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Safeguarding Consumers' Interests in Cyberspace

Larry Irving†

The American people find themselves conquering a new frontier called cyberspace. More than anything else, cyberspace appears to be changing our concept of time and place. We can obtain a book from the Library of Congress or view a painting at the Louvre in Paris without leaving our home. We can have a live political discussion with a group of people who are scattered across the world. We can have a doctor examine the x-rays of our broken bones as we lie on an examining table miles away.

Electronic dissemination of information has opened up new vistas. Computers and networks link people from remote sites to one another. Wireless communications devices allow us to communicate anywhere, anytime. A recent article in the *Economist* talks about "the death of distance"¹—the fact that technology and competition in telecommunications are making distance irrelevant. Distance will no longer be a determinant of the cost of communications. As the article noted, already a carrier's cost of carrying an additional long-distance telephone call is often so minimal as to be virtually free.²

Telecom and information technologies are changing the nature of our jobs and the ways we relax. Increasingly, we e-mail correspondence and documents rather than using the United States Postal Service. London's Cyberia Internet cafe is now the "in" place and has inspired cybercafes and cyberpubs worldwide.³ And many of these technologies have become embedded in our daily lives without our realizing the extent to which they have done so. Computer chips are found in our cellular phones as well

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¹ See *The Death of Distance*, *Economist* S5 (Sept 30, 1995).

² *Id.*

³ For a general discussion of cybercafes, see Jon Van, 'Cybercafes' *Serving a Blend with Byte*, *Chi Trib* 1-1 (Jan 8, 1996).

as our toasters. The modern car has more computer power on board than the original Lunar Lander space ship.⁴

In his commencement address given at Harvard this past June, Vaclav Havel, president of the Czech Republic, spoke about the global impact that the expansion into cyberspace is having on our lives:

The world is now enmeshed in webs of telecommunication networks consisting of millions of tiny threads or capillaries that not only transmit information of all kinds at lightning speed, but also convey integrated models of social, political, and economic behavior. We are familiar with CNN and Chernobyl, and we know who the Rolling Stones, or Nelson Mandela, or Salman Rushdie are.

More than that, the capillaries that have so radically integrated this civilization also convey information about certain modes of human coexistence that have proven their worth, like democracy, respect for human rights, the rule of law, the laws of the marketplace. Such information flows around the world and, in varying degrees, takes root in different places.⁵

We're being propelled into cyberspace, but we're using yesterday's laws to guide us. As policymakers and lawyers, we understand the need for statutory and regulatory reform—we can't be driving forward using a rearview mirror.

Telecom regulation, privacy, intellectual property, and First Amendment issues all need to be revisited. The libel lawsuit against Prodigy in early 1995⁶ raised the kind of new questions that are now arising—is an online service like a book or like a bookstore, which cannot be held responsible for the contents of a book it sells? Does music sent over the Internet have copyright protection? What type of copyright protection can we give to museums that want to put images of their collections online? To what extent, if any, can a university discipline a student for a message left on an electronic bulletin board?

⁴ Michael Wiltshire, *A Journey into the Future*, Financial Times 14 (June 7, 1995).

⁵ Vaclav Havel, *The World Can Find the Means of Coexistence*, Christian Science Monitor 18 (June 9, 1995).

⁶ See *Stratton Oakmont, Inc. v Prodigy Serv Co.*, 1995 NY Misc LEXIS 229. See also Peter H. Lewis, *Judge Stands by Ruling on Prodigy's Liability*, NY Times D2 (Dec 14, 1995).

At the present, we know one thing for certain—the boundaries of this new frontier are unclear. As consumers, we wonder whether resolution of this ambiguity will empower us or rob us of our rights.

Government has an important role in safeguarding consumers against the latter. I want to focus on three key areas: 1) ensuring consumers a diversity of telecom and information sources; 2) protecting their privacy; and 3) rethinking intellectual-property rights.

