

**PROTECTING HYPERLINKS AND PRESERVING FIRST  
AMENDMENT VALUES ON THE INTERNET**

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ABSTRACT

*Hyperlinks are critical to communication in part because they facilitate access to information. They provide visitors on one website a way to navigate to internally referenced words, phrases, arguments, and ideas. In addition to being vehicles for communication, this article contends that hyperlinks are communicative in and of themselves. They signal user preferences, democratize the national dialogue, indicate credibility, function as a signature on a virtual petition and help establish virtual associations. This Article presents the first comprehensive examination of First Amendment concerns related to hyperlinks and argues that any judicial or legislative regulation of hyperlinks should be reviewed under a strict scrutiny standard. Nearly 50 years ago, the Supreme Court recognized a constitutional privilege to disseminate information in *New York Times v. Sullivan*. In *Sullivan*, the Court extended a constitutional privilege to newspapers because of their role as an incredibly important, unique medium of communication. The same sentiment should extend to protect new media as they emerge. This Article concludes by discussing how a strict scrutiny standard should be applied to claims alleging trademark infringement, e-trespass, copyright infringement, contributory infringement, and contract violation as a result of hyperlink use.*

TABLE OF CONTENTS

INTRODUCTION.....	1018
I. HYPERLINKS AS COMMUNICATION .....	1024
A. Original Conception of Hyperlinks.....	1024
B. Hyperlink as an Address .....	1026
C. Hyperlink as a Signal of Preference .....	1026
D. Hyperlink as a Signature on a Virtual Petition .....	1030
E. Hyperlink as a Membership Card and Recruiting Tool .....	1031

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F.	The Medium is the Message.....	1033
G.	Hyperlink as Total Change .....	1034
H.	Hyperlink as Democracy .....	1036
I.	Hyperlink as a Signal of Credibility.....	1037
II.	REGULATING SPEECH.....	1040
A.	Content-Based Regulation .....	1040
B.	Content-Neutral Regulation.....	1041
III.	REGULATING HYPERLINKS.....	1049
A.	Trademarks and Servicemarks .....	1050
B.	E-Trespass .....	1058
C.	Copyright.....	1059
D.	Contributory Infringement.....	1066
E.	Contracts .....	1072
IV.	CONCLUSION.....	1075

“The ability to refer to a document (or a person or any thing else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else.”  
—Tim Berners-Lee<sup>1</sup>

## INTRODUCTION

The Internet is an unprecedented medium of communication. It affords individuals opportunities to speak to, organize among, and learn from all those connected to its network. The ability to speak anonymously, to reach millions of people, and to find like-minded and not-so-like minded communities cheaply and quickly makes the Internet an incredibly valuable tool in proliferating First Amendment values. Communication on the Internet occurs through emails, websites, pop-up ads, banner advertisements, and, increasingly, hyperlinks. A hyperlink, or a link, is a “cross-reference . . . appearing on one [W]eb page that, when activated by the point-and-click of a mouse, brings onto the computer screen another [W]eb page.”<sup>2</sup> A link can appear as a blue, underlined version of an Internet address

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<sup>1</sup> Tim Berners-Lee, *Links and Law: Myths*, WORLD WIDE WEB CONSORTIUM (W3C) (Apr. 1997), <http://www.w3.org/DesignIssues/LinkMyths.html>. Tim Berners-Lee is the Director of the World Wide Web Consortium.

<sup>2</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455 (2d Cir. 2001).

(“URL”) or as a word, phrase, or image embedded with the URL of the linked website. Either way, clicking on the link directs the user to the linked website.

Hyperlinks have long been understood to be critical to communication because they *facilitate* access to information. They provide visitors on one website a way to navigate to internally referenced words, phrases, arguments, and ideas. Under this view, if the Internet is an endless expanse of information where “any person . . . can become a pamphleteer”<sup>3</sup> then “[h]yperlinks are the paths among websites, creating the bustling street corners for distribution of those pamphlets and inviting passersby to engage more deeply with the issues raised.”<sup>4</sup>

This notion of hyperlinks as the vehicle of communication is confirmed by the rise of services that specialize in making it easier to share links. TwitThis, for example, provides customers with a simple widget to add to the bottom of their blog posts. It encourages blog readers to click on the widget and share the URL of that blog post instantly via their Twitter accounts. As a testament to its utility, another link sharing service, AddThis, said recently that its service reaches a billion unique users every month.<sup>5</sup>

In addition to being vehicles for communication on the Internet, this Article contends that hyperlinks should be understood as communication in their own right. Hyperlinks both explicitly and implicitly communicate messages. For example, if, on my Facebook page, I provided a link to [www.prochoice.com](http://www.prochoice.com) or [www.dailyshow.com](http://www.dailyshow.com), those viewing my profile could fairly estimate my political leanings and my sense of humor. If I am the author of a new online newspaper, links function as virtual footnotes, communicating credibility to my readers. In both of these examples, the hyperlink functions as both a mechanism of access to, *and* an independent source of, information. In the former instance, the message is explicit—announcing to your network of friends that you like Jon Stewart. In the latter instance the message is implicit—subtly communicating to a newspaper’s readers that they can trust their news source.

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<sup>3</sup> Reno v. ACLU, 521 U.S. 844, 870 (1997).

<sup>4</sup> Brief for Openlaw Participants as Amicus Curiae Supporting Defendants at 3, Universal City Studios, Inc. v. Corley, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) (No. 00 Civ. 0277), *available at* <http://cyber.law.harvard.edu/openlaw/DVD/amicus.html>.

<sup>5</sup> Justin Thorp, *New AddThis Analytics, Now with Audience Interests*, ADDTHIS BLOG (Dec. 20, 2010), <http://www.addthis.com/blog/2010/12/20/new-addthis-analytics-now-with-audience-interests/>.

These are not the only messages hyperlinks convey, however. Hyperlinks communicate a range of both explicit and implicit messages. Marshall Kirkpatrick, a long time technology blogger, has written about the analytical value of hyperlinks in determining individual preferences *and* social relevance. In one post about the use of the popular URL-shortening service, Bit.ly, he argues that the company that best analyzes the linking data sent across the networks of social media websites like Twitter and Facebook will be as revolutionary as Google. He writes that “[p]ublishing the metrics of sharing on the social [W]eb is something that is very fairly compared to indexing the pages of the [W]eb and analyzing the links between them.”<sup>6</sup>

Kirkpatrick’s belief is substantiated by the rapid growth of companies interested in aggregating and analyzing individuals’ linking data. ShareThis is another one of many companies that allow users to share more easily the links to the websites they visit with their friends across a number of social media including Facebook, StumbleUpon, MySpace, LinkedIn, and Twitter. The *New York Magazine* website employs ShareThis to let their online readers quickly and seamlessly share a link to an article they liked with their friends and colleagues through their social medium of choice. ShareThis then provides *New York Magazine* with information about their users based on their sharing habits.<sup>7</sup> This information helps *New York Magazine* identify user preferences. AddThis, mentioned before, also provides user analytics.<sup>8</sup>

Twitt(url)y, TweetMeme, and Topsy are all services that aggregate and monitor links tweeted by users on Twitter. Twitt(url)y monitors public Tweets and ranks sites based on the number of times their URLs are tweeted by users. TweetMeme is a service that aggregates links on Twitter to determine which links are most popular. TweetMeme then buckets these links into categories, subcategories, and channels so that users can easily identify which links are relevant to their particular interest. Topsy is a search engine, much like Google, except that instead of indexing the World Wide Web, Topsy indexes the tweets of the “30 million or so [Twitter] users” sending out “tens of thousands of unique links per day to interesting things around the

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6 Marshall Kirkpatrick, *Twitter Crowns Bit.ly as the King of Short Links; Here’s What It Means*, READ WRITE WEB (May 6, 2009, 11:11 AM), [http://www.readwriteweb.com/archives/twitter\\_crowns\\_bitly\\_as\\_the\\_king\\_of\\_short\\_links\\_he.php](http://www.readwriteweb.com/archives/twitter_crowns_bitly_as_the_king_of_short_links_he.php).

