TOWARDS A THEORY OF CYBERPLACE:
A PROPOSAL FOR A NEW LEGAL FRAMEWORK

by

Ronnie Cohen[?] and Janine Hiller[**]

Introduction

The Internet has generated many cases in which courts are being asked to stretch traditional legal concepts, statutory interpretations, and the application of legal precedents to issues involving similar, but ultimately different, questions of rights and obligations. One area in which courts are struggling to conceptualize the Internet within the legal framework is that of how the electronic medium fits into rules about property and places. Does the Internet contain a public commons in which civil rights should be protected, or conversely do networks consist of private property that can be subject to unlawful trespass? Or, do different Internet activities require different characterizations? On the one hand, the Supreme Court characterized the Internet as the "most participatory form of mass speech yet developed,"[1] while on the other hand, private networks are staking out their claims to cyberterritory and suing those who interfere with their property rights.[2] The tension between these two conceptual frameworks: voice or place, is evident in the early development of Internet case law. While the harm alleged by plaintiffs in the online environment is generally similar to harm that is traditionally remedied by current common law and statutory provisions, the cause of the harm lacks the physical components that previously were assumed without much discussion. As a result, courts have to go beyond ordinary definitions, common understandings, and historical underpinnings of the law to make the "fit" to cyberspace.

As one commentator predicted in 1998, the question of "what constitutes authorized access" to computer networks is a frequently asked question.[3] For example, computer crimes in Virginia are defined in terms of whether a person has "authority" to use the computer or computer network, and authority is defined in terms of the property rights of the network owner.[4] "The tension inherent in balancing the importance of information and free speech against the security and privacy needs of individuals and enterprises is nothing new."[5] The same can be said regarding the balancing of free speech and private property rights. Should private entities, such as Microsoft and America Online, set the boundaries for what is authorized use, because their networks are their own private property? Or, as a matter of public policy, should the public have more input into defining authorized use, because the Internet, although privately managed in large segments, is in fact, a public place? Are these the most useful questions for us to be asking as the courts attempt to shape a more cohesive and distinct body of Internet law?

It is well documented that the words we choose to describe a concept can influence the way in which the concept is understood.[6] The use of a connected set of metaphors creates a cognitive model that unconsciously shapes our perception of the subject.[7] "Metaphors create our social realities as they tell us who we will be in the future, they also make our experience coherent."[8] The language that is often used to describe the Internet is descriptive of physical places. The Internet is referred to as the Information Highway, or Superhighway. When searching for information, we describe the action as "surfing." The Net Lingo dictionary offers these other terms as examples of the language of place, as well: address, architecture, chat room, crawler, data traffic, domain name, firewall, gateway, local area and wide area networks, navigate, netizen, and portal.[9] As these terms are used to describe both the concept of the Internet and the activities that are associated with it, they also play a part in setting the legal landscape of Internet law. If various aspects of the Internet, such as networks and web sites, are analogized to physical places, which is generally governed by property law, then the relationships of people who occupy, visit, or intrude upon those places is also likely to be determined by reference to the traditional law of property.[10]

The consistent application of a framework of either private or public property, place or possession, to the use of computer networks will resound in many ways that may not be within the current contemplation of the courts.[11] Are there alternative metaphors for the Internet? Is the Internet a voice, rather than a place? Is the law of speech, for example, defamation, abusive language, the First Amendment, and public forum a more useful framework for case analysis?[12]

Part I of this paper reviews the trespass theories under the common law that litigants have argued and courts have employed to address the regulation of online activities. Part II looks at the definition of "place" and whether particular uses of the Internet are "places of public accommodation." In Part III, we propose a new legal framework that could be applicable to the Restatement as well as serve as a basis for statutory extension to reach cyberspace issues. This framework will serve as a bridge so that by using traditional legal starting points, the law can logically and consistently be applied to new cyberspace issues as they arise.