I. FROM TELETOPIA TO THE RISE OF THE DEREGULATED MONOPOLIST AND THE RETURN OF THE MEDIA MOGUL

The current telecom-reform debate began with a vision of open networks, of electronic magazine racks, of thousands of entrepreneurs having access to airwaves, wireline, and wireless networks—a “teletopia.” The idea was to allow new competitors into telephone and cable, to replace monopolies with true competition.

However, it turns out that’s *not* what the new legislation is going to bring many Americans. Competition will be thwarted and consumers will be harmed if we simply allow the two most likely competitors—the cable company and the telephone company—to buy each other out in region. Prior to the 1992 Cable Act,⁷ customers with only one choice of cable provider were paying as much as 30 percent more than customers with choices.⁸ We do not want customers to have to face such increases again. We want to encourage two wires to the home, not one, as well as additional wireless options. We want to encourage more choices for consumers. Instead, the legislation promises to give rise to *deregulated monopolists*.

Of even greater concern is the *media concentration* that will result from these bills. Under the House bill, the same individual or company could own two television stations, an unlimited number of radio stations, and the local newspaper.⁹ In rural areas, the same company also could own the phone system.¹⁰ The Sen-

⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub L No 102-385, 106 Stat 1460, codified at 47 USC § 325 et seq.

⁸ See John Merline, *Tuning Out Cable TV Monopolies: With Competition, Costs Get Lower and Service Gets Better*, Wash Post D1 (May 19, 1991).

⁹ See HR 1555, 104th Cong, 1st Sess (May 3, 1995), in 141 Cong Rec H8438, H8441 (Aug 4, 1995).

¹⁰ *Id* at H8438.

ate bill similarly would allow a lot of media concentration.¹¹ Now, it is fair to say that if one person controls all of these media sources, that person will have a strong influence on how that community thinks.

Think of your own life. You read the paper over breakfast in the morning, and then listen to the radio in your car or on your Walkman as you make your way to classes. In the evening, you may watch the local news on TV. Today, it is almost certain that there are three different owners/editors of the newspaper, radio, and television station. Yet, what would be the effect in a city or town if one person controlled each of these news sources?

Let me give another example. Depending on whether the Time Warner/Turner deal goes through, or how it is structured if it is approved, John Malone could be the second largest shareholder at Time Warner *and* the president and CEO of Tele-Communications, Inc. This means that John Malone could influence companies providing service to over 45 percent of cable subscribers.¹² That is potentially incredible media power and influence. And again as we look at the Time Warner/Turner deal, we need to at least ask these questions—will *Time* or *Fortune* magazines (owned by Time Warner) be objective in covering Time Warner/Turner's economic performance? Will *Sports Illustrated* favor coverage of the Atlanta Braves and fights on HBO? Let me be clear—I am not stating opposition to any of the proposed or pending media mergers. I am stating that we need to ask and answer the tough questions that they raise.

The potential monopolization of the marketplace of ideas should concern each of us. Cross-ownership rules were enacted to promote the free exchange of diverse viewpoints and information and to protect the needs of local communities. Diversity of ownership assures that a variety of opinions and viewpoints will be heard.

News and information are essential to our system of democracy, which relies on an informed citizenry. As John Stuart Mill wrote in *On Liberty*, "only through diversity of opinion is there . . . a chance of fair play to all sides of the truth."¹³ Broadcasting and newspapers are still the major sources of news, infor-

¹¹ See S 652, 104th Cong, 1st Sess (Mar 30, 1995), in 141 Cong Rec S8580-81 (June 16, 1995).

¹² For a general discussion of the proposed merger, see John Greenwald and John Moody, *Hands across the Cable*, *Time* 34 (Oct 2, 1995).

¹³ John Stuart Mill, *On Liberty* 46 (W.W. Norton, 1975).

mation, and entertainment in this country. Yet with media concentration, the lead story on television and radio might also be the story on the front page of the local newspaper.