7 *See Reporting & Analytics*, SHARETHIS, [http://sharethis.com/publishers/features\\_reporting](http://sharethis.com/publishers/features_reporting) (last visited Mar. 27, 2011).

8 Thorp, *supra* note 5.

Internet.”<sup>9</sup> Underpinning the logic behind all three of these sites is a belief that links transmitted by individuals are informative of something much bigger than just the information to which they link.

As Kirkpatrick described it,

People share links to pages. By email, on Facebook, on Twitter and through countless other methods [sic]. The company that does the best job analyzing that sharing activity and creating a compelling user experience based on it is likely to become a very big deal. . . . Allong [sic] the way the service [Bit.ly] analyzes the page being linked to, pulls out the key concepts discussed on that page, and then provides real-time statistics about where the link is being shared and how many people are clicking on it.<sup>10</sup>

Drawing inferences from the way we link is not a new idea. Every modern search engine does it daily. However, in the early days of search, search engines like AltaVista determined their search results based on how well a Web page matched the query.<sup>11</sup> AltaVista met its demise in the late 1990s in the face of Google’s growing popularity among Web users. The key, in part, to Google’s success was its revolutionary belief that the relevance of a given website is determined not by the text on that site but rather by how many other websites linked to that site. This belief was hard-coded into the PageRank algorithm,<sup>12</sup> the code behind Google’s search engine. PageRank remains in use today and continues to place heavily linked-to sites towards the top of its search results.

These anecdotes about companies like Google and Topsy tell an important story about how individuals can contribute to the national dialogue. The technologies that underpin Google and Topsy function in a way that allows every Internet user to contribute in the effort to push an obscure idea into national relevance. For example, Google is widely considered to be one of the best traffic generators for a given website. The top results that appear in a Google search are awarded an incredible amount of traffic.

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<sup>9</sup> Michael Arrington, *Topsy Search Launches: ReTweets Are the New Currency of the Web*, TECHCRUNCH.COM (May 26, 2009), <http://techcrunch.com/2009/05/26/topsy-search-launches-retweets-are-the-new-currency-of-the-web/>.

<sup>10</sup> Kirkpatrick, *supra* note 6.

<sup>11</sup> Arrington, *supra* note 9 (“Before Google, search engines like AltaVista determined relevance based on how well a [W]eb page matched the query.”).

<sup>12</sup> The patent describes PageRank as a technology which “assigns importance ranks to nodes in a linked database, such as any database of documents containing citations, the [W]orld [W]ide [W]eb or any other hypermedia database.” U.S. Patent No. 6,285,999 (filed Jan. 9, 1998). The method involves “identifying a weighting factor for each of the linking documents, the weighting factor being dependent on the number of links to the one or more linking documents, and adjusting the score of each of the one or more linking documents based on the identified weighting factor.” *Id.*

Despite the important roles of the hyperlink as both a medium of communication and a message itself, the use of hyperlinks has been threatened. Trademark, copyright, and contract law are often, but not exclusively, leveraged in an attempt to regulate the use of links online. While the concerns motivating cases brought against hyperlinks are often legitimate, limiting the use of links poses a significant danger to communication and future innovation.

One particularly egregious example of attempted hyperlink regulation arose from an incident involving the Che Café Collective, a student organization at the University of California at San Diego (UCSD), which was asked by the university to delete hyperlinks to an alleged terrorist website from their UCSD-hosted website. In a letter to the organization, a university official demanded that the organization “immediately remove the [Revolutionary Armed Forces of Colombia (FARC)] from listing on the burn.ucsd.edu web site.”<sup>13</sup>

School administrators told the group that linking to a site supporting the Revolutionary Armed Forces of Colombia (FARC) was prohibited under the USA Patriot Act, which bans “providing ‘material support to support terrorists.’”<sup>14</sup> The university threatened disciplinary action if the group did not immediately remove the link to FARC. In response to these threats, a number of free speech advocates, including the American Association of University Professors, the American Civil Liberties Union, and the National Coalition Against Censorship, came to the aid of the Che Café Collective, arguing that the university’s interpretation of the statute was inaccurate and overbroad in ways that threatened First Amendment rights online.<sup>15</sup> As one member from the Foundation for Individual Rights in Education noted, “All you’d have to do is declare someone a terrorist organization to prevent someone from knowing who the enemy is or what they [sic] stand for . . . . That’s not how democracy works.”<sup>16</sup>

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13 E-mail from Gary R. Ratcliff, Dir. of Univ. Ctrs., Univ. of Cal., San Diego, to the Che Café Collective (Sept. 17, 2002), available at <http://www.indybay.org/newsitems/2002/09/24/1511821.php>.

14 Declan McCullagh, *University Bans Controversial Links*, CNET NEWS (Sept. 25, 2002), <http://news.cnet.com/2100-1023-959544.html>.

15 See, e.g., Letter from the American Association of University Professors et al. to Robert Dynes, Chancellor, University of California, San Diego (Oct. 8, 2002), reprinted in *U.C., San Diego Admits First Amendment Mistake After ABFFE and FEN Protest*, BOOKSELLING THIS WEEK (Oct. 10, 2002), <http://news.bookweb.org/news/uc-san-diego-admits-first-amendment-mistake-after-abffe-and-fen-protest> (asking the university to reaffirm the First Amendment rights of the students and rescind the orders that were issued to students who ran the Che Café).

16 McCullagh, *supra* note 14 (internal quotation marks omitted) (quoting Greg Lukianoff, Director of Legal Advocacy for the foundation for Individual Rights in Education).

The Che Café Collective example reminds us of the importance of applying the First Amendment as a limitation on the regulation of media and messages. The First Amendment protects both the vehicles through which we communicate and the communication itself. In the Che Café Collective example, the most overt free speech concern arose because the university attempted to prohibit the dissemination of information about a State Department-designated terrorist organization on a university-hosted Web page. The second order concern, however, was that the university demanded that a hyperlink on the Che Café Collective website, which merely connected users to another website, be removed from the website because the link constituted “material support” to FARC.

While media and messages are both protected under the First Amendment, they are not afforded equal protections under the law. Regulating platforms for speech, such as signs on utility poles, has traditionally been viewed by courts as “content-neutral” behavior because such regulation affects the medium regardless of the content traversing across it.<sup>17</sup> Content-neutral laws, while implicating First Amendment rights, are by and large subject to a less rigorous standard of review by the courts. However, when laws attempt to limit speech based on the message conveyed, so-called “content-based” regulation, courts apply a considerably stricter standard of review.

The line distinguishing content-neutral and content-based regulation is conceptually clear but practically blurry. For example, often times “time, place, and manner restrictions,” the paradigmatic content-neutral regulation, reduces the total quantity of public debate and thus have clear content-based effects. Some content-neutral zoning regulations, like those that restrict pamphleteering or the use of megaphones, effectively ban those means of expression “essential to the poorly financed causes of little people.”<sup>18</sup> When a regulation is designed to be content-neutral but affects the total quantity or quality of speech or disproportionately affects a specific segment of the population, the distinction between content-neutral and content-based regulation becomes dangerously blurred.

