CHURCH OF SCIENTOLOGY'S EARLY BATTLES FOR  
SACRED SECRECY

Lawrence Wollersheim, a former Scientology member who sued the Church in the mid-1980's for intentional infliction of emotional distress, is one of the central figures in the legal struggle over the Church's "Advanced Technology" documents. During the course of discovery in that case, Mr. Wollersheim obtained copies of the "Advanced Technology" documents.<sup>121</sup> The state court refused the Church's request to place the documents under seal, and since then, the documents circulated among the Church's dissidents.<sup>122</sup> Subsequently, Mr. Wollersheim won a \$30 million jury verdict against the Church, reduced to \$2 million on appeal.<sup>123</sup> The Church has yet to satisfy the judgment.<sup>124</sup> Two years ago, as a collateral attack on this judgment, the Church filed a new suit against Mr. Wollersheim, but the court dismissed the case and ordered the Church to pay more than \$130,000 for Mr. Wollersheim's legal fees.<sup>125</sup>

In the meantime, several Church dissidents began to use the Internet to circulate the "Advanced Technology" documents. In early 1995, Dennis Erlich, a former Scientology minister who lives in California, began posting copies of the documents to the Usenet newsgroup 'alt.religion.scientology.'<sup>126</sup> Six months after these postings began, the Church sued Mr. Erlich and the organizations that made his access to

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121. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1078-79 (9th Cir. 1986). The very same documents also had been stolen from a Church office in Copenhagen, Denmark, two years earlier. *Id.* at 1078. Throughout the next decade of litigation, most courts were unable to determine with any degree of confidence whether the particular "Advanced Technology" documents at issue in this particular case derived from the material legally obtained by Wollersheim or stolen in Copenhagen.

122. *Id.* at 1079. The same "Advanced Technology" documents also were available in the public file of another case the Church brought against one of its dissident members. See Fisher, *supra* note 120. In that case, the defendant attached 69 pages of the "Advanced Technology" documents to his affidavit, and the court initially refused to seal the file. See *Church of Scientology Int'l v. Fishman*, 35 F.3d 570 (9th Cir. 1995) (upholding the trial court's refusal to seal the record). This "Fishman Affidavit" was the source of the documents used by the *Washington Post* in stories about the controversy. See Fisher, *supra* note 120. Immediately after the *Post's* stories appeared, however, the trial court in the *Fishman* case sealed the record. *Id.*

123. *Wollersheim v. Church of Scientology of California*, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992), *cert. denied*, 114 S. Ct. 1216 (1994).

124. See *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519, 1521 n.1 (D. Colo. 1995).

125. *Church of Scientology of California v. Wollersheim*, 49 Cal. Rptr. 2d 620 (Cal. Ct. App. 1996) (ruling that the Church's suit was properly dismissed under California's law against "SLAPP" suits).

126. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995) [hereinafter "*Netcom II*"].



the Internet possible: Tom Klemesrud and Mr. Klemesrud's Clearwood Data Services; the California computer bulletin board service where Mr. Erlich was a member; and Netcom On-Line Communications Services, Inc., the national commercial on-line service that provided Internet access to the members of Clearwood's bulletin board group.<sup>127</sup> The Church's suit alleged both copyright infringement by Mr. Erlich in posting the "Advanced Technology" documents and contributory infringement by the Internet access providers in allowing Mr. Erlich to reach the Internet.<sup>128</sup> The Church also brought state-law claims against Mr. Erlich for misappropriation of their trade secrets.<sup>129</sup>

The trial court issued an injunction against Mr. Erlich that prohibited him from posting materials which were not a fair use of the "Advanced Technology" documents.<sup>130</sup> The court, however, refused to issue a preliminary injunction against the Internet access providers because the Church was unable to prove contributory infringement.<sup>131</sup> On the state-law trade secret claim, the trial court applied California's version of the Uniform Trade Secrets Act<sup>132</sup> and ruled that the "Advanced Technology" documents were not trade secrets, because those documents were previously posted on the Internet by other anonymous Usenet users unrelated to Mr. Erlich.<sup>133</sup> The court disapproved of the prospect that anonymous Internet postings could destroy an organization's property in its secrets,<sup>134</sup> but found that "once posted, the works lost their secrecy."<sup>135</sup>

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127. *Id.* at 1365-66.

128. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1238 (N.D. Cal. 1995) [hereinafter "*Netcom I*"].

