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**Personal Jurisdiction in On-line Expression Cases:
Rejecting Minimum Contacts in Favor of Affirmative Acts**

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I. Introduction

The Internet deservedly has been praised for revolutionizing the collection, maintenance and dissemination of information. It stands as a singular accomplishment, providing a novel medium by which anyone with even elementary computing skills may communicate worldwide. New technologies inevitably create new legal problems, however, and the Internet is no exception. As state and national borders fall at light speed where the Internet is concerned, the issue of personal jurisdiction, which determines where a defendant may be legally sued for tortious expressive acts, assumes primary importance in the developing law of on-line defamation.

Despite an impressive flurry of scholarship, the Internet has not received extensive examination by the courts. In fact, the courts are only now beginning to address the most fundamental issues of on-line defamation, including the application of the personal jurisdiction doctrine. The courts currently are badly split over the issue, making it difficult for Internet speakers to accurately assess their risk of exposure to suit in a distant forum.

When a speaker injures a party through on-line communication, the initial inquiry becomes how and where the injured party may recover damages from the Internet speaker within the constitutional limits established by the Due Process Clause of the constitution on the places where a plaintiff may choose to sue a defendant. The due process limits were created to prevent a plaintiff from suing a non-resident defendant in a resident's court system unless the defendant had enough contact with the state to reasonably anticipate being sued there. As cyberspace renders moot much of the geographical principles upon which jurisdictions rely, the issue of personal jurisdiction -- the involuntary imposition of a forum state's legal power -- emerges as a threshold issue in the law of on-line expression.

The issue of personal jurisdiction has generated an impressive array of scholarship and mass media attention, divided somewhat equally between those who would apply traditional jurisdictional concepts to the Internet, and those who argue that the Internet renders moot the time-honored law of territorial jurisdiction and national borders. Personal jurisdiction merits renewed concern given the steady increase in lawsuits stemming from defamatory statements communicated via the Internet.-

The fundamental problem is that the Internet is not a physical entity, and yet existing legal precedent

is based on a rather complex system of physical borders on the local, state, national and international level. Under conventional territorial laws, jurisdiction is predicated upon the geography of the court and the litigants before it. While litigants still can be categorized geographically, other parts of the jurisdictional equation, such as the physical location of the offensive message itself, elude existing territorial domains, creating novel jurisdictional problems. Despite the novelty of these "cyber-actions," courts face the age-old question of deciding whether to develop a new body of jurisprudence to deal with a novel legal problem, or to identify analogous legal precedents that best fit the facts at bar.

Jurisdictional questions are often viewed as little more than pretrial procedural sparring in libel suits. Libel law in the United States typically focuses on substantive definitional issues, such as the level of fault to be required of the plaintiff or the privilege claimed as a defense by the defendant. In reality, choice-of-law questions can have a profound effect on the outcome of libel cases, since libel law still varies widely from state to state. A court's decision to assert personal jurisdiction could allow a libel plaintiff to benefit from a generous statute of limitations, keep a lawsuit from being dismissed entirely or vastly increase the amount of damages that may be awarded by allowing the plaintiff to "forum shop." Determining whether to assert personal jurisdiction over a non-resident defendant, whose only contact with the forum state are electronic messages, clearly raises important constitutional issues about the protection of on-line expression.

This article will briefly trace the historical development of personal jurisdiction in the United States, review its development in libel cases and discuss the first line of cases applying personal jurisdiction doctrine to on-line expression. The article concludes by discussing the unique issues raised by the emerging tort of on-line defamation and the issues central to determining choice of law in on-line defamation cases.

II. Historical Development of Personal Jurisdiction and its Role in Speech Cases

The U.S. Supreme Court in the landmark *Pennoyer v. Neff* decision established two broad principles of jurisdiction that define its role today: first, that every state possesses exclusive jurisdiction within its territory; and second, that no state can exercise jurisdiction over persons "without its territory." Thus, the state had jurisdiction *in personam* (over persons located in the forum state) or jurisdiction *in rem* (over property located in the forum state). These limitations emanated from the Fourteenth Amendment Due Process Clause, the guarantor of state sovereignty.