This blurring occurs often when regulating hyperlinks. A law that would, for example, demand that websites obtain authorization before hyperlinking would appear to be content-neutral—it applies to

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17 See, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (holding that the city of Los Angeles could ban all signs, commercial and political, from being placed on city utility poles because the citizens had “ample alternative modes of communication” in the city).

18 *Martin v. Struthers*, 319 U.S. 141, 146 (1943).

links regardless of the content linked to and regardless of the content within the link. However, if a new political commentary blog is required to obtain permission from all of the news organizations it links to, it threatens the blog's very existence for two main reasons. First, attempting to obtain approval for all the links will likely be prohibitively expensive and time-consuming. Second, even if the blog owner is able to pay for the costs of obtaining permission to link, incumbents in the field have an incentive to deny her the ability to link to their sites. If the blogger is unable to link to public websites—either because she cannot afford to or because the site(s) in question denies her permission to link—her credibility is undercut among her nascent reader base, and her effectiveness at providing quick, thoughtful commentary to a broad reader base is reduced. The net effect is that our new blogger's likelihood of success is seriously threatened.

Thus, such a regulation would both hurt the total quantity of public debate and unfairly target poorly financed, independent bloggers. Furthermore, the regulation would likely negatively affect those causes or viewpoints that are not covered by the mainstream media but instead are niche topics only covered by smaller, individual voices.<sup>19</sup>

Recognizing the dynamic role of hyperlinks in modern-day communication will help us assess the impact of laws that limit their use in a more thoughtful and rigorous manner. This Article will explore the various communicative roles of hyperlinks and the legal claims that have been brought to attempt to limit their use. Part I will describe the multi-faceted role hyperlinks play in how we communicate. Part II will then discuss the standard of review most applicable to the laws affecting hyperlink use. Finally, Part III will explore the various legal claims brought against the use of hyperlinks and assess the merit of the claims under the standard articulated in Part II.

## I. HYPERLINKS AS COMMUNICATION

### A. *Original Conception of Hyperlinks*

Tim Berners-Lee developed the World Wide Web in order to “re-frame the way we use information.”<sup>20</sup> His goal was to create a virtual

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<sup>19</sup> This hypothetical is no idle concern. A number of companies, including National Public Radio, the Better Business Bureau, KPMG, and Fast Company have all had a history of demanding permission to link. For a good review of such incidents, see Stephan Ott, *Linking Policies—Permission or Fee for Linking?*, LINKS & LAW, <http://www.linksandlaw.com/linkingcases-linkingpolicies.htm> (last visited Mar. 27, 2011).

<sup>20</sup> TED2009, *Tim Berners-Lee on the Next Web*, TED (Mar. 2009), [http://www.ted.com/talks/lang/eng/tim\\_berniers\\_lee\\_on\\_the\\_next\\_web.html](http://www.ted.com/talks/lang/eng/tim_berniers_lee_on_the_next_web.html).



documentation system through which people could share their documents with ease and speed. This universal space of information was to be navigated via hypertext links, or hyperlinks. For Berners-Lee, the value of the Web was obtained through the links that connected the documents in the ether.<sup>21</sup> Without the links, the Web would have been an impenetrable mess. Information would only be accessible if you knew the exact address of the information for which you were searching. The Web, he argued, “looses [sic] its power if there are certain types of things to which you can’t link.”<sup>22</sup> The hyperlink provided users with an innovative way to navigate the network.<sup>23</sup>

Underpinning the Web is Berners-Lee’s fundamental belief that publicly available information should be easily accessible to the public.<sup>24</sup> If access to content is constrained, the ease with which people speak and share information on the Internet decreases.<sup>25</sup> Because hyperlinks are the primary means of access, the robust use of hyperlinks became critical to free speech and information sharing on the Web.

While the hyperlink was the sole means of navigation (outside of direct inputs of URLs) in the early days of the Internet, the dominant form of navigation over the one-trillion-plus unique URLs<sup>26</sup> that compose the World Wide Web today is the search engine.<sup>27</sup> A search engine, like Google, Bing, or Yahoo!, is a service that “helps its users locate content on the Internet.”<sup>28</sup> Though search engines have replaced links as our preferred method of navigation over the Net, a quick peek under the hood shows that links fuel search engines. As Professor James Grimmelmann describes, “powerful link-structure techniques involving study of which [W]eb pages link to which other pages have become the dominant [W]eb search paradigm.”<sup>29</sup> This simply means that the Google/Bing/Yahoo! algorithm that returns a list of websites in response to your search query heavily relies on links

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21 *Id.*

22 Tim Berners-Lee, *Realising the Full Potential of the Web*, WORLD WIDE WEB CONSORTIUM (Apr. 1997), <http://www.w3.org/1998/02/Potential.html>.

23 TED2009, *supra* note 20.

24 *Id.*

25 *Id.*

26 Jesse Alpert & Nissan Hajaj, *We Knew the Web Was Big . . .*, OFFICIAL GOOGLE BLOG (July 25, 2008, 10:12 AM), <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html>.

27 James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 6 (2007) (“Every major Internet application today is a search engine, contains a search engine, or depends on a search engine.”).

28 *Id.*

29 *Id.* at 10.

to determine which websites to list. Thus, linking, even today, remains critical to Web navigation.

However, the use of hyperlinks has evolved over time. This paper argues that in addition to its navigational function, hyperlinks should now also be recognized for their communicative capacity. The messages hyperlinks communicate may be explicit, conveyed through the text or image provided by the hyperlink, or implicit, conveyed through the use of the link. In this Section I will explore the variety of messages conveyed by links—from simple, straightforward address information to more complex notions of democratizing determinations of social relevance.

### *B. Hyperlink as an Address*

A hyperlink that directs you to the *New York Times* website can simply display its textual URL—[www.nytimes.com](http://www.nytimes.com). If I were to provide a textual URL hyperlink to the *New York Times* website in this article, I would be providing the virtual address of the *New York Times*. If I type “[www.nytimes.com](http://www.nytimes.com)” into my browser, the browser uses the URL to determine where in the network the *New York Times* website lives. The browser then goes to that place, gets the content that lives there, and displays it for me. Consider the analog-world parallel—the physical address of the *New York Times* building is 620 Eighth Avenue, New York, NY 10018. If I would give this address to a taxi driver in New York, he would take me to the front door of the *New York Times* building. The taxi driver of the analog world is the hyperlink of the digital world—by giving both of these entities my destination location, they can take me there.

### *C. Hyperlink as a Signal of Preference or Opinion*

Hyperlinks can convey more than just addresses, of course. Consider the hyperlink [www.fuckgeneralmotors.com](http://www.fuckgeneralmotors.com), the use of which was litigated a few years ago.<sup>30</sup> By placing that link on a personal blog or tweeting the link to friends, an individual is communicating much more than a Web address. She is able to send a very clear expressive

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<sup>30</sup> *Ford Motor Co. v. 2600 Enterprises*, 177 F. Supp. 2d 661, 662 (E.D. Mich. 2001) (denying injunction to owner of trademarked website “ford.com” that sued owner of domain name “fuckgeneralmotors.com,” which provided a hyperlink to the “ford.com” website).

message through the text of the link itself. In this instance, she is letting the world know that she is not a great fan of General Motors.