[?] Professor, Christopher Newport University, Newport News, VA
[**] Professor, Virginia Tech, Blacksburg, VA

I. A Thing or a Place; Public or Private?

A. Restatement of Torts: Trespass to Chattels

Section 217 of the Second Restatement of Torts defines a trespass to chattels as the following:

> A trespass to a chattel may be committed by intentionally
> (a) dispossessing another of the chattel, or
> (b) using or intermeddling with a chattel in the possession of another.[13]

Section 218 states additional requirements for damages to the property in order for a person to be liable for the trespass:

> One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
> (a) he dispossesses the other of the chattel, or
> (b) the chattel is impaired as to its condition, quality, or value, or
> (c) the possessor is deprived of the use of the chattel for a substantial time, or
> (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.[14]

The comments to Section 218 explain that damages for trespass to chattels do not arise automatically, as with real property, but instead require that an important interest of the possessor of the chattel be affected. In addition, the comments explain that:

> Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected.[15]

Thus, there are two basic requirements to prove trespass to chattels. First, the chattel must be interfered with, or meddled with, and second, the chattel must suffer some damage.

B. Robots and Trespass to Chattels

Several recent trespass to chattel cases dealing with Internet access to another's computer communications are instructive to an understanding of the application of this common law tort to the new medium.[16] In *eBay v. Bidder's Edge,*[17] *Register.com v. Verio,*[18] and *Oyster Software v. Forms Processing*,[19] the issue was whether the use of an electronic robot to search the plaintiff's website constituted a trespass. In *Hamidi v. Intel*,[20] the issue was whether the sending of an email through a proprietary company email network constituted trespass to chattels. In all of these cases, the court examined the intangible attributes of the electronic environment in order to apply the age-old tort of trespass, where the computer system was the personal property subject to the trespass. The first three trespass cases involving commercial robots searching the computers of another are important background to the *Hamidi* case that involves expressive action, but which nonetheless was pursued under the rubric of an invasion of a common law right in property.

An electronic robot is a program that will scour web sites automatically for particular information.[21] Robots can also be known as "scrapers," as they scrape information off of web sites, or as "spyders," as they spin a web to catch information. In all three cases, *eBay v. Bidder's Edge, Register.com v. Verio,* and *Oyster Software v. Forms Processing,* the defendant used an electronic robot to secure some type of information from the plaintiff's web site. Bidder's Edge and Verio obtained significant amounts of information from the plaintiff's site. Bidder's Edge robots scanned the prices found on eBay approximately 100,000 times a day.[22] Verio accessed the WHOIS database of Register.com to obtain daily the new registered domain names and to match them with contact information.[23] The unauthorized access of both Bidder's Edge and Verio, coupled with the use of the plaintiffs' system capacity, resulted in a preliminary injunction by both courts based on trespass to chattels. The unauthorized access satisfied the meddling component of trespass, and the reduced network capacity satisfied the damage component.

Oyster Software involved a different level of interference with chattels. The court first noted that Oyster Software used electronic robots to gain unauthorized access to Forms computers, thus meeting the first requirement of a trespass. The distinguishing factor in the Oyster decision, however, was that the court held that the extent of damages need not be significant; a use of any kind of the plaintiff's computer would suffice for a trespass to chattels claim. The mere copying of the plaintiff's metatags by Oyster's robot was a sufficient allegation to prevent the motion to dismiss the trespass to chattels claim.[24]

C. Spam and Trespass to Chattels

Unsolicited bulk email, also known as spam, is a problem for system administrators and individuals because it uses server space and interferes with normal communications. Early cases established a fairly consistent view that spam could be actionable as a trespass to chattels. The first case was *CompuServe Incorporated v. Cyber Promotions, Inc. and Sanford Wallace.*[25] Because of customer complaints, Compuserve notified Cyber Promotions to cease sending emails to its

subscribers, however Cyber Promotions refused to do so. The court applied the law of trespass to chattels as found in the Restatement, and identified the harm to Compuserve's computer service caused by the large amount of unsolicited email as the core of the tort.[26]

Following the Compuserve case, several AOL cases also confirmed the application of the tort of trespass to chattels as a basis for injunctions to prevent spam, and award damages to the plaintiff: *AOL v. IMS et al*.,[27] (60 million emails sent), *AOL v. LCGM, Inc. et al*.[28](over 90 million email messages sent), and *AOL v. Greatdeals.net et al*[29](over 130 million emails sent). In all of these cases, the plaintiff, AOL, was successful in arguing that the spam constituted a trespass to its system, and that it had been harmed by the effect on the system that these large amounts of unsolicited email had caused.