129. *Id.*

130. *Id.* at 1265-66.

131. *Netcom II*, 907 F. Supp. at 1383.

132. *Netcom I*, 923 F. Supp. at 1250 (considering CAL. CIV. CODE § 3426 (West 1996)).

133. *Netcom I*, 923 F. Supp. at 1254. No significant choice-of-law issue surfaced in this case, despite the presence of a national commercial on-line service as one of the defendants, because the parties to the trade secret claim were solely California residents—the Church did not name Netcom and Mr. Klemesrud as defendants in its trade secret claim. *Id.* at 1238.

134. *Id.* at 1256. "The court is troubled by the notion that . . . one of the Internet's virtues, that it gives even the poorest individuals the power to publish to millions of readers . . . can also be a detriment to the value of intellectual property." *Id.* (citation omitted).

135. *Id.* The court's decision hinged on the fact that the "Advanced Technology" documents were not actually secret. Almost a decade earlier, however, the Ninth Circuit had ruled that these same documents could not be considered trade secrets under California law because their value to the Church was spiritual, not commercial. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1090 (9th Cir. 1986) (stating that "[w]e do not accept that a trade secret can be based on the spiritual advantage the Church believes its adherents acquire over non-adherents by using the materials in the prescribed manner"); *see also Religious Technology Ctr. v. Scott*, 869 F.2d 1306, 1310 (9th Cir. 1989) (stating that any allegation by the Church that the documents have economic rather than spiritual value

B. THE *LERMA* CASE

At the same time the Church waged a battle against Mr. Erlich and his Internet access providers, the Church filed suits in Virginia<sup>136</sup> and Colorado<sup>137</sup> to prevent any further Internet postings of "Advanced Technology" documents. In Alexandria, Virginia, the Church obtained an *ex parte* temporary restraining order against a Scientology critic and seized his computers, disks, modem, and other electronic material, because the former Scientology member posted copies of the "Fishman Affidavit" on the Internet.<sup>138</sup> The Church charged Arnaldo Lerma and his Internet access provider, Digital Gateway Systems in Vienna, Virginia, with copyright infringement and misappropriation of trade secrets. The Church added the *Washington Post* to the suit after the *Post* published quotes from the documents in a story about Mr. Lerma's case.<sup>139</sup>

Soon after the raid on Mr. Lerma's house, District Judge Leonie Brinkema began to curtail the Church's attack on Mr. Lerma and the *Post*. On Aug. 30, 1995, she denied the Church's request to turn the temporary restraining order into a preliminary injunction, and ruled that the Church was not likely to succeed on its copyright or trade secret claims.<sup>140</sup> On Nov. 28, 1995, she granted summary judgment to the *Post* dismissing the claims.<sup>141</sup> Finally, on Nov. 29, 1995, Judge Brinkema ruled that the Church's unclean hands dictated that the church should be barred from any equitable remedies against Mr. Lerma, and noted that "[h]ad the Court been aware of the true motives behind this litigation, it might not have granted the RTC's initial *ex parte* motions . . . . We are greatly disturbed to learn that the scope of RTC's involvement clearly exceeded our intentions."<sup>142</sup>

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would "raise grave doubts about [the Church's] claim as a religion and a not-for-profit corporation"). *But see* *Bridge Publications, Inc. v. Vein*, 827 F. Supp. 629, 633-34 (S.D. Cal. 1993) (holding that the "Advanced Technology" documents had independent value for the Church and were protectable trade secrets). The *Vien* decision seems to be unique in the history of the Scientology battles, and the *Vien* court's failure to address the 1986 *Wollersheim* decision renders the case suspect. *See Netcom I*, 923 F. Supp. at 1251 (noting that "[w]ith the exception of the *Vien* case, there is little authority to support a finding that religious materials can constitute trade secrets").

136. *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995) [hereinafter "*Lerma I*"].

137. *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995).

138. *See* Lan Nguyen, *Va. Man's Computer Seized in Internet Lawsuit; Church of Scientology Claims Postings Infringed on Copyrights*, WASH. POST, Aug. 13, 1995, at B6. For an explanation of the background of the "Fishman Affidavit," see *supra* note 122.

139. *See* Fisher, *supra* note 120.

140. *Lerma I*, 897 F. Supp. at 267.

141. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1367-69 (E.D. Va. 1995) [hereinafter "*Lerma II*"].

142. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1361 (E.D. Va. 1995) [hereinafter "*Lerma III*"].