The hyperlink possesses the ability to serve as expression in part because, unlike physical addresses, which are constrained by the municipally decided street names and numbers, Web addresses are created and personalized by the owners of the virtual real estate. For example, when General Motors created its website, it was able to choose the domain name of the site, and it chose [www.gm.com](http://www.gm.com). It could also have chosen [www.generalmotors.com](http://www.generalmotors.com), [www.chevyandmore.com](http://www.chevyandmore.com), or any other domain name it so desired—assuming the name was not already taken.<sup>31</sup>

Because Web addresses can be personalized and, as a result, expressive, many people utilize links to convey specific messages. The use of links in the “status message” option of instant messenger clients, as tweets on Twitter, or as status updates on Facebook is increasingly popular. As one Huffington Post commentator noted, “[b]efore Twitter and Facebook, there was only one place where you could broadcast your inane real-time status updates and make sure all your friends clicked on that hilarious link or read the Goo Goo Dolls lyrics that *totally* reflected what you were going through: the away message.”<sup>32</sup> For applications where the space to communicate is limited, like on Twitter, links can prove to be an especially effective tool to communicate what users are finding interesting, amusing, or noteworthy at any given moment. In fact, the use of links on Twitter has become so popular that one of the search functions Twitter offers its users is the ability to search for Tweets that contain links.

I began to really notice the use of links as away messages during the 2008 elections, when there was a contingent of individuals on my Google Chat (Gchat) buddy list that linked exclusively to *Politico*, *Daily Kos*, or *Talking Points Memo*. Now, I have noticed another group of individuals who perennially link to articles from *The Onion* or clips from *The Daily Show with Jon Stewart*. By posting these links, my col-

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<sup>31</sup> Website owners often do not choose their IP address. An IP address is the numerical address that corresponds to a website’s domain name. The American Registry for Internet Numbers distributes IP addresses in the United States. General Motors’s IP address is 170.224.60.167. While GM could have chosen a number of domain names to correspond with this IP address, they were likely just assigned the numbers that compose their IP address. For more information on how the Internet distributes IP addresses and domain names, see *What Does ICANN Do?*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://www.icann.org/en/participate/what-icann-do.html> (last visited Mar. 27, 2011).

<sup>32</sup> Fernanda Diaz, *The Easiest Thing You’ll Ever Do to Help Obama Win the Election: Donate Your Away Message*, HUFFINGTON POST (Oct. 10, 2008, 9:42 AM), [http://www.huffingtonpost.com/fernanda-diaz/the-easiest-thing-youll-e\\_b\\_133531.html](http://www.huffingtonpost.com/fernanda-diaz/the-easiest-thing-youll-e_b_133531.html).

leagues communicate what they are thinking about (or at least what they *want* people to think they are thinking about). Even when I do not always click on their posted links to read the *Daily Kos* article or to watch *The Daily Show* video, I know those colleagues are thinking about progressive politics or enjoying ironic humor. This is because the links display the domain name of the site and I have some knowledge of the contents of the site. Because most links to clips of *The Daily Show* contain “www.thedailyshow.com” somewhere in the longer link, I can draw inferences about the content and the linker based on the text of the link. Put differently, because links are composed of Web address content, they are inherently expressive, offering individuals an opportunity to communicate their interests to their friends and the public at large.<sup>33</sup>

My experience is not unique. During the 2008 Presidential campaign, Seth Flaxman created a website [www.weapprovethismessage.com](http://www.weapprovethismessage.com), which asked visitors to post its URL in their away messages through Election Day in order to help spread accurate and compelling information about then-candidate Barack Obama. Explaining his inspiration for the website, Flaxman noted two things—that his own Gchat away message had been politicized since September 2007 and that people are more likely to read a friend’s away message than a traditional news source.<sup>34</sup> As the popularity of linking to this site grew, “weapprovethismessage.com” became a bumper sticker in support of Obama. It grew beyond its original function of informing the uninformed and became a symbol of solidarity and support behind then-candidate Obama.

Just as away messages and status updates allow Gchat and Facebook users to use links to communicate their preferences and opinions, blogrolls allow website owners to use links to signal their preferences and opinions. Blogrolls are lists of links to sites that the blogger likes, and a recent study shows that two in five bloggers (41%) keep a blogroll.<sup>35</sup>

A company like Google signals its public policy perspective through its blogroll by including links to *463 Blog: Inside Tech Policy*, *CDT—PolicyBeta*, *Cisco High Tech Policy Blog*, *CNET Politics Blog*, *EFF:*

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<sup>33</sup> Notably, the Web address itself, even if not hyperlinked, is also expressive. However, as the rest of this Section will illustrate, there are expressive capabilities that are unique to hyperlinks that are not available with plain text Web addresses.

<sup>34</sup> Diaz, *supra* note 32.

<sup>35</sup> AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET’S NEW STORYTELLERS at iv (2006), <http://www.pewinternet.org/~media/Files/Reports/2006/PIP%20Bloggers%20Report%20July%2019%202006.pdf.pdf>.

*DeepLinks*, *Hillicon Valley*, *Intel Policy Blog*, *John Palfrey's Blog*, *Lessig Blog*, *Peter Fleischer: Privacy . . . ?*, and *Public Knowledge Blog*.<sup>36</sup> Knowing something about the content on the blogs listed on Google's blogroll gives its readers a sense of the content of *Google Public Policy Blog* without reading a single post.

Blogrolls also speak to the preferences of new readers, telling them what the given blog is similar to—a type of “if you liked them, you'll like me” service. Consider the blogroll of the Center for Democracy and Technology (CDT),<sup>37</sup> an advocacy organization dedicated to keeping the Internet “open, innovative, [and] free.”<sup>38</sup> Among the blogs included in CDT's blogroll are *Public Knowledge*, *EFF: Deep-Links*, *Technology Liberation Front*, and the *American Constitution Society*. These blogs often take substantively similar positions on Internet issues. In this way, the links communicate a context or a frame of reference to visitors of CDT's website, which allows them to make a judgment on the type of content they should expect to encounter on the site.

The analog to the blogroll in the physical world would be the choice use of reviews praising a new book that often occupy its back cover. These quotations are selected not only based on the substance of the quote, but based on the authors of the quotations. A quotation from the *New York Review of Books* signals something entirely different than a quotation from the *Wall Street Journal*. For example, the back panel of Professor Tim Wu's new book, *The Master Switch: The Rise and Fall of Information Empires*, includes reviews from Arianna Huffington of the *Huffington Post*, Josh Silverman of Skype, David Leonhardt of the *New York Times Book Review*, and Cory Doctorow of Boing Boing.<sup>39</sup> Though not all of the reviews are from left-leaning individuals, the majority of the reviews are from members of the liberal Technorati whose names will trigger assumptions for the reader about the substance of the book.

As demonstrated by the use of hyperlinks on status messages and blogrolls, communicating preference and opinion is an important and common role for hyperlinks. Next, we will look at the role of hyperlinks in online activism.

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36 GOOGLE PUB. POL'Y BLOG, <http://googlepublicpolicy.blogspot.com> (last visited Mar. 27, 2011).

37 CENTER FOR DEMOCRACY & TECH., <http://www.cdt.org/> (last visited Mar. 27, 2011).

38 *Id.*

39 For an example of the reviews featured on Professor Wu's book, see *Review Quotes: Praise for Tim Wu's The Master Switch*, RANDOM HOUSE, <http://www.randomhouse.ca/catalog/display.pperl?isbn=9780307269935> (last visited Mar. 27, 2011).