D. Speech and Trespass to Chattels:

Hamidi was the webmaster for a forum devoted to airing grievances about the work environment and conditions at Intel Corporation. In addition, he sent several emails to all of Intel's employees. Hamidi argued that this electronic forum was essential for communication between employees of Intel's international corporation, who otherwise would be unable to effectively communicate across the globe.[30]

Intel, however, did not appreciate Hamidi's emails to its employees, and claimed a trespass to its chattel. The action was based on the argument that Hamidi committed a trespass to the internal email system of Intel, because of the six emails that Hamidi sent to thousands of electronic work addresses of Intel employees. Intel claimed the emails clogged the system and wasted company human capital used to block and remove the messages. Hamidi took steps to defeat the security of Intel blocking messages from certain outside sources, causing Intel to use additional resources to stop his messages.[31]

The appellate court began its discussion of the nature of trespass to chattels and the Internet by noting "The common law adapts to human endeavor."[32] The court recognized the additional challenge of applying the law to the electronic world of communication in that "[t]respass to chattels is somewhat arcane and suffers from desuetude."[33] Not dissuaded, the court then proceeded to chart the development of the common law of trespass to chattels and its historical precedents. It noted the progression of cases from early in the common law, and arrived at the conclusion that trespass to chattels could occur with electronic messages, as they are close enough to tangible personal property to fall into the chattel category. In addition, the damage to the chattel was found in the time that the system administrators of Intel took to block the messages, and the time of each employee who opened, read and disposed of the individual message found in their email. Thus, the court upheld an injunction ordering Hamidi to cease sending emails to Intel employees' business addresses.[34]

The dissent in the case focuses on the fact that the damage alleged is too far removed from the property to constitute a trespass. The dissent argues that employee time is not closely connected to the system itself, as in previous cases, where the damage by the robots was identified as the use and limitation to the electronic system.[35] Indeed, Intel argued no damage from the emails clogging their system, and under the facts it is questionable that they could have succeeded in that claim[36]. The dissent warns that extending the tort of trespass to chattels to situations where the harm consists of merely having to read the unwanted emails could result in quite significant unintended consequences and that it, "transforms a tort meant to protect possessory interests into one that merely attacks speech."[37] One commentator criticized the majority's analogy of the facts in the case to a physical trespass, likening Hamidi's conduct instead, to that of a person shouting at Intel's employees from a public park outside of Intel's offices "and Intel wants the court to force Hamidi to take his megaphone and his message elsewhere."[38] The objection was to the message, not the burden imposed by having to close the office windows.

The next section considers another cyberspace context in which the concept of property and place are intertwined with speech. Do the laws preventing discrimination in places of public accommodation apply to Internet chat rooms? Can a virtual forum for communication be governed by the anti-discrimination laws applicable to private property?

II. What is a Place?

What is a place? Webster's offers ten possibilities, two of which clearly illustrate the difficulty of determining whether cyberspace is a place, with the legal attributes of a place. 1. physical environment; 2. an indefinite region or expanse.[39] While the first definition describes the traditional notion of place, the second one could describe the concept of cyberspace as a place. The question raised by a case recently filed in the United States District Court in Alexandria, Virginia,[40] is whether a law pertaining to a place, specifically, Title II of the Civil Rights Act of 1964,[41] is applicable in cyberspace. Saad Noah argues that an America Online Chat room is a "place of public accommodation"[42] that is subject to the requirements of Title II. The importance of this question is increasing every day, as more and more of our activities are conducted on the Internet.

Cases discussed in the previous section of this paper indicate that a number of courts have viewed computer networks as property with physical characteristics, upon which robots may enter and trespass. The *Hamidi* Court recognized that "At early common law, trespass required a physical touching of another's chattel or entry onto another's land. The modern rule recognizes an indirect touching or entry."[43] This rule has recognized trespass from dust particles, smoke, sound waves, and now electronic signals.[44] Thus, the courts have interpreted common law tort of trespass over time to award damages for a harm similar to a physical interference, although the property being trespassed on, as well as the trespasser, no longer are required to have a physical form. Using the development of this trespass model for the question of place, will the law

recognize the Internet as fitting Webster's definition of an indefinite region or expanse that has no physical location as a place?