The dangers of abuse and monopolization of thought were seen prior to the establishment of the media-ownership rules by the Federal Communications Commission ("FCC") and Congress. For example, in 1938, the FCC allowed for a single regional "superstation" on a clear channel. WLW in Cincinnati, Ohio was rated number one in thirteen states and number two in six states. It soon was discovered, however, that the station owner was broadcasting only anti-labor political commentary. The domination of one controlling opinion led to the end of regional superstations.

Media concentration also will bring a loss of localism. Currently, of the 11,000 radio stations around the country, two-thirds are owned by sole proprietors.¹⁴ They live in their communities and reflect the character of their towns. Elimination or relaxation of national ownership caps will cause local ownership and the coverage of local events slowly to disappear. And communities will suffer.

Take the example of WTOC-TV in Savannah, Georgia. A resident of Savannah explained that:

[WTOC] run[s] a very popular high-school football highlight show in the fall from 11:30-12:00 p.m., EST. But that's David Letterman's time. He draws half the size audience as does the football program. [However,] CBS gets all of the revenue from the Letterman show, . . . while it receives zero income when [WTOC does] high-school football and delay[s] Letterman one-half hour, giving the competing 'Leno' show a thirty-minute jump. [WTOC has] been able to keep CBS at bay because [it is] a strong station.¹⁵

However, if network-owned stations were to cover 50 percent of United States homes, coverage of high-school football in Savannah and other towns would disappear faster than a speeding channel surfer.

An advertiser or a political candidate seeking to reach an audience would face a bottleneck—the local media mogul—with a

¹⁴ *Something's in the Air*, Forbes 11 (June 19, 1995).

¹⁵ Letter from Leroy Paul to Congressman Jack Fields (May 16, 1995) (on file with the *University of Chicago Legal Forum*).

stranglehold over a community. The owner of the television station could require its advertisers or candidates to buy time on its radio station and space in its newspaper. Advertisers or candidates who purchase time on a competitor's station may be blocked from buying space in the newspaper.

For a sense of what we can look forward to, we can look back to the 1950s when radio stations and local newspapers engaged in such tactics. Many newspapers denied space to anyone who advertised on the radio, refused to publish radio programming logs, and wrote only unfavorable reviews of the local stations. For example, the *Mansfield Journal* required its newspaper advertisers to enter into exclusive contracts with the paper and to refrain from buying air time.¹⁶

Why do we want to tilt the playing field in favor of large, national owners? Is this how we want to define the public interest? Do we still care about diversity and localism?

We have the best media system in the world. As Bill Ryan of *Post-Newsweek* has stated, "[t]he whole world is trying to emulate the local system of broadcasting that we have in this country, and here we are creating a structure that will abolish it or put it in the hands of very, very few."¹⁷

We need a media system that serves the people of this country and allows their ideas, opinions, and creativity to flourish. We have that system in place today. Retaining the media-ownership rules will ensure that we will have it tomorrow as well.

II. PROTECTING PRIVACY

The frontier of cyberspace promises tremendous economic, educational, medical, and civic benefits to its explorers and to the nation. National and global networks can bring us these benefits because they will facilitate and expand the flow of information from people to people and place to place. However, many people may be reluctant to use the National Information Infrastructure ("NII") and venture into cyberspace if they are afraid that the personal information transmitted over it can be used in ways that are unexpected or inappropriate.

Let me give an example. Few people realize that when they are surfing around the Internet, they leave a trail of every site

¹⁶ John E. Lopatka and Andrew N. Kleit, *The Mystery of Lorain Journal and the Quest for Foreclosure in Antitrust*, 73 *Tex L Rev* 1255, 1266-67 (1995).