As interstate travel and business increased during the Industrial Revolution, territorialism was supplanted by the "minimum contacts" standard outlined by the Court in *International Shoe v. Washington*. The Court ruled that a non-resident of a state may be sued in that state if the party has "certain minimum contacts with [the state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The Court said that lower courts must examine the amount of the defendant's contacts with the state and the relationship between the contacts before exercising personal jurisdiction.

The Court refined the "minimum contacts" theory in subsequent cases, requiring in *Hansen v. Denckla* that there be "some act by which the defendant purposefully avails itself" of the forum state, then in a 1985 case, adding five factors to help courts determine when granting personal jurisdiction does not offend traditional notions of fair play and substantial justice." The Court also refused to grant personal jurisdiction in a pair of noteworthy cases, *Asahi Metal Indus. Co., Ltd. v. Superior Court of California* and *World-Wide Volkswagen Corp. v. Woodson*, the Court dismissed cases for lack of personal jurisdiction, stating in *Asahi* that "...placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed at the forum State." Lower courts thus are left with a two-part analysis when determining personal jurisdiction. First, the court must look at the amount of the defendant's contacts with the forum state, asking (1) whether these contacts are sufficient to meet the "traditional notions of fairness" described in *International*

Shoe and (2) whether the defendant "purposefully availed" itself of the privilege of doing business in the forum state.

In defamation cases, the courts generally allow a defendant to be sued in a state where the harm to the plaintiff's reputation occurred. Personal jurisdiction questions in libel cases have been guided by two United States Supreme Court print media cases decided on the same day more than fifteen years ago. The first case, *Keeton v. Hustler Magazine*, involved a libel suit brought in New Hampshire against *Hustler Magazine*, an Ohio corporation with its principal place of business in California.

The Court held that *Hustler* could be sued in New Hampshire based on the fact that it sold between 10,000 and 15,000 copies of the magazine in that state each month. The Court reasoned that "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated or fortuitous." Because *Hustler* had "continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action."

In the second case, *Calder v. Jones*, the Supreme Court considered whether a California court had personal jurisdiction in a libel case filed against an editor of the *National Enquirer*, both of whom lived in Florida. Based on the *Enquirer's* large circulation in California and also on the fact that the plaintiff lived and worked in California, the Court held that jurisdiction over the defendants was proper. The defendants wrote and edited "an article that they knew would have a potentially devastating impact" and they knew that "the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation." Under these circumstances, the Court said that the defendants could reasonably anticipated being haled into court there.

Perhaps because of its factual specificity, *Calder* has emerged as the critical case in personal jurisdiction in on-line libel cases. Courts interpreting *Calder* as they apply to traditional print and broadcast media have tended to read the case expansively. For example, in *Hugel v. McNell*, the First Circuit applied *Calder* as controlling precedent in a case involving libelous statements made about a New Hampshire resident by a non-resident to the *Washington Post*. The court reasoned that since the defendant's statements were aimed toward a New Hampshire resident, with knowledge of the "devastating effect" of the words, one could infer that the words' impact would be greatest in the plaintiff's home state.

While most federal district and circuit courts rely on *Calder* for the proposition that it is the locale in which the harm is felt and not the location of the forum that controls personal jurisdiction, other federal courts have relied on the broader, pre-*Calder* doctrine created in non-speech cases that defendants must "purposefully avail themselves" of opportunities in the forum state, concluding that without some affirmative act on the part of the plaintiff toward the forum state, the due process prong of personal jurisdiction analysis will not be satisfied.

The choice of "minimum contacts" or "purposeful availment," then, becomes central to any analysis of personal jurisdiction. The cases reveal a split between the federal circuits over whether a defendant may be sued in a state where the harm to the plaintiff's reputation occurred regardless of the medium used to deliver the message, and regardless of whether or not the plaintiff purposefully availed himself of the forum state. *Calder* emphasized, beyond all else, the focus on the *place* where the effects of the harm were felt; even when the statement was not aimed at any particular destination, some courts have found that the sender could reasonably know the harm would be felt most where the injured party resides. Thus, it is the direction of the harm, and not the physical location of the forum which controls personal jurisdiction. Such an analysis ignores the depth of the contact with plaintiff's resident forum in favor of simplistic determinations based on mere availability: if someone is State X could download information, that information was directed at State X. The issue of personal jurisdiction, then, requires choice between the minimum contacts approach and the affirmative acts approach.