The question comes up with respect to online chat rooms in a case filed in the United States District Court in which the plaintiff claims that America Online's unequal treatment of hate messages based on religion and national origin in its chat rooms amounts to discrimination in a place of public accommodation, prohibited by the 1964 Civil Rights Act.[45]

Plaintiff Saad Noah is a Muslim male, who seeks to represent a class of Muslim current and former member of America Online who have been "insulted, threatened, mocked, ridiculed and slandered due to their religious beliefs in AOL's 'Beliefs in Islam' and 'Koran' chat rooms," without any intervention by AOL.[46] Although AOL's terms of service state that this type of offensive content is prohibited and those who post such messages are subject to having their membership terminated, Noah claims that AOL is not enforcing these rules in the chat rooms pertaining to Muslim beliefs, but does enforce the rules in chat rooms dealing with other subjects and particularly, with other faiths. As a result, Noah claims that he and members of his class are being discriminated against because of their religious beliefs. [47]

Like trespass, the law regarding public accommodation has a long history in the common law. This history was recounted in a U.S. Supreme Court case challenging the conviction for trespass of 12 African American students after a sit-in at a Maryland restaurant in 1963.[48] The court stated, " 'the good old common law' required that the state insure all citizens access to places of public accommodations.[49] This is the basis of an innkeeper's duty "to take in all travelers and wayfaring persons," then extended to common carriers, and later to public shows and amusements. It is the same duty that was the basis of Title II of the 1964 Civil Rights Act (hereafter CRA). The Act provides:

> All persons shall be entitled to the full and equal treatment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.[50]

The question raised by the Noah complaint is whether a place of public accommodation can exist in cyberspace and if so, whether certain types of speech amount to discriminatory conduct under the CRA.

A. "Place" under Title II of the Civil Rights Act

Since its enactment in 1964, the Civil Rights Act and its state counterparts have been interpreted many times as the struggle to end discrimination extended to forums beyond essential services such as education, transportation, and lodging. Among the many defenses raised by groups and institutions seeking to avoid the mandate of equal treatment, a number of cases revolved around the question of whether the site of the discrimination was a "place" at all. Defendants who are membership organizations have argued that they are "private clubs" and thus exempt from the Act.[51] Or, if membership is non-exclusive, organizations have argued that their activities are not tied to a particular place and therefore the organization does not come within the definition of "place of public accommodation."[52]

In *Welsh v. Boy Scouts of America*,[53] Mark Welsh, a seven-year-old boy who was denied admission to the Boy Scouts because of his refusal to take an oath affirming his belief in God, argued that that his exclusion from the organization was illegal discrimination based on his religious belief. The Boy Scouts of America asserted that the organization was a membership organization and therefore was not subject to the Act. First the court asked: "…whether Congress intended to govern organizations like the Boy Scouts within the statutory language 'place of public accommodation' or 'other places …entertainment?'"[54] The court notes that although the statute lists fifteen examples of regulated facilities, none of them "remotely resembles" a membership organization.[55] The court then considers whether the Boy Scouts of America is included as [an]other place of exhibition or entertainment. And again, the court concludes that the language of the statute does not include a "membership organization whose purpose is not closely connected to a particular facility."[56]

Title II of the CRA does not include a prohibition against gender discrimination in places of public accommodation. Thus, when the National Organization for Women challenged Little League's exclusion of girls from its activities, it did so under the New Jersey state civil rights statute.[57] While the New Jersey law is broader than the federal law, because it extends to gender discrimination, the public accommodation language is similar to Title II. In interpreting that language the New Jersey court stated:

> The statutory noun "place" (of public accommodation) is a term of convenience, not of limitation. It is employed to reflect the fact that public accommodations are commonly provided a "fixed places," e.g. hotels, restaurants, swimming pools, etc. But a public conveyance like a train is a "place of public accommodation" although it has a moving situs…[58]