¹⁷ Kim McAvoy and Don West, *The Battle over Bigness: Broadcasting's Fatal Attraction*, *Broadcasting & Cable* 50 (May 22, 1995).

they visit—"mouse droppings." I've left plenty of droppings in ESPNET SportsZone and sites about jazz music. These mouse droppings are valuable to suppliers and manufacturers who can market their products directly to you. Several online companies already track and sell information derived from mouse droppings. For example, Internet Profiles Corporation in San Francisco uses its software to track who visits a particular Web site, what is looked at, and for how long.¹⁸ This company sells such information to the relevant Web site operator for \$5,000 per report.¹⁹

At the same time, the mouse droppings are extremely revealing about your personal life. For example, perhaps you were in a health-care Website looking at the issue of incontinence and found it interesting so you happened to stay there for a while. Soon you might be receiving "Depends" product information. And a host of people might know about a personal health problem that you have—or don't have—that could cause you embarrassment at best and professional or personal damage at worst. We all remember the issue made during Judge Bork's Supreme Court nomination hearings about the video tapes watched by the Judge and his family.

Americans are not pleased about mouse droppings or other incursions into their privacy. Indeed, privacy is something we have always prized. More than sixty years ago in the case of *Olmstead v United States*,²⁰ Supreme Court Justice Louis Brandeis noted that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." As reported in *USA Today*, a new Equifax/Louis Harris survey found that almost 80 percent of United States consumers fear they have lost control of their personal information gathered by computerized information systems, and 43 percent are concerned about marketers collecting information.²¹

Privacy is a global concern. The European Union recently adopted a directive "on the protection of individuals with regard to the processing of personal data and on the free movement of such data."²² A survey conducted by two Canadian consumer

¹⁸ *The Cutting Edge: Computing/Technology/Innovation*, LA Times D5 (Sept 6, 1995).

¹⁹ *Id.*

²⁰ 277 US 438, 478 (1928) (Brandeis dissenting).

²¹ Bruce Horovitz, *80% Fear Loss of Privacy to Computers*, USA Today 1A (Oct 31, 1995).

²² See EU Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Council Directive 95/46/EC

groups found that 90 percent of Canadians surveyed are concerned about private businesses sharing information, and 70 percent are concerned about governments sharing information at different levels and with the private sector.²³ Eighty-two percent said that technology should not place a greater burden, financial or otherwise, on individuals who want to protect their privacy.²⁴

Concerns about safeguarding privacy will likely grow as the national and global information infrastructures become a pervasive and standard way of disseminating and accessing information as well as conducting business. As we use the NII and Global Information Infrastructure ("GII") to shop for clothes and household goods, obtain medical care, do homework, conduct banking, and keep in touch with family and friends, more and more personal information is going to be accessible to those who operate telephone, cable, broadcast, satellite, and Internet-related companies. Consumers need to be empowered with the tools to protect their personal information.

As a first step toward such consumer empowerment, the National Telecommunications and Information Administration ("NTIA") released a *White Paper* entitled *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information*.²⁵ NTIA's *White Paper* addresses the growing consumer-privacy concerns specifically related to subscribing to and using a telecommunications and/or information service. For example, in the course of subscribing to telephone, cable, wireless, and Internet services, an individual must divulge certain information so that a particular provider can connect him or her to its network. We call this subscription information, and it typically includes the name, home address, home telephone number, work telephone number, type of service requested, and credit card information of a subscriber.²⁶

The *White Paper* also addresses the privacy issues related to information generated by using a particular communications service. For instance, users typically generate information that

(1995).

²³ Robert Brehl, *Ottawa Urged to Police Info Highway*, Toronto Star D1 (Oct 12, 1995).

²⁴ *Id.*

²⁵ United States Department of Commerce, National Telecommunications and Information Administration, *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (Oct 1995) ("White Paper").