*D. Hyperlink as a Signature on a Virtual Petition*

Hyperlinks are also used to show support for a cause—a virtual signature on a petition. Gaza Youth Breaks Out (GYBO) is a group of Gaza youth who are tired of Palestinian and Israeli violence. Their Facebook page contains their manifesto and a list of ways supporters can aid in their efforts. Number one on the list of ways supporters can help out is “[p]romoting [their] manifesto by sharing it on [their] profile on Facebook.”<sup>40</sup>

In 2008, Google undertook a large campaign to pressure the Federal Communications Commission (FCC) to free unused and under-used spectrum.<sup>41</sup> The campaign was entirely virtual—it featured a website, [www.freetheairwaves.com](http://www.freetheairwaves.com), that provided visitors information on the effort, an opportunity to email a letter to the FCC encouraging them to free up the spectrum, and YouTube videos featuring Google employees, academics, and public interest representatives all describing the various benefits of unlicensed spectrum. Because of the Web-based nature of Google’s campaign, word was spread by individuals linking to the website in a move described by *Ars Technica* as a “linked advertising campaign.”<sup>42</sup> Linking to the website was a very public signal of support. With many influential people in the telecom/Internet policy world, such as Professors Susan Crawford and Lawrence Lessig, linking to the website, the campaign garnered much attention in the media and ultimately was successful in achieving its goal.<sup>43</sup>

Both the GYBO and the Google example illustrate the linking as activism argument. This argument has been put forth before.

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<sup>40</sup> *Gaza Youth Breaks Out (GYBO)*, FACEBOOK, <http://www.facebook.com/pages/Gaza-Youth-Breaks-Out-GYBO/118914244840679?v=info> (last visited Mar. 27, 2011).

<sup>41</sup> The “Free the Airwaves” campaign was dedicated to freeing up white spaces. The white spaces are those spectrum bands between occupied radio bands or channels that remain unused to prevent interference. The need for white spaces has become greatly diminished as digital signaling has replaced analog signaling as well as with the advancement of devices to prevent interference. For more information, see *Time to “Free the Airwaves,”* OFFICIAL GOOGLE BLOG (Aug. 18, 2008, 5:59 AM), <http://googleblog.blogspot.com/2008/08/time-to-free-airwaves.html>.

<sup>42</sup> Nate Anderson, *Google White Space Petition: 13,000 Signatures and Counting*, ARS TECHNICA (Sept. 02, 2008, 8:15 AM), <http://arstechnica.com/news.ars/post/20080902-google-white-space-petition-13000-signatures-and-counting.html>.

<sup>43</sup> See, e.g., Susan Crawford, *Two Possibly Related Developments*, SUSAN CRAWFORD BLOG (Aug. 18, 2008), <http://scrawford.net/blog/two-possibly-related-developments/1234/>; Lawrence Lessig, *Free the Airwaves: Whitespace Campaign*, LESSIG 2.0 (Aug. 20, 2008, 12:12 AM), [http://lessig.org/blog/2008/08/free\\_the\\_airwaves\\_whitespace\\_c.html](http://lessig.org/blog/2008/08/free_the_airwaves_whitespace_c.html).

In the case of *Universal City Studios v. Corley*,<sup>44</sup> defendant Eric Corley and his magazine, *2600*, were hosting DeCSS code on their website, which allowed Linux users to play CSS-encrypted DVDs on their systems. At that time, without the DeCSS code, it was impossible to play a legally obtained, encrypted DVD on a machine running Linux as its operating system. Because of this posting, Corley raised the ire of a number of Hollywood studios, one of which was Universal City Studios. The studios sent him cease and desist letters and threatened legal recourse. In response, Corley invited supporters to “mirror” the DeCSS files on their own websites and created a Web page within his own site that contained links to the supporters’ websites. Members of the Openlaw Forum at Harvard University argued in an amicus brief filed on behalf of Corley that his publication of the Web page containing links of his supporters’ websites was a “protest akin to a union picket line or peaceful demonstration.”<sup>45</sup> The brief further argued that just as “advertisers in the *New York Times* list their sponsors,”<sup>46</sup> Corley simply gave his readers the websites at which his supporters could be contacted and their speech read. Site owners “choose to express their political support not only by writing and hosting the linked [W]eb pages but by ‘signing’ the magazine’s list and making their pages publicly visible.”<sup>47</sup>

Preserving the ability of individuals to link in these instances is important. It ensures that people can engage in digital activism, casting their support for causes and issues on the Internet. As the members of the Openlaw forum explained:

[T]he multitude of links suggests that numerous people support *2600*’s fight for fair use of digital media; they express a shared view that reverse engineering justifies bypassing access controls; they imply that DeCSS is still easy to obtain and that an injunction against a single Web publisher will be ineffective to stem dissemination of DeCSS. It is not a message plaintiffs want to hear, but it is still not one they can block from the Web.<sup>48</sup>

#### E. Hyperlink as a Membership Card

A closely related point is the way in which hyperlinks signal association on the Web.<sup>49</sup> Consider the use of hyperlinks on the social net-

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<sup>44</sup> 273 F.3d 429 (2d Cir. 2001).

<sup>45</sup> Brief for Openlaw Participants, *supra* note 4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Tim Bonnemann, *14 Facebook Groups for the Dialogue, Deliberation, Public Participation, E-government, and E-democracy Community*, INTELLITICS (May 9, 2008),

working service, Facebook. Facebook allows members to create groups that others can join independently or by invitation. These groups are commonplace on Facebook. An individual lists hyperlinks connecting viewers to her groups' Facebook pages on her profile page. Clicking on the links allows viewers of the profile to understand more about the groups.

The groups range from general—for example, “UPenn Alumni”—to specific—for example, “People Who Always Have to Spell Their Names for Other People.”<sup>50</sup> When a member of a group displays her membership to a given group by including a link to the group's Web page on her profile, she is publicly associating and assembling around a cause or interest. Seeing that one's friends or peer group are members of a certain group increases the likelihood that an individual will join that group. Thus, an individual linking to display membership signals association and potentially even encourages further association by friends and peers. Facebook is just one example of the opportunity to assemble through hyperlinks. Other social networking websites with similar opportunities include LinkedIn, MySpace, and Doostang.<sup>51</sup>

Of course, the ability to link to signal membership is not limited to the world of social networking sites. The example above of the Obama supporters that linked to [www.weapprovethismessage.com](http://www.weapprovethismessage.com) is also an example of how linking can create a loosely affiliated group of individuals assembled around a given cause or idea. In that instance, there was no organized member list, but there was an affiliation among mutual linkers. As Fernanda Diaz explained,

Last week, before I had heard anything about the project, [www.] [weapprovethismessage.com](http://www.weapprovethismessage.com) took over most my Gchat friends list's status boxes—a curious development which led me to click on it and marvel at the simple brilliance of its idea. *It's such a great way to centralize support in a pervasive yet subtle manner . . .*<sup>52</sup>

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<http://www.intellictics.com/blog/2008/05/09/14-facebook-groups-for-the-dialogue-deliberation-public-participation-e-government-and-e-democracy-community/> (listing various groups on Facebook that deal with different facets of “dialogue, deliberation, public participation, e-government, and e-democracy”).

50 See, e.g., Amit Agarwal, *The Ten Facebook Groups That Are Funny but Quite Popular*, DIGITAL INSPIRATION (Aug. 27, 2007), <http://labnol.blogspot.com/2007/08/ten-facebook-groups-that-are-funny-but.html>.

51 LinkedIn and Doostang use linking among individuals' profiles as a way to highlight professional associations and networks. LinkedIn is an increasingly important tool to establish business and relationship networks that allow those “linked in” to get jobs and make new contacts. (MySpace is more of an all-purpose social networking site, like Facebook.)