Likewise the court dismissed the defense that Little League is a membership organization similar to a private club. The court approved of the lower court judge's conclusion that: "membership organizations, although not having a 'specific pinpointable geographic area,' are nevertheless places of public accommodation if, as Little League does, they offer advantages and facilities on the basis of a general, public invitation to join."[59]

B. Place under Title II of the ADA

Whether an online chat room is a place of public accommodation will be a case of first impression for the court, and therefore, the theoretical and legal framework for addressing the issue may be found in other contexts besides the Civil Rights Act. The most analogous language is found in the Americans with Disabilities Act, (hereafter ADA) which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases, (or leases to) or operates a place of public accommodation.[60]

The most recent, and celebrated case interpreting this language in the ADA is *PGA v. Martin*.[61] Casey Martin, a well-known and talented professional golfer has a circulatory disorder that prevents him from walking golf courses. The use of a golf cart violated one of the rules of the Professional Golfers' Association, which sponsors major golf tournaments, for which Martin qualified in all other respects. Martin sued, alleging that the PGA was a place of public accommodation and as such was required to make reasonable accommodation to individuals with disabilities. The court had two issues to examine, only the first of which is relevant here. Was the PGA a place of public accommodation, under Title III of the Americans With Disabilities Act, and if so, would use of the golf cart fundamentally alter the nature of the event?

The PGA argued that it was a private club or private establishment, or, alternatively, that "the play areas of its tour competitions do not constitute places of public accommodation."[62] The list of covered establishments under Title III of the ADA and those of Title II of the CRA are similar. In fact, the first three categories of the ADA are identical to the categories of the CRA, although the language is slightly more modern.[63]

The *Martin* Court notes the similarity of the two statutes. The Court states that its conclusion that the PGA is a place of public accommodation is consistent with case law under the Civil Rights Act, citing *Daniel v. Paul*,[64] a 1969 civil rights case. In *Daniel*, the court found that the snack bar in a recreational club made the club a place of public accommodation,[65] but when cited in *Martin*, that court said that *Daniel* stood for the proposition that the phrase covers participants in a sport or athletic activity, with no reference to the snack bar that was the basis of the *Daniel* court's decision holding the entire facility within the CRA.[66] In essence, the *Martin* court interpreted the CRA to apply to much broader range of activities than those occurring at a specific, physical place, citing legislative history for support.[67] The court concluded that the PGA was a place of public accommodation. But, in fact, the Professional Golfers' Association is an organization and not a place at all.

Can we conclude that in using the same language as the CRA, Congress, when it enacted the ADA almost thirty years later, intended that the acts would be interpreted consistently?[68] That appears to be what the Supreme Court believed in the *Martin* case. To take a contrary position, that the ADA contains a broader description of place of public accommodation than the CRA would mean that Congress was more concerned about disability discrimination than it is about racial, religious and ethnic discrimination. If the Supreme Court correctly interpreted Congress's intent, it is certainly likely that in the passage of time since 1964, Congress realized that more and more activities are important to equal access to society's benefits and opportunities

The Court that hears *Noah v. AOL* has several choices. First, it could adopt the reasoning of the trespass cases and find that the AOL network is a physical place to which chat room activities are closely connected and therefore the chat rooms are places in the traditional sense; it could disregard the physical requirement, by following the PGA v. Martin reasoning that a specific physical place is not required; or the court could find that the chat rooms are not places of public accommodation under Title II of the Civil Rights Act.

C. Is Cyberspace a Place?

It is stating the obvious that more and more of our culture is going online. In the 1999 Government report *Falling Through the Net*, the administration observed that access to the Internet was a pre-requisite to full participation in the society of the 21st century. In this early report participation was equated with access:

> For some individuals, it is an economic solution. Lower prices, leasing arrangements, and even free computer deals will bridge the digital gap for them. For high cost communities and low-income individuals, universal service policies will remain of critical importance. For other individuals, there are language and cultural barriers that need to be addressed. Products will need to be adapted to meet special needs, such as those of the disabled community. Finally, we need to redouble our outreach efforts, especially directed at the information disadvantaged.[69]

In its most recent report, the Department of Commerce found that Internet access was growing rapidly,[70] leading one commentator to conclude that the digital divide is not the civil liberties issue of the 21st century.[71] And if the divide is seen only in terms of access, that appears to be the case, as almost all young people have access now, and more than likely will continue to have access to technology as they grow up. But, while access remains an important first step, it alone will not create equality of opportunity to participate. As we have learned through the civil rights struggles of the past century, just opening the door to the schoolhouse is not sufficient. The curriculum,

the teachers, and the textbooks must not exclude any one from meaningful participation. Similarly, the way in which the Internet is managed, will determine if certain groups are able to fully use and enjoy their access.