²⁶ *Id.* at 5-6.

indicates the date, time, subject, duration, and addresses of outgoing messages.²⁷

Although most consumers are probably aware that communications providers collect a wide range of information, they may be less aware of the *uses* to which that data can be put. In fact, many consumers may have the same level of awareness as the woman who told a caller trying to sell long-distance service that she did not make many out-of-town calls:

"I'm surprised to hear you say that," she recalls him saying. "I see from your phone records that you frequently call Newark, Delaware, and Stamford, Conn."²⁸

Information collected in the course of subscribing to or using a telecommunications service can help direct marketers better target their customers. However, in the wrong hands, it can also be used to embarrass or harm an individual. Furthermore, the new generation of communications services that will likely combine the two-way, switched features of telephone service, the full interactivity of the Internet, and the broadband capacity of video carriage will increase both the amount and type of personal information that service providers collect. These networks will make it possible for service providers to collect information that identifies a person's entertainment viewing habits, telephone calling patterns, shopping preferences, and even voting behavior.

Although the free exchange of personal information promotes consumer welfare by encouraging firms to develop and market goods and services that most interest their existing and potential customers, it also raises issues of fairness and confidentiality. NTIA acknowledges that consumers will demand different levels of privacy protection in the Information Age. However, we believe that there should be a uniform "base" privacy standard for the communications sector.

Today's existing privacy rules and regulations for the communications sector are *not* uniform. Similar services do not provide for similar privacy protection. And some services, such as those offered over the Internet, do not provide any privacy protections for an individual's subscription and usage data.

As a first step in safeguarding consumers' privacy with respect to telecommunications-related personal information, NTIA

²⁷ *Id.* at 6.

²⁸ Jeffrey Rothfeder, *Is Nothing Private?*, *Business Week* 74, 76 (Sept 4, 1989).

has proposed a framework with two fundamental elements: 1) *provider notice*; and 2) *customer consent*.

A. Provider Notice

Under NTIA's proposed framework, *for the first time*, all communications providers, including telephone, video, wireless, and Internet service providers, would inform their customers about what information they intend to collect and how it will be used.²⁹ We believe that providers should make such notice conspicuous and state the notice "in plain language so that consumers have the necessary information to exercise sound judgment about the level of privacy protection that they desire and what is available to them."³⁰ The notice must inform the consumer that a choice is required, and it must reach the consumer *before* the provider uses personal information for purposes unrelated to a particular service.³¹

B. Customer Consent

The second component of NTIA's privacy framework is customer consent. If a service provider obtains consent from a customer, then the provider would be free to use information about the customer for purposes other than to render a service.³²

Affirmative consent would be required with respect to "sensitive" personal information such as information relating to health care, political persuasion, sexual matters and orientation, and personal finances.³³ For all other types of information, tacit customer consent would be sufficient to authorize the firm to use the information.³⁴

We recognize the importance of enhanced consumer education in this area. Education serves two purposes: 1) empowerment—giving consumers control of how their personal information is used; and 2) understanding—helping consumers to understand how their personal information can be used in beneficial ways.³⁵

²⁹ *White Paper* at 21 (cited in note 25).

³⁰ *Id.* at 21-22.

³¹ *Id.* at 22.

³² *Id.* at 23-27.

³³ *White Paper* at 25 (cited in note 25).

³⁴ *Id.*

³⁵ *Id.* at 26-27.

C. The Benefits of NTIA's Privacy Framework

NTIA's privacy framework enables service providers and their customers to come to mutually agreed upon contracts independent of government intervention. The advantages for consumers and the private sector are obvious. For the first time, consumers will benefit from a privacy standard that affords them the same safeguards for similar services across the communications sector. Uniformly applied, a common standard will also prevent some industries from gaining an unfair competitive advantage. Moreover, because NTIA's approach gives private firms considerable flexibility to discharge their privacy obligations in a way that minimizes their costs and the costs to society, we believe that both consumers and industry will benefit.³⁶ As stated in the *White Paper*, however,

[if] industry self-regulation does not produce adequate notice and customer consent procedures, government action will be needed to safeguard the legitimate privacy interests of American consumers. Ultimately, defining the balance between the free flow of information and an individual's right to privacy over a NII revolves around trust. If consumers feel that their personal information will be misused or used in ways that differ from their original understanding, the commercial viability of the NII could be jeopardized as consumers hesitate to [venture into cyberspace]. Whether through government intervention or industry self-regulation, consumers will have to feel comfortable with how personal information is used, and with their ability to control its use in a meaningful way.³⁷

III. RETHINKING INTELLECTUAL PROPERTY

The value of the NII and GII for consumers will depend on the content that travels over these networks. Yet whether creators and owners of books, artwork, music, research, and other information will put their materials online depends a great deal on how we protect intellectual property.