In resolving the Church's trade secret claims, the district court applied Virginia's version of the Uniform Trade Secrets Act.<sup>143</sup> However, the court failed to address the choice-of-law issues raised by the facts of the case. Although the Church of Scientology is an international religious organization, its principal place of business is in California, and the copies of the "Advanced Technology" documents at issue in this case came from California.<sup>144</sup> Hence, under traditional choice-of-law rules, the proper law to apply to the Church's trade secret claim was California's, not Virginia's.<sup>145</sup> Indeed, although the Second Restatement fails to specifically address which choice-of-law rules apply to trade secret claims, its general commentary on choice-of-law rules for multi-state publication torts suggests that the "place of the plaintiff's domicile, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law."<sup>146</sup>

By relying on Virginia's trade secret law,<sup>147</sup> rather than California's, the district court failed to take cognizance of the 1986 *Wollersheim*<sup>148</sup> decision in which the Ninth Circuit ruled that the very documents at issue in *Lerma* could not be considered trade secrets under California law, because their value to the Church was spiritual rather than eco-

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143. VA. CODE ANN. §§ 59.1-336 to 59.1-342 (Michie 1995).

144. *Lerma II*, 908 F. Supp. at 1364-65.

145. The essential nature of the Church's trade secret claim in this case is unusual—the claim is unlike the typical trade secret claim between competitors in which one competitor obtains a commercial advantage over the other by obtaining the proprietary information. In that typical trade secret case, the choice of law typically proceeds to the state where the defendant's actions took place because the state of the plaintiff's headquarters "may have only a slight relationship to . . . the plaintiff's loss of customers or trade." See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f (1971).

The trade secret claims in the Scientology cases, however, are not analogous to this typical kind of "misappropriation of trade values." In *Lerma*, as was the case in *Netcom*, the Church's trade secret claim is based on the harms flowing from unlimited publication of the "Advanced Technology" documents. The Church's harm is based on publication, not a competitive, commercial disadvantage. Thus, when analyzing the choice-of-law question, the Church's claims should be analyzed under the framework for publication torts. See, e.g., *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 302 (7th Cir. 1990) (applying similar reasoning, and ruling that the state with the most significant contacts based on ABC's broadcast of copies of internal FMC documents was California—where FMC's principal place of business was located and where the documents were located—rather than where the broadcast originated).

146. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f (1971).

147. The court quotes Virginia's trade secret statute in *Lerma I*, 897 F. Supp. at 266, but in *Lerma II*, the court relies on decisions that interpreted the trade secret law of Maryland, Wisconsin, and Michigan. See *Lerma II*, 908 F. Supp. at 1368-69 (citing *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir.), cert. denied, 114 S. Ct. 443 (1993); *Smith v. Snap-On Tools Corp.*, 833 F.2d 578 (5th Cir. 1987); *Aerospace America, Inc. v. Abatement Technologies, Inc.*, 738 F. Supp. 1061 (E.D. Mich. 1990)). Despite these conflicting citations, it seems clear that the court intended to apply Virginia law to this case.

148. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986).

nomic.<sup>149</sup> Instead, the court resolved the case on the basis of a finding that the "Advanced Technology" documents no longer could be considered secret because of the various anonymous Internet postings.<sup>150</sup>

### C. THE *F.A.C.T.NET* CASE

In the latest Scientology case, *Religious Technology Center v. F.A.C.T.Net, Inc.*,<sup>151</sup> the district court similarly disposed of the trade secret claims by applying Colorado trade secret law rather than California's law.<sup>152</sup> In *F.A.C.T.Net*, the Church brought copyright and trade secret claims against Lawrence Wollersheim and his Colorado-based, non-profit archive and bulletin board service.<sup>153</sup> Mr. Wollersheim made copies of the "Advanced Technology" documents available to subscribers of the F.A.C.T.Net bulletin board, but not in the public portions of the archive.<sup>154</sup> Just as in *Lerma*, the Church initiated the suit against F.A.C.T.Net with an *ex parte* temporary restraining order and a warrant to seize the computer equipment that had been used to disseminate the alleged trade secrets.<sup>155</sup> In addition, as was the case in *Lerma*, the defendants subsequently raised questions about the good faith of the Church's actions in the seizure, in part because Church representatives wiped the memory from all of Mr. Wollersheim's computer files, including files unrelated to the lawsuit.<sup>156</sup>

In ruling on the trade secret claim, the district court applied Colorado's version of the Uniform Trade Secrets Act<sup>157</sup> without analyzing why Colorado's law was more appropriate. As previously discussed, California is the state where the Church of Scientology has its headquarters and where the "Advanced Technology" documents were obtained. In a multi-state publication tort such as this case, traditional choice-of-law

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149. *Id.* at 1089-91; see also discussion of *Wollersheim*, *supra* note 135.