Entertainment, work, banking and investing, shopping and social interaction are just some of the functions that occurred in physical space in 1964 when the Civil Rights Act was passed and now also occur in cyberspace. The stated purpose of the CRA, however, is significantly undermined if the activities in cyberspace are exempt from its coverage. While economic barriers to Internet access appear to be diminishing, barriers based on discrimination have, heretofore, received little attention. The case filed by Saad Noah against AOL requires the court to consider whether the legal tools exist insure that such barriers will not be built in cyberspace.

Participatory Internet activities, like their physical world counterparts, vary widely. For example, people may join a listserv in order to carry on a conversation with like-minded people, people in the same occupation, or with some other common characteristic. A listserv is analogous to a private club, if membership is based on a legitimate credential related to the purpose of the list. A listserv that admits members who only share a commitment to a particular purpose would likely be an exempt membership organization under the CRA.

A chat room, on the other hand, is open to anyone who joins the network. AOL membership is solicited through general advertisement, distribution of the software through the mail, and automatic membership with the purchase of a new personal computer from certain manufacturers. It is "open to the public" in every sense of the word. People meet, and have real-time conversations in these virtual rooms, just as they would in physical rooms. The advent of streaming audio and video capability makes this comparison even stronger.

The harm that has allegedly been suffered by the class represented by Saad Noah is exactly the kind of harm that Congress intended to redress in passing the Title II of the 1964 Civil Rights Act. In finding that the Act covered a recreational area with a snack bar in *Daniel v. Paul*, the Supreme Court stated: "Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreational areas. But it does not follow that the scope…should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage."[72] As the foregoing discussion suggests, a natural reading of the language is ambiguous with regard to the law's application to cyberspace. Consequently, the court may be unwilling to judicially extend its reach, leaving it to Congress to amend the Act.

What can the courts do now to address this continuing conflict between rights of property owners and rights of free speech? And how might Congress address it legislatively? In the concluding section we offer a new proposal.

III. A Proposal for a New Framework: A Place of Public Communication

One approach to resolving the tension between the Internet as a voice and the Internet as a place looks to the common law of public accommodation as the basis for a new Restatement concept. The authors propose the following new Restatement provision:

> ***Places of Public Communication:***
> *A private provider of online content/access creates* ***a place of public communication*** *when*
> *1) the purpose of the online place is generally available for access by the online public, or*
> *2) the online place is available for access to a limited number of persons for a commercial reason.*
> *This does not include any content/access made available by a person or company for employee or independent contractor only use.*
> *Places of public communication shall not discriminate based on age, race, religion, national origin, political views or gender. Individuals who are harmed by the discrimination of a place of public communication shall have an action in tort to recover actual damages, attorney's fees and costs.*
> *Persons who enter places of public communication shall have the duty to abide by nondiscriminatory (as defined above) terms of use established by the provider. Failure to do so creates tort liability for the actual harm incurred by the provider.*

Thus, a place of public communication seeks to extend the common law duty of nondiscrimination imposed on innkeepers and common carriers, to online service providers. The provision seeks to protect the private property of the provider, while at the same time recognize the special duty to the public that a person or corporation has when the means of public communication are within that entity's control. The analysis of the cases described in this article under the proposed Restatement would necessarily begin with an inquiry as to whether the Internet use in each case meets the definition of a place of public communication. Only if that preliminary test were met, would the provider then face liability for discriminatory practices in that identified cyberplace.