III. Personal Jurisdiction and On-line Expression

The first cases to address personal jurisdiction in the United States have created two very distinct lines of cases. One line follows the general principles developed in one of the early Internet cases, *Maritz v. Cybergold*, and refined in *Inset Systems, Inc. v. Instruction Set, Inc.*, and would find jurisdiction in nearly all, if not all, situations. The other line follows the general analysis established by the courts in another early Internet case, *CompuServe, Inc. v. Patterson*, and refined in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, and would limit jurisdiction to only those situations where affirmative acts have been taken toward the forum state. This divergent reasoning creates two classes of jurisdictional precedent, a conflict of law which promises to wreak havoc on the Internet until higher appellate courts enter the fray. A review of the leading cases in each line illustrates the need for clarity in this critical jurisdictional area.

A. Inset Systems, Inc. v. Instruction Set Inc. and Zippo Manufacturing v. Zippo Dot Com:: Creating a Sliding Scale Following the Stream of Commerce

Courts in some on-line expression cases have found the existence of a Web site alone sufficient to grant personal jurisdiction, but only after subjective analysis of the "interactivity" offered by the site. In cases granting personal jurisdiction over Internet-based defendants, the courts have relied upon an emerging line of analysis which holds that the mere presence of a Web site, without more, can subject defendants to personal jurisdiction.

This reasoning can be traced to *Maritz, Inc. v. Cybergold, Inc.*, a United States District Court case in which the court held that a forum state could properly exercise jurisdiction over a defendant who had advertised over the Internet. The defendant in *Maritz* operated an Internet server in California which allowed users to sign onto a mailing list to receive advertisements. At the time of the litigation, the site was not yet operational; it was no more than a static promotion for the service. The plaintiff, a Missouri corporation, filed suit claiming trademark infringement and unfair competition.

Despite the defendant's arguments that its only contact with the state of Missouri was through the Web site, and evidence showing that of 311 "hits" from Missouri residents, 180 were from the plaintiff company, the court concluded that Missouri's long-arm statute was applicable because *Maritz* had suffered harm as a result of the defendant's behavior. The court's decision was based on its findings that the defendant "consciously" transmitted its advertisement into Missouri, despite its admission that Web sites "automatically and indiscriminately" respond to each user. Because technology has simplified such cross-border activity, the court reasoned that the scope of jurisdiction must be broadened in order to keep pace.

The strongest pronouncement that Web sites alone confer jurisdiction was offered by a U.S. District Court in Connecticut in *Inset Systems, Inc. v. Instruction Set, Inc.* The case involved two computer companies: the defendant *Instruction Set*, based in Massachusetts; and the plaintiff *Inset Systems*, based in Connecticut. *Instruction Set* obtained a Web site address and a toll-free telephone number carrying the word "INSET" despite the fact that *Inset Systems* owned the trademark "INSET." *Inset* learned of its rival's use of the name when it applied for its own Web site and filed a trademark infringement action.

Although *Instruction Set* maintained no offices in Connecticut, had no sales staff there and made no other attempt to communicate with Connecticut residents, the court ruled that jurisdiction could be based on the Web site and toll-free number:

Unlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, advertisements over the Internet are available to Internet users continually, at the stroke of a few keys of a computer. At this time there are over 10,000 Internet connected computer users in the

state of Connecticut.

Based on this analysis, the court concluded that the defendant had "purposefully availed itself of the privilege of doing business with Connecticut."

This approach was expanded by the U.S. District Court for the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com*. In *Zippo*, the court held that Pennsylvania's long-arm statute could reach Zippo Dot Com, a California corporation, haling it into Pennsylvania courts to face actions for trademark dilution, infringement, false designation and trust torts. Zippo Manufacturing, a Pennsylvania maker of cigarette lighters, sued Zippo Dot Com, an Internet service provider based in California, for its use of the Zippo name and for its registered domain names "zippo.com," "zippo.net," and "zipponews.com."