52 Diaz, *supra* note 32.



*F. "The Medium Is the Message"*

In addition to the explicit messages about address, preference, support, and membership, hyperlinks also convey messages simply through their use. The substance of this implicit communication is derived from the nature of the medium itself. The notion that a medium of speech is able to independently transmit a message was first articulated by Marshall McLuhan when he boldly declared that "the medium *is* the message."<sup>53</sup> The medium, McLuhan argued, "shapes and controls the scale and form of human association and action."<sup>54</sup> David Sarnoff, founder of the National Broadcasting Company and a pioneer in the American radio and television industries, once described technology as devoid of an independent message. Sarnoff said, "[t]he products of modern science are not in themselves good or bad; it is the way they are used that determines their value."<sup>55</sup> McLuhan stands in stark contrast to this view and characterizes Sarnoff's representation of technology as "the voice of the current somnambulism."<sup>56</sup> McLuhan argued that such a view is analogous to saying that "[f]irearms are in themselves neither good nor bad; it is the way they are used that determines their value."<sup>57</sup> Technology, McLuhan compellingly argued, is imbued with value and conveys a message independent of the content it transmits.

One of McLuhan's most prominent examples is the electric light. McLuhan found that the electric light sends a message about the irrelevance of traditional signals of time and place. "The electric light ended the regime of night and day, of indoors and out-of-doors . . . . Cars can travel all night, ball players can play all night, and windows can be left out of buildings. In a word, the message of the electric light is total change."<sup>58</sup>

Perhaps the most striking element of McLuhan's idea is the subtle but pervasive effect the medium has on how society views and engages with the world. The electric light created a social revolution. People could remain active after sundown. Windows, for the first time, could be viewed as a design element to a building. Just as the steam engine catalyzed how we build and create, the electric light revolutionized how we interact. In both the case of the steam engine

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53 MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN 23 (2d ed., New American Library 1964) (emphasis added).

54 *Id.* at 24.

55 *Id.* at 26.

56 *Id.*

57 *Id.*

58 *Id.* at 60.

and the electric light, the catalytic effect on society soon becomes associated with the use of the medium to the point where the medium begins to convey a message of total change. As McLuhan described, “[t]he effects of technology do not occur at the level of opinions or concepts, but alter sense ratios or patterns of perception steadily and without any resistance.”<sup>59</sup> McLuhan argued that when a person views a sign constructed with electric light, though she reads and consciously processes the contents of the sign, she is subconsciously processing its message of total change.

Like the electric light did years ago, the hyperlink conveys today’s message of total change. It conveys a message of incredible speed, decentralized power, and universal access. The hyperlink embodies the ability to have all of the world’s information, created by all of the world’s people, merely one click away. The balance of this Section will explore the various implicit messages that are delivered by hyperlinks.

### *G. Hyperlink as Total Change*

To grasp the message expressed by hyperlinks, compare it to a Web address that is not hyperlinked: The latter, in its jet black, plain text conveys a simple, staid, traditional message. The former, with its bright blue, underlined font sends a significantly more exciting message. It is the lynchpin that ties together the virtual, universal documentation system through which people can communicate with ease and speed. It serves as our access point to a massive Web of people, places, and information. Because of its role, the hyperlink has come to embody the decentralization, speed, interactivity, universality, and access that is the Internet. The link has become a symbol of the technology it facilitates.

Consider the way in which we consume information. I am no longer limited to getting my news solely from the big three broadcasting networks. Now I can follow the links in my Twitter feeds to identify today’s top stories. Alternatively, I can visit my news aggregator of choice and skim through the headlines of a range of news organizations, big and small. Neither of these would be possible without links. The link facilitates a decentralized model of news distribution. In addition to decentralizing the distribution of news, links have decentralized the creation of news. Everyone can now actively contribute to social relevance because the determinant of relevance is no longer

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<sup>59</sup> *Id.* at 33.

just the prerogative of the owner of the news source. Now, our collective linking behavior determines social relevance and creates Internet memes.

In 1945, the Supreme Court declared that the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public” and “that a free press is a condition of a free society.”<sup>60</sup> The media industry today is highly concentrated with only six companies dominating the U.S. market—the Walt Disney Company, NBC (formerly owned by GE, now owned by Comcast), Time Warner, Viacom, News Corporation, and CBS.<sup>61</sup> The Internet allows smaller players to enter this media landscape. Matt Drudge of *Drudge Report* describes his publication as “‘citizen journalism,’ releasing stories that the mainstream media either does not know about or refuses to publish.”<sup>62</sup> This more decentralized media is made possible because of hyperlinks, and as such has become an important message communicated by the use of hyperlinks. Restrictions on hyperlinks limit the communication of that message.

Links also convey a message of speed because of the speed with which they allow individuals to obtain information on the Web. Links facilitate access to a website with the simple click of a button. The alternative would require typing or copying the website’s URL directly into the browser’s address bar. Hyperlinks are like digital footnotes where instead of having to copy down the call number and search the library stacks for the referenced information, one simply has to click a button and the referenced information pops up on the screen. The speed with which people can search and access information on the Web is unprecedented, and because of the role hyperlinks play in facilitating that speed, the appearance of hyperlinks has come to embody the promise of exceptional speed.

Hyperlinks also represent interactive communication. Whereas the analog world is characterized by one-way communication, the digital world is two-way. The reader interacts with the content. Hyperlinks facilitate active reading by enabling individuals to engage with the content by clicking on words and images therein that connect them to other, related content. While the analog world limits the reader to a passive role, merely receiving the words on the page,

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<sup>60</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>61</sup> *See Ownership Chart: The Big Six*, FREE PRESS, <http://www.freepress.net/ownership/chart/main> (last visited Mar. 27, 2011) (laying out basic information regarding the largest media firms in the United States, including their yearly revenues and holdings).

<sup>62</sup> *Profile: Matt Drudge*, BBC NEWS, (Feb. 29, 2008, 12:24 PM), <http://news.bbc.co.uk/1/hi/uk/7270685.stm>.

hyperlinks remind and encourage the reader to dive deeper by clicking on the links.

Universality is another message conveyed through links. Links are the internationally used Dewey Decimal system for the entirety of the Web. The whole of the World Wide Web, at home and abroad, is structured and accessible via links. Not only do they connect people to the universe of information indexed on the Web, but they do so across the globe.

Finally, and closely linked to universality, hyperlinks have become a symbol for access. My right index finger can bring the universe of information to my computer screen. Imagine reading a column in the *New York Times* about the Supreme Court's latest decision. The column is peppered with bright blue, underlined words. The case name is one of these linked words, and one click takes me to the opinion available through the Legal Information Institute at Cornell University. Reading the opinion, I see more linked words that take me to the important cases the Court relied on to come to their decision as well as the lower court decision and any relevant statutes. All of this information is available to anyone with access to a computer and an Internet connection.

The hyperlink has revolutionized what we say, whom we say it to, and how we say it. It has fundamentally changed communication. For this reason, the hyperlink is now imbued with that message of total change. It is, as the electric light and steam engine were, a symbol of change and reminder of a new way of life. In the next section, we will explore the way in which hyperlinks convey two other important messages—democracy and credibility.

#### *H. Hyperlink as Democracy*

The presence of a link reminds users of the democratic nature of the Internet. Links are powerful tools placed in the hands of every Internet user to push an obscure idea into national relevance. Google search results have quickly become an important barometer for social relevance. As described above, Google's search engine algorithm determines the relevance of a given page based in large part on the frequency of links to that page. This ability of linking to push websites up from obscurity to prominence means that linking allows individuals to participate in the determination of the relevance of information on a national level. PageRank shifted the control from the creator of Web content to the consumer of Web content. The ability to use a hyperlink as a vote in this national debate highlights the very fundamental way in which links behave like speech.