The implication of establishing the concept of a place of public communication is resonant of the private property/public forum debate that emerged as privately owned shopping centers and malls began to replace publicly owned streets and parks

in downtown areas. The debate has re-emerged as the Internet begins to replace other forums for speech. While state constitutions may provide protection for free speech on certain types of private property,[73] most do not,[74] and there is no equivalent federal protection.[75] Moreover, while the enforcement of trespass laws might constitute the state action necessary to bring a speech claim in these cases, no such state action is present where a private entity engages in discriminatory enforcement of private terms of use, as alleged in the *Noah* case.

Applying the place of public communication model would not alter the outcome of the trespass to chattels cases discussed above, where interference with the network was the proven harm to the plaintiffs[76]. However, it would prevent further extension of the trespass doctrine as a means for service providers to suppress certain forms of speech where the damage is the unwanted speech itself. On the other hand, an AOL chat room would clearly fall within the definition of a place of public communication, and therefore, if the allegations in the *Noah v. AOL* case are proven to be true, liability would result under this provision.

This proposal seeks to preserve the rights historically associated with private property, but at the same time recognize that when a private property owner transforms the property into a place for the public to communicate, and receives a benefit from that transformation, then the property owner can be subject to the common law duty of nondiscrimination, traditionally imposed on innkeepers and common carriers.

Footnotes

---

[1] Reno v. ACLU, 521 U.S. 844, 863 (1997) (quoting District Court findings).
[2] See i*nfra*, pages 2-5 and cases cited therein.
[3] Barbara Spillman Schweiger, *The Path of E-Law: Liberty Property and Democracy from the Colonies to the Republic of Cyberia*, 24 RUTGERS COMPUTER & TECH. L.J. 223, 226 (1998).
[4] VA. CODE ANN. §§18.2-152.2-18.2-152.4., See also EF Cultural Travel BV v. Explorica, 274 F. 3d 577 (1st Cir. 2002) applying the Computer Fraud and Abuse Act.
[5] Schweiger, *supra* note 3 at 274.
[6] See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).
[7] GEORGE LAKEOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR 65-66 (1981).
[8] Marie A. Fallinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 St. John's L. Rev. 217, 231 (1997).
[9] *NetLingo* < http://www.netlingo.com>.
[10] For a general discussion of property based models applicable to cyberspace see Harold Smith Reeves, *Property in Cyberspace*, 63 U. CHI. L. R. 761 (1996).
[11] See Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L. J. 561 (2001).
[12] For a discussion of these competing interests in the context of intellectual property protection, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, available online at: http://james-boyle.com, and Carol. M. Rose, *The Several Futures of Property: Of Cyberspace ad Folk Tales, Emission Trade and Ecosystems*, 83 MINN. L.R. 129 (1998).
[13] RESTATEMENT (SECOND) OF TORTS §217 (1965).
[14] RESTATEMENT (SECOND) OF TORTS §218 (1965).
[15] RESTATEMENT (SECOND) OF TORTS §218 cmt. e (1965).
[16] For a discussion of trespass law applicable to the Internet, see John D. Saba, *Internet Property Rights: E-Trespass*, 33 ST. MARY'S L.J. 367 (2002) and Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002).
[17] eBay v. Bidder's Edge, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).
[18] Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000).
[19] Oyster Software, Inc. v. Forms Processing, Inc., 2001 U.S. Dist. LEXIS 22520 (N.D.Cal. 2001).
[20] Intel Corp. v. Hamidi, 114 Cal.Rptr.2d 244 (Cal.App. 3 Dist. 2001) review granted, 118 Cal.Rptr.2d 546 (Cal., 2002).
[21] Steve Fischer, When Animals Attack: Spiders and Internet Trespass, 2 MINN. INTELL. PROP. REV. 139 (2001).
[22] 100 F. Supp. 2d at 1060.
[23] 126 F. Supp 2d at 243.
[24] 2001 U.S. Dist. LEXIS 22520 at 40.
[25] Compuserve, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997).
[26] *Id*. at 40.
[27] America Online Inc. v. IMS, 24 F.Supp. 2d 548 (E.D. Va. 1998).
[28] America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444 (E.D.Va.1998).
[29] America Online, Inc. v. GreatDeals.Net, 49 F.Supp.2d 851 (E.D.Va.1999).
[30] Hamidi, 114 Cal. Rptr. 2d at 328.