Zippo Dot Com's activities in Pennsylvania take place almost exclusively over the Internet. Its Web site contains information about the company and its Internet services, and its advertising in Pennsylvania is limited to its site, which posts information about access services available to subscribers worldwide. Of 140,000 Zippo members, only 3,000, or two percent, are Pennsylvanians.

The district court created a sliding scale to determine personal jurisdiction on the Internet, reasoning that the scope of jurisdiction is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." At one end of the scale are cases consisting of nothing more than posting information on a Web site; at the other end of the scale are cases in which the defendant is clearly engaged in business over the Internet. The middle ground consists of cases involving interactive Web sites where the user can exchange information with the host. In these cases, the court reasoned that jurisdiction can be determined by examining the level of interactivity and the commercial nature of the information involved.

The *Zippo* court placed the case at bar on the far end of the scale toward commercial involvement by the defendant, finding that Zippo Dot Com has purposefully directed its business toward the forum state. Jurisdiction was reasonable, it concluded, because had Dot Com wished to avoid doing business in Pennsylvania, it could have sifted through its on-line applications and ruled out all Pennsylvania subscribers.

Rather than dismiss *Zippo* as a pure trademark case, note the potential impact of such a sliding scale on "pure" speech cases. Zippo Dot Com is, at its heart a news and information service, providing content to anyone in the world who accesses it with a modem. As one author noted, it is not a company that happens to advertise on the Internet, but a virtual business that exists exclusively on the Internet. It is unfair to subject Dot Com's activities in Pennsylvania to the same personal jurisdiction analysis as traditional businesses because it had no cost-effective way of determining which of its 140,000 subscribers were from Pennsylvania. More importantly, its conceptualization of "contacts" is backward: unlike traditional jurisdiction cases, in which the defendant aggressively seeks business from other states, in cases such as *Zippo* the Web user visits the site, requests information and then acts upon that information in an affirmative way.

Zippo Dot Com targeted no particular state; its Web site instead targeted every Web user in the world. By finding that Zippo Dot Com engaged in deliberate and repeated contacts with Pennsylvania, the district court revised the "stream of commerce" approach endorsed by the United States Supreme Court in *Asahi* that a state may not assert jurisdiction over a defendant who has merely placed a product in the stream of commerce. Such a revision makes news services and other Internet speakers vulnerable to nationwide jurisdiction for the mere placement of content into the stream of commerce that is the Internet.

Personal jurisdiction doctrine states that "minimum contacts" be deliberate, purposeful acts on the part of the defendant. The *Zippo* court's sliding scale instead relies upon utterly random acts on the

part of Internet users. If any defendant who posts information on the Web is purposefully directing content toward non-resident states, Internet speech is in immediate peril.

The sliding scale has been adopted by courts in a variety of Internet personal jurisdiction cases, with predictable results. Federal district courts in Missouri, Minnesota, the District of Columbia and Florida have relied upon the sliding scale approach to conclude that the existence of a Web site, even if only for advertising purposes, may be sufficient to establish personal jurisdiction.

Also of note is the near absence of *Calder*, the United State Supreme Court's leading case on personal jurisdiction in libel law, from the analysis of personal jurisdiction on the Internet -- even in cases involving defamation. Only one court in the Internet era has relied on *Calder* to focus on where the harm from actionable statements occurred. In *California Software, Inc. v. Reliability Research, Inc.*, a California federal district court granted personal jurisdiction over a Nevada software seller who disseminated defamatory messages about a California corporation by mail and telephone communications in California and by the Internet in an effort to reach the corporation's national sales base.

Citing *Calder*, the California district court said the resident plaintiff "felt the brunt of the harm from the defendants' out-of-state acts in California." The Internet postings, it said, would have been sufficient to assert personal jurisdiction, so long as the plaintiff can show that some prospective customers did in fact read the defamatory postings. *Calder's* influence in Internet personal jurisdiction cases has been slight, as most analysis has centered instead on questions of purposeful availment.

B. *Bensusan Restaurant Corp. v. King*: Protecting the Stream of Commerce Approach

Another emerging line of Internet-based personal jurisdiction cases rejects the sliding scale analysis of *Zippo* as insufficient to establish personal jurisdiction under traditional notions of fairness. Courts in this line of cases demand more than a Web site to assert jurisdiction, requiring a showing of more purposeful activity on the part of the defendant.