Never was this idea more salient than in 2005 when a query for “miserable failure” or “failure” on Google’s search engine returned President George W. Bush’s biography, as found on the White House website, as the number one-ranked site.<sup>63</sup> This prank was the result of a coordinated effort by Web users to manipulate the Google search algorithm, an effort known as Googlebombing. To Googlebomb President Bush, the pranksters had a large number of websites link to the official White House website using the same anchor text—“miserable failure”—so as to trick the Google algorithm into thinking that the linked-to website was the authoritative source for information about the anchor text of the hyperlink.<sup>64</sup> Googlebombing, though a subversive application of the phenomenon, exemplifies the ability of linking to bestow upon the information-consuming public the ability to push certain issues, stories, and ideas into national and international relevance.

### *I. Hyperlink as a Signal of Credibility*

More than ten years ago, Jakob Nielsen, a well-renowned Web usability expert, said that “[n]ot being afraid to link to other sites is a sign of confidence, and third-party sites are much more credible than anything you can say yourself. Isolated sites feel like they have something to hide.”<sup>65</sup> Through their role as clickable internal citations, a hyperlink indicates factual accuracy or support, which increases the credibility of the site containing the link.

The defendants in *Universal City Studios v. Corley* argued this position in court, explaining that an online publication reporting on the newly developed DRM-circumventing DeCSS code was *required* to link to the code if the article was to carry any credibility among its readership.<sup>66</sup> Whether the readers clicked on it or not, *that the article provided a link* to the code was sufficient to communicate to readers that what they were reading was supported by fact. Corley linked to the DeCSS code because “in a journalistic world, . . . [y]ou have to show your

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<sup>63</sup> Marisa Mayer, *Googlebombing 'Failure,'* OFFICIAL GOOGLE BLOG (Sept. 16, 2005, 12:54 PM), <http://googleblog.blogspot.com/2005/09/googlebombing-failure.html> (explaining how the practice of “googlebombing” by pranksters caused a biographical page on the White House’s website to be the top result based off of a search of the word “failure”).

<sup>64</sup> *Id.*

<sup>65</sup> Jakob Nielsen, *Trust or Bust: Communicating Trustworthiness in Web Design*, USEIT.COM, (Mar. 7, 1999), <http://www.useit.com/alertbox/990307.html>.

<sup>66</sup> See *Universal City Studios v. Corley*, 273 F.3d 429, 439 (2d Cir. 2001) (internal quotation marks omitted) (referring to defendant Corley’s argument that not adding the link was equivalent to “printing a story about a picture and not printing the picture”).

evidence[,] . . . and particularly in the magazine that [he] work[ed] for, people want to see specifically what it is that [they] are referring to, including what evidence . . . [they] have.”<sup>67</sup> In this way, a hyperlink indicates to readers that the supporting materials can be viewed with merely a click and communicates credibility to viewers.

By providing credibility, hyperlinks help smaller Internet publishers flourish and facilitate the creation of a journalistic model premised upon decentralized media sources as discussed above. Conveying credibility is of utmost importance in establishing a new publication. The credibility of the avidly read and referenced online investigative reporting publication, *Drudge Report*, is in part due to its practice of providing links to its sources.<sup>68</sup> Starting with breaking the Monica Lewinsky scandal in 1998, *Drudge Report*, despite its low budget and simple website consisting largely of links to other sources, has become recognized as an important, legitimate news source.<sup>69</sup> Wikipedia and Wikileaks are also paradigms of this point. Both sources of information rely heavily on links to establish credibility. Wikipedia itself describes the “[i]dentification of reputable third-party sources as citations” as one of the key metrics in measuring credibility.<sup>70</sup> Similarly, Wikileaks makes clear that they do not accept rumor, opinion, or other kinds of first-hand accounts because the Wikileaks journalists “write news stories based on the material, and then provide a link to the supporting documentation to prove [their] stories are true.”<sup>71</sup>

The successes of these online publications lie in their ability to establish credibility. The “most frequently reported journalistic activities” among bloggers outside of writing are fact-checking and linking “to original source material that has been cited or in some way used in a post.”<sup>72</sup> Furthermore, one study found that while traditional blogs link about as often as the websites of traditional news organizations, they link to external sites far more frequently. The study showed that “more than a third of the links of the Huffington Post and Daily Kos and over three-quarters of the links of Think Progress

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67 *Id.* (internal quotation marks omitted).

68 *Profile: Matt Drudge*, *supra*, note 62 (describing *Drudge Report* as “required reading for journalists and politicians in the United States”).

69 *See, e.g., id.* (citing *Drudge Report* as the first news source to run the story on the affair between President Clinton and Monica Lewinsky).

70 *Reliability of Wikipedia*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Reliability\\_of\\_Wikipedia](http://en.wikipedia.org/wiki/Reliability_of_Wikipedia) (last visited Mar. 27, 2011).

71 *Submissions*, WIKILEAKS, <http://213.251.145.96/Submissions.html> (last visited Mar. 27, 2011).

72 LENHART & FOX, *supra* note 35, at 11 (reporting findings that 35% of surveyed bloggers “often” spend extra time verifying the facts they post).

and Michelle Malkin pointed to external [web]sites.”<sup>73</sup> Comparatively, political news articles in the *New York Times* linked externally less than one percent of the time.<sup>74</sup>

In addition to the credibility linking lends to smaller news outfits, referential links are critical to the provision of news generally. As the number of online sources grows with each new blog, video website, and news service, comprehensive reporting is reliant on linking to these news sources instead of developing original content for every single news story. Referential links allow large media organizations to provide coverage of a variety of issues, including municipal-level issues, for its readers. For example, the *Boston Globe* provides a “Your Town” section on its website where readers can get more local news based on where they live.<sup>75</sup> The way the *Boston Globe* does this is, in part, by linking to smaller, local news media organizations that cover local news in more depth than the *Boston Globe*’s own reporters do.

Furthermore, referential links are critical to the success of aggregators—services like *Google News* or the *Huffington Post*—that collect and post the headlines and leads of stories posted on third party news sites, and embed the content with links to the sites on which the full story can be found. Aggregators allow us to receive and process news not only in a way that ensures broad exposure to information, but also recognizes the time and cognitive capacity constraints that limit our ability to process a lot of information. The link signals credibility of the aggregation site to the user. Were *Google News* to simply list snippets without the link, people might not trust the aggregator as much.

Whether by conveying credibility or allowing us to show our support for a cause, hyperlinks communicate to their audience. This ability to communicate, in conjunction with their critically important role as a vehicle for communication, means limiting the use of hyperlinks should be done with utmost care and an acute understanding of the resulting impact on our ability to communicate on the Web. In the next Section, I will discuss how we have traditionally regulated various types of speech.

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<sup>73</sup> Lokman Tsui, *The Hyperlink in Newspapers and Blogs*, in *THE HYPERLINKED SOCIETY: QUESTIONING CONNECTIONS IN THE DIGITAL AGE* 70, 79 (Joseph Turow & Lokman Tsui eds., 2008).

<sup>74</sup> *Id.* (referring also to the *Washington Post* for linking its political news articles to external websites).

<sup>75</sup> *Your Town*, BOSTON.COM, <http://www.boston.com/yourtown/> (last visited Mar. 27, 2011).