[31] *Id.*, See Susan M. Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209 (2000) arguing that without actual harm, there should be no recognized trespass.
[32] *Id.* at 329.
[33] *Id*.
[34] *Id*. at 344.
[35] *Id*. at 348.
[36] *Id.* at 349.
[37] *Id.* at 352.
[38] Note, *The Long Arm of Cyber-Reach*, 112 HARV. L.R. 1610, 1613 (1999).
[39] WEBSTER'S NEW ENGLISH DICTIONARY AND THESAURUS (1993).
[40] Noah v. AOL Time Warner, Inc., No. CA-01-1342-A (E.D. Va. filed Aug. 31, 2001). Complaint available online at < http://www.cair-net.org/downloads/aol.pdf>.
[41] Civil Rights Act of 1964, 42.U.S.C. §2000a (2000).
[42] 42 U.S.C. §2000a(b)
[43] Hamidi, *supra*, note 16, at 251 quoting Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559 (1996).
[44] *Id*.
[45] Noah, *supra* note 35.
[46] *Id*.
[47] *Id*.
[48] Bell v. Maryland, 278 U.S. 226 (1964).
[49] *Id.* at 255.
[50] 42 U.S.C. §2000a(a).
[51] See e.g. Daniel v. Paul, 395 U.S. 298 (1969) arguing that a membership club for recreational purposes was not a place of public accommodation under the CRA.
[52] See e.g. Welsh v. Boy Scouts of America, 993 F. 2d 1267 (7th Cir. 1993) arguing that the Boy Scouts are not a "place" under the CRA.
[53] *Id*.
[54] *Id. at 1269.*
[55] *Id*.
[56] *Id.* at 1276.
[57] Law Against Discrimination, N.J.S.A. 10:5-1.
[58] Nat'l Organization for Women v. Little League Baseball, Inc., 318 A. 2d 33 (N.J. 1974).
[59] *Id*. at 37.
[60] 42. U.S.C.§ 12182.
[61] 532 U.S. 121 (2001).
[62] *Id.* at 670.
[63] Compare 42 U.S.C. §2000a (b)(1)-(3) and 42 U.S.C.§12181(7).
[64] *Supra*, note 45.
[65] 395 U.S. at 305.
[66] Martin, *supra* note 53 at 681.
[67] *Id*. at 674.
[68] For an analysis of the ADA and the Internet, see Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205 (2000)., Mathew A. Stowe, *Interpreting Place of Public Accommodation under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implication*, 50 DUKE L.J. 297 (2000). The Civil Rights Division of the Department of Justice has taken the position that the ADA does apply to the Internet, See Letter to the Honorable Tom Harkin, U.S. Senate, dated Sept. 9, 1996 from David L. Patrick, Assistant Attorney General, Civil Rights Division, available online at <http://www.usdoj.gov/crt/foia/cltr204.txt .> See also Nat'l Federation of the Blind v. AOL, (D. Mass. 1999) complaint available online at http://www.education-rights.org/homenfbvaol/html which was ultimately settled with AOL's agreement to make its software accessible to the sight impaired.
[69] *Falling Through the Net: Defining the Digital Divide* (Dept. of Commerce, July 8, 1999) <http://www.ntia.doc.gov/ntiahome/fttn99/part3.html>.
[70] *A Nation Online: How Americans Are Expanding Their Use of the Internet*, (Dept. of Commerce, Feb. 2002) <http://www.ntia.doc.gov/ntiahome/dn/html/execsum.htm>.
[71] Sonia Arrison, *What Digital Divide?* NEWS.COM, Mar. 13, 2002 <http://news.com.com/2010-1078-858537.html>.
[72] Daniel, *supra* note 45 at 307.
[73] California, Colorado and New Jersey courts have found such protection in their state constitutions. See Robins v. PruneYard Shopping Center, 592 P.2d 341 (Cal. 1979); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991) and New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994).

[74] For a discussion of the free speech in shopping malls see Mark C. Alexander, *Attention Shoppers: The First Amendment and the Modern Shopping Mall*, 41 ARIZ. L. REV. 1 (1999).
[75] See PruneYard, *supra* note 63.
[76] See *supra* pages 2-5.