150. *Lerma II*, 908 F. Supp. at 1368-69.

151. 901 F. Supp. 1519 (D. Colo. 1995).

152. *Id.* at 1526-27.

153. *Id.* at 1521.

154. *Id.* at 1521-22. Arnaldo Lerma was a board member of F.A.C.T.Net, and following the Church's seizure of Lerma's computer files in Virginia, the defendants in *F.A.C.T.Net* posted a message to an Internet newsgroup stating that Lerma's postings had been done with F.A.C.T.Net's endorsement and support. *Id.* at 1522. Six days after F.A.C.T.Net posted this message, the Church's lawyers secured an *ex parte* order against F.A.C.T.Net. *Id.*

155. *Id.* at 1522.

156. See *Religious Tech. Center v. F.A.C.T.Net, Inc.*, 907 F. Supp. 1468, 1470 (D. Colo. 1995) (describing the court's contempt proceeding against RTC and its appointment of a special master to determine what damage, if any, had been done to Mr. Wollersheim's computer files).

157. COLO. REV. STAT. § 7-74-101 to 7-74-110 (West 1996); see *F.A.C.T.Net*, 901 F. Supp. at 1526-27 (citing *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993)); *Colorado Supply Co. v. Stewart*, 797 P.2d 1303 (Colo. Ct. App. 1990).

doctrines suggest that the appropriate state law to apply is the law of California, not Colorado.<sup>158</sup> Although Colorado's trade secret law provides for smaller damages than those allowed under California's law,<sup>159</sup> the 1986 *Wollersheim*<sup>160</sup> decision suggests that California's trade secret law is less than hospitable to the Church's assertions of trade secret status for its training manuals.<sup>161</sup>

## V. CONCLUSION

The courts in *F.A.C.T.Net* and *Lerma* reached the same result for the same reasons, but did so in contravention of traditional choice-of-law principles. In choosing the law of the defendants' jurisdiction rather than the law of the plaintiff's residence, the *F.A.C.T.Net* and *Lerma* courts missed an opportunity to sharply restrain the freewheeling efforts of the Church of Scientology to squelch its critics. As Judge Brinkeman recognized, the Church's suits over these "Advanced Technology" documents had very little to do with protecting religious secrets.<sup>162</sup> Instead, the apparent aim of the "Advanced Technology" suits was to incite fear and create financial distress among the corps of former Scientology members who utilized the Internet as a vehicle to lambaste the church. In relying on Colorado and Virginia law, the *F.A.C.T.Net* and *Lerma* courts likewise declined to prohibit this kind of legal warfare. By deciding these cases only on the limited grounds of whether the "Advanced Technology" documents are actually secret, the courts left open the possibility that the Church might effectively assert trade secret status over other Church documents. On the other hand, if courts addressed the alternative grounds raised in the 1986 *Wollersheim* decision—that no religious document can be a trade secret—then the Church would be hard pressed to justify trade secret status for *any* of its documents, not just the ones that already have been posted to the Internet.

In their defenestration of the emerging pattern of choice-of-law decisions, the *F.A.C.T.Net* and *Lerma* courts looked to the law of the defendants' residence, which was the place where the Internet transmissions

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158. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f (1971).

159. Compare COLO. REV. STAT. § 7-74-104 (1996) (allowing exemplary damages not to exceed the amount of actual damages awarded in a case) with CAL. CIV. CODE § 3426.3 (West 1996) (allowing exemplary damages that are double the amount of actual damages).

160. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986).