This reasoning can be traced to one of the first Internet cases of note, *CompuServe, Inc. v. Patterson*, in which a United States district court concluded that asserting personal jurisdiction over Internet users would violate due process. The issue arose as the result of a trademark infringement dispute between a Houston resident who had entered into software agreements with CompuServe, an Ohio corporation. The court held that Patterson's contacts with Ohio -- which were limited to accessing CompuServe's dial-up network -- were too tenuous to establish jurisdiction. The view that a more expansive exercise of jurisdiction over Internet activity is warranted led the United States Court of Appeals for the Sixth Circuit to reverse the decision in 1996, however. Thus, the original *Patterson* decision is of persuasive but not precedential value to the analysis.

In *Bensusan Restaurant Corp. v. King*, a New York federal district court considered whether the existence of a Web site, without anything more, was sufficient to exercise personal jurisdiction over a Missouri-based defendant. The plaintiff, owner of a jazz club in New York City known as "The Blue Note," sued the defendant, the operator of a Missouri night club also known as "The Blue Note," for trademark infringement, trademark dilution and unfair trade. The alleged infringement occurred on the defendant's Web site, which contained a logo "substantially similar" to the plaintiff's and contained references to the plaintiff's New York club. The defendant moved to dismiss the action for lack of personal jurisdiction, and the court granted the motion, concluding that merely posting a Web site was insufficient to subject the defendant to a suit in New York.

In concluding that creating a Web site, without more, is not an act purposefully directed toward the forum state, the New York federal district court rejected the popular argument that on-line personal jurisdiction be decided according to the "stream of commerce" theory originated in *World-Wide*

Volkswagen. Instead, the court embraced a more lenient approach along the lines of *Asahi*, in which the U.S. Supreme Court ruled that placement of a product into the stream of commerce is not an act of the defendant purposefully directed at the forum State unless other corroborative elements are present.

The same court again rejected personal jurisdiction based solely on a Web site in *Hearst Corp. v. Goldberger*. In *Hearst*, a New Jersey lawyer established a Web site using the domain name "Esquire.com," to offer legal services. The New York publishers of *Esquire* magazine sued for trademark infringement, despite the fact that the site did no more than invited users interested in its legal services to contact the lawyer via e-mail. New Yorkers were found to have accessed the site, but the court found this unconvincing, comparing the site to an advertisement in a national magazine, which had been found in a previous case to be insufficient to provide personal jurisdiction under the state's long-arm statute. Because the defendant had in no other way directed its products or services to New Yorkers, the court refused to assert personal jurisdiction. In fact, the court took the opportunity to pointedly reject courts that has asserted personal jurisdiction in similar factual scenarios -- namely the *Inset* court -- stating that, under that line of reasoning, "this Court, and every other court throughout the world may assert personal jurisdiction over all information providers on the global World Wide Web." By so doing, the *Hearst* court rejects the *Inset* court's distinction between interactive and non-interactive Web sites and focuses the inquiry instead on the very real issue of whether the site does more than simply allow a user to contact a site host.

Other courts have followed the New York district court's analysis developed in *Bensusan and Hearst*. In *McDonough v. Fallon McElligott, Inc.*, a federal district court in California held that allowing mere computer interaction via the Web to establish minimum contacts would "eviscerate the personal jurisdiction requirement as it currently exists." In *SF Hotel Co. v. Energy Investments, Inc.*, a federal court in Kansas also dismissed a trademark claim on jurisdictional grounds when the sole basis of jurisdiction was the fact that the defendant had a Web site accessible by Kansans.

In a hint of the endless reach of the Internet, a New Jersey resident attempted to exercise personal jurisdiction over an Italian hotel in a personal injury case because the hotel had a web site with pictures and descriptions of the hotel facilities and rooms. The court in *Weber v. Jolly Hotels* found the Web contact insufficient to exercise personal jurisdiction, stating that the

The theme emerging from cases rejecting personal jurisdiction over out-of-state parties with little other contact than e-mail or Web site presence in a state is recognition of the vast interconnectivity of the Internet and the possible consequences of extending personal jurisdiction indefinitely on the judicial system. Due process considerations, and simple judicial efficacy demand that courts take a close look at whether the Internet defendant is truly purposefully availing another jurisdiction.