Current intellectual property laws allow only some to take advantage of digital transmission. For example, the

³⁶ See *id.* at 27.

³⁷ *White Paper* at 27-28 (cited in note 25).

Smithsonian's National Museum of American Art is able to put a great deal of its collection online,³⁸ but the National Museum of Art, which just opened its Micro Gallery—a digital collection of 1,700 of its works—will not go online because of the loss of control over the images and their copyrights.³⁹

Intellectual property laws need to be adapted for the electronic transfer of information. The Administration's Information Infrastructure Task Force's ("IITF") Working Group on Intellectual Property Rights has issued a report on recommendations for changes in the law to provide the necessary protection of rights in copyrighted works.⁴⁰ Fundamentally, we have to figure out a new system of copyright for digital information. The old rules do not work; potential for theft and abuse is clear. Many cyberspace cowboys believe all information should be freely available, but most of us would agree that few people are going to create anything of value if they are going to be compelled to give that creation away or run the risk of not being compensated for their efforts. The bottom line is that we have to ensure methods to protect the rights of owners and creators of information.

The IITF's Report states that an "effective intellectual property regime must (1) ensure that users have access to the broadest feasible variety of works by (2) recognizing the legitimate rights and commercial expectations of persons and entities whose works are used in the NII environment."⁴¹ For instance, the report "recommends that the Copyright Act be amended to expressly recognize that copies or phonorecords of works can be distributed to the public by transmission, and that such transmissions fall within the exclusive distribution right of the copyright owner."⁴² The report also recommends a public-performance right in sound recordings.⁴³

The IITF report also supports expansion of the exemption for libraries and archives that permits them to engage in digital copying under certain circumstances. The report notes that libraries and archives are the "trustees of our collective knowledge

³⁸ See Jacqueline Trescott, *Pixels at an Exhibition: Washington Takes the Lead in On-Line Culture*, Wash Post G1, G7 (Aug 20, 1995).

³⁹ Jo Ann Lewis, *Armchair Museum-Goer: NGA's Computer Art Lesson*, Wash Post G1, G5 (Oct 29, 1995).

⁴⁰ See United States Department of Commerce, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Sept 1995) ("IITF Report").

⁴¹ *Id.* at 12.

⁴² *Id.* at 193.

⁴³ *Id.* at 200-01.

and must be able to make use of digital technology to preserve the Nation's heritage and scholarship."⁴⁴ Specifically, IITF recommends current library exemptions be amended:

(1) to accommodate the reality of the computerized library by allowing the preparation of three copies of works in digital form, with no more than one copy in use at any time; . . . (2) to recognize that the use of a copyright notice on a published copy of a work is no longer mandatory; and (3) to authorize the making of digital copies for purposes of preservation.⁴⁵

CONCLUSION

In 1960 at the Democratic National Convention, then candidate-for-President John F. Kennedy talked about a new frontier, which he described as "a frontier of unknown opportunities and perils—a frontier of unfulfilled hopes and threats."⁴⁶ At that time, Kennedy was speaking about the frontier of space, but his words can also be used thirty-five years later to describe the frontier of cyberspace. I believe that we can turn this opportunity into economic and social success for consumers as well as providers if we are forward-looking in our thinking and act in the public interest.

⁴⁴ IITF Report at 205 (cited in note 40).

⁴⁵ Id.

⁴⁶ I.E. Levine, *Young Man in the White House* 128-29 (Julian Messner, 1964).