161. See also discussion of *Wollersheim*, *supra* note 135.

162. See *Lerma II*, 908 F. Supp. at 1360.

[T]he Court is now convinced that the primary motivation of RTC in suing *Lerma*, DGS and *The Post* is to stifle criticism of Scientology in general and to harass its critics. As the increasingly vitriolic rhetoric of its briefs and oral argument now demonstrate, the RTC appears far more concerned about criticism of Scientology than vindication of its secrets.

originated. Therefore, the absence of any reasoning to support these decisions indicates that the Scientology decisions amounted to defaults in favor of the law of the forum state. Although not all issues involving disputes on the Internet are "new" or "unique," the instantaneous national scope of communications via the Internet should prompt all courts dealing with such cases to explicitly evaluate choice-of-law issues, especially when the parties to such cases present clearly interstate disputes. Perhaps in undertaking this choice-of-law analysis, courts will conclude that the academic suggestions for a new federal common law for the Internet or a new *lex cyberalty* really are worthwhile.<sup>163</sup> Interestingly, courts may determine that the Second Restatement's presumption in favor of the plaintiff's state of residence is inappropriate, and that the nature of the Internet requires a choice-of-law doctrine that favors the defendant's state of residence.<sup>164</sup>

Unfortunately, no explicit guideposts exist to determine how courts might resolve these issues. Courts do not acknowledge that the issues exist. Instead, choice-of-law decisions are made in silence. In the meantime, Internet users are consigned to the bliss of ignorance, unaware of which state's law they might violate as their digital messages flash through the ether.

In its ignorance, the cyberspace community is vulnerable to legislative intrusions similar to the Communications Decency Act.<sup>165</sup> When

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163. As discussed *supra*, however, both of these ideas probably are unworkable in today's legal framework. The *Erie* doctrine probably poses an insurmountable hurdle for creating a federal common law of Internet torts, and due process concerns will hinder the development of a *lex cyberalty*. See *supra* notes 41 & 57 and accompanying text.

164. This conclusion would directly contradict the Second Restatement's explicit instruction that in cases of multi-state publication torts, the state with the most significant relationship is the state of the plaintiff. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(2) (1971); see also *supra* note 31 and accompanying text (discussing the rule that in a case of multi-state publication torts, the state with the most significant relationship is the state of the plaintiff's domicile).

Nevertheless, if courts concluded that in the context of the Internet, the state with the most significant contacts to a publication tort is the defendant's state—the place where the transmission originated—one can feasibly envision a kind of "Delaware-effect" in the realm of Internet law. If the defendant-forum rule became controlling, one could reasonably expect that many, perhaps most, large scale Internet publishers would move to the state with the most advantageous legal protections for the Internet. As this process developed, the Internet industry could reasonably be expected to lobby the legislators of this state to expand and solidify these protections.

No particular state yet occupies this position as the forum-of-choice for Internet publishers, but such a movement could be expected if the choice-of-law regime for the Internet became more clearly defendant-oriented.

165. Pub. L. 104-104, § 509(c)(1), 110 Stat. 56 (to be codified at 47 U.S.C. § 230(c)(1)). This section of the Telecommunications Act has been widely decried as a ham-fisted attempt by Congress to meddle in an area in which its political inclinations lead to detrimental legislation. See, e.g., Meredith L. Friedman, Note, *Keeping Sex Safe on the Information*

the legal rules for a ubiquitous medium are ambiguous, the temptation for Congress to clarify the ambiguity is intense. This political dynamic appears to be little other than a threat to the autonomy of the Internet, and is another reason why the Scientology cases are so harmful to the interests of the Internet community. These cases injected uncertainty into the choice-of-law equation where previously a pattern of predictability started to emerge. If the courts had followed that pattern in the Scientology cases, it would have been possible to point to a clear rule for publication torts on the Internet. That rule would have established the law of an Internet case to be the law of the plaintiff's residence. That rule would have exposed cyber-publishers to the variety of differences in the substantive law of the fifty-one jurisdictions in this country, and beyond. But the rule would have had the advantage of settling the choice-of-law question. With the question settled, the likelihood of legislative intrusion would have diminished.

Today, thanks to the Scientology cases, the emerging pattern of a traditional choice-of-law rule is discarded. No other explicit rule has arisen to take its place. As John Perry Barlow told us, everything we thought we knew about the Internet was wrong. So far, however, courts have not been willing to tell us what is right.

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*Superhighway: Computer Pornography and the First Amendment*, 40 N.Y.L. SCH. L. REV. 1025, 1047-50 (1996) (criticizing the provisions of the 1996 Act that defines or criminalizes obscene or indecent transmissions); see also John K. Wilson, *Myths and Facts: How Real is Political Correctness*, 22 WM. MITCHELL L. REV. 517, 537 (1996) (stating that "the Decency Act rips a hole in the First Amendment ten times wider than any speech code ever did").