Conclusion

The law of on-line speech law is slowly emerging, but a few principles today seem fairly obvious. The courts have left no doubt that individuals are legally responsible for what they say over the Internet and that they can be found liable for defamatory on-line statements. If service providers or bulletin board operators exercise some modicum of control over content, then they likely will be held liable as publishers of defamatory material. Distribution of a defamatory statement through an on-line service is clearly considered publication of a statement under libel law, just as the retransmittal of a statement by another sender appears to be republication.

Personal jurisdiction, on the other hand, remains a mix of confusing lower court decisions split between two contradictory conclusions. Such division clearly complicates any hypothesis of the future of personal jurisdiction in on-line expression, forcing courts to adopt a case-by-case approach until a clear rule of law emerges. The current conflict may require the courts to create a new doctrine for exercising personal jurisdiction cognizant of the unique nature of this increasingly important

medium.

Technology, it seems, only adds to the confusion. Traditional personal jurisdiction doctrine, based on geographic and territorial concepts, is problematic. Cyberspace eliminates the physical boundaries upon which personal jurisdiction was created; it enables users to enter, and leave, forum states without ever knowing they were there. It appears contradictory to apply a doctrine whereby knowledge of a physical address can bring an on-line defendant within the jurisdiction of a state simply because he directed communications at a global audience through computer addresses. That doctrine shortchanges the expressive value of the communication, equating speech with other, less constitutionally protected acts.

For example, though a Web page exists on a hard drive in some physical location, it can be retrieved and viewed throughout the world. Is it then "located" in every state and nation? A Web page may be authored in West Virginia, edited in the United Kingdom and stored on a computer in the Cayman Islands. Where does the analysis begin and end? Likewise, e-mail recipients rarely know the physical address of senders, and newsgroup postings have no physical location in the historical sense: no one knows where the computers transmitting the messages are located, and users can transmit from laptops on airplanes! To argue that paper and pen constitute the only difference between communications of the past and those of the on-line variety simplifies the issue beyond reason.

Surprisingly, many scholars seem content to conclude that since a Web page author publishes with the knowledge that "the world is watching," he is purposefully directing his activities to a worldwide audience, and thus, to worldwide jurisdiction. A stunning conceptualization, and one which would effectively transform the Internet into a sort of self-censorship Olympics, this popular argument completely ignores the unique position of speech in the constitutional scheme.

Instead, jurisdiction in on-line expression cases requires the court to focus on the specific acts of the publisher, and whether, according to a reasonable person, the publisher purposefully acted to place the offending speech in front of the plaintiff, or merely offered the communication up for general consumption by the rest of the on-line world. The nature of the former act is quite different from the latter; it limits personal jurisdiction to those fora which a reasonable person would conclude the author directed the speech toward. The posting of a Web page is not purposeful availment, and mere accessibility, without more, does not constitute the constitutionally required nexus between the actor and the resultant injury. A more restrained approach based on the depth and scope of a party's availment will permit the Internet to function while continuing to allow citizens access to their states' court system. This line of thinking reflects the court's reasoning in *Bensusan* and its progeny, and better serves the important societal value of free speech on-line.

To achieve predictable results in future jurisdictional cases, the courts must adopt a "purposeful availment" approach that honors the core value of free speech. Many commentators argue that the courts' handling of personal jurisdiction issues attendant to other new technologies, such as the telephone or cable television, provide ready analogies for on-line expression; that we need not start fresh, but build on existing examples. The Internet, however, is not a government-regulated monopoly, nor is it a corporate-dominated utility. It is, according to the United States Supreme Court, a "unique and wholly new medium of worldwide human communication."

The existing body of personal jurisdiction jurisprudence may very well be equipped to deal with the unique issue of on-line expression, but not until the courts better understand the importance of speech on the Internet. Until then, Internet speakers are free to communicate at their own risk, dangerously short of the "breathing room" the Court once found so necessary for speech to thrive.