## II. REGULATING SPEECH

Despite the protections of the First Amendment, historically speech can be subject to regulation. Regulation that turns on the speech itself is said to be content-based and triggers a higher level of scrutiny from the courts. On the other hand, regulation that turns on the medium or mode of communication is an example of a content-neutral regulation and is generally subject to a much lower standard of judicial review. Because hyperlinks both deliver messages and function as conduits for messages, regulation of hyperlinks can theoretically be categorized as either content-based or content-neutral. Though distinct, these two roles of hyperlinks are in many ways inextricably linked. For example, if Wikipedia is ordered to de-link from a third party source but is allowed to include a formal citation to that source, the site loses some of its credibility. There is something immediately less believable about the content if it lacks links. Thus, regulating links requires us to tread the thin line between content-based and content-neutral regulation. It is precisely because of this difficulty that I argue that hyperlinks should be protected under some form of strict scrutiny review.

In this Section, I will first review how courts have traditionally treated content-based and content-neutral regulation.

### A. *Content-Based Regulation*

The First Amendment, though clear in its language, has been interpreted in a way that recognizes the various types of speech that exist and the differing levels of societal importance accorded to each.<sup>76</sup> The First Amendment has been applied in a manner that reflects the balance of all relevant interests. Consequently, there is no single standard of review under which to consider the constitutionality of a

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<sup>76</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (instituting a balancing test that accords significant deference to school officials evaluating speech rights of students in public schools); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (establishing a four-part test for commercial speech); *Miller v. California*, 413 U.S. 15, 39 (1973) (Douglas, J., dissenting) (noting that the majority had created a three-prong test for obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (holding that a state statute, which criminalized using unlawful methods such as crime or violence as a means of achieving political reform, violated the First Amendment by punishing “mere advocacy” and by forbidding assembly with others “merely to advocate the described type of action”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399–401 (1969) (creating intermediate scrutiny standard for broadcast regulation); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing knowing or reckless disregard as the truth or falsity standard for public official libels).



given law or regulation. That being said, strict scrutiny is generally understood as the default test when dealing with a content-based regulation of speech,<sup>77</sup> while intermediate scrutiny often applies to content-neutral regulation.<sup>78</sup>

To test the constitutionality of content-based laws, the Supreme Court first establishes if the speech is so-called “low value” speech. The “two-level” theory of speech first appeared in *Chaplinsky v. New Hampshire*, which stated that

[C]ertain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>79</sup>

Since then, the Court has found that several classes of speech fall into this class of “low value” speech, including express incitement,<sup>80</sup> obscenity,<sup>81</sup> false statements,<sup>82</sup> and child pornography.<sup>83</sup>

For speech not found to be of “low value,” the Court traditionally accords virtually absolute protection.<sup>84</sup>

#### B. Content-Neutral Regulation

Content-neutral restrictions, on the other hand, are viewed much more permissively by the Court because, theoretically, such regulations do not directly regulate speech.<sup>85</sup> The Court has upheld prohi-

<sup>77</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (holding that a content-based regulation was unconstitutional because it was not reasonably necessary to achieve the alleged compelling interest).

<sup>78</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (finding that when a regulation prohibits conduct that combines “speech” and “nonspeech” elements, “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms”) (internal quotation marks omitted).

<sup>79</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>80</sup> See, e.g., *Brandenburg*, 395 U.S. at 447 (holding that the “guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

<sup>81</sup> See, e.g., *Miller*, 413 U.S. at 23 (finding that obscene material is unprotected by the First Amendment).

<sup>82</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that “there is no constitutional value in false statements of fact”).

<sup>83</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 764 (1982) (describing child pornography as “without the protection of the First Amendment”).

<sup>84</sup> See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987) (“[O]utside the realm of low-value speech, the Court has invalidated almost every content-based restriction that it has considered in the past thirty years.”).

<sup>85</sup> See *id.* at 54 (stating that content-neutral regulations do not always receive “a minimal level of scrutiny” even though courts sometimes underestimate the First Amendment threats that such restrictions pose) (internal quotation marks omitted).

bitions on the use of loudspeakers,<sup>86</sup> the posting of signs on utility poles,<sup>87</sup> and the destruction of draft cards<sup>88</sup> as permissible content-neutral regulations.

Importantly, however, the Court has recognized instances where a regulation that is seemingly content-neutral in fact threatens free speech and, consequently, has applied a higher standard of review. For example, in *Schneider v. New Jersey*, the Court held that a content-neutral ordinance, which prohibited any person from distributing leaflets in “any street or way” in an effort to keep the streets cleaner, was invalid.<sup>89</sup> The Court reasoned that “the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.”<sup>90</sup> Thus, in *Schneider*, the content-neutral legislation was determined to have too significant an impact on speech to justify the ordinance. Alternatively put, the purpose of the ordinance was not sufficiently important to justify the restriction on speech that resulted.

Similarly, in *Metromedia, Inc. v. City of San Diego*,<sup>91</sup> the Court held that an ordinance that banned virtually all billboards was unconstitutional. While a plurality found the ordinance to be an unconstitutional content-based restriction, Justice Brennan and Justice Blackmun found the ordinance to be an unconstitutional content-neutral restriction. Justice Brennan’s concurrence expressed a concern with the “practical effect of the San Diego ordinance” which “eliminate[s] the billboard as an effective medium of communication.”<sup>92</sup> Because of this effect, Justice Brennan felt the ordinance suffered grave constitutional problems and suggested that in such instances, it is necessary to assess the “substantiality of the governmental interests as-

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86 *See Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) (upholding a city ordinance prohibiting any person from using any sound truck or other instrument that emits “loud and raucous noises” on any public street).

87 *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (holding that the city of Los Angeles could ban all signs, commercial and political, from being placed on city utility poles because the citizens had “ample alternative modes of communication” in the city).

88 *See United States v. O’Brien*, 391 U.S. 367, 386 (1968) (holding that burning a draft card was not protected by the First Amendment because such an action threatens the functioning of the Selective Service).

89 *Schneider v. New Jersey*, 308 U.S. 147, 156 (1939).

90 *Id.* at 162.

91 453 U.S. 490, 521 (1981) (reasoning that the ordinance’s stated purpose of averting traffic hazards did not constitute a government interest sufficient to outweigh private interests in free speech, and noting that the ordinance was limited to offsite billboards and did not ban onsite commercial advertising).

92 *Id.* at 525 (Brennan, J., concurring) (emphasis omitted).

served” and “whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment.”<sup>93</sup>

In *United States v. Grace*,<sup>94</sup> the Court struck down a statute on the grounds that it exceeded the government’s ability to permissibly restrict expressive conduct in public fora. Specifically, the Court overturned a statute that prohibited “display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement”<sup>95</sup> because the statute was not sufficiently narrowly tailored to serve a significant government interest.<sup>96</sup> The language the Court employs here is one strikingly similar to that used when the Court invokes a strict scrutiny standard generally applied to content-based regulation.

These three cases highlight instances of content-neutral regulation that were, despite the lower standard of scrutiny generally understood to apply to content-neutral regulation, found to be unconstitutional. This then raises the question—when does the Court find a given content-neutral regulation constitutional?

In undertaking a review of the Supreme Court’s jurisprudence around content-neutral regulation, Professor Geoffrey Stone found that the Court, when assessing the constitutionality of content-neutral regulation, relies on not one uniform standard but rather on one of three distinct, flexible standards of review—deferential, intermediate, and strict—depending largely on the net effect of the regulation on speech.<sup>97</sup> Thus, the particular facts of the case determine the standard applied.

Stone found that content-neutral regulation generally triggers a deferential standard with the Court.<sup>98</sup> This standard, Stone noted, “resembles the rational basis standard of equal protection review,” and under this standard the Court often upholds content-neutral laws if they rationally further legitimate governmental interests.<sup>99</sup> The

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93 *Id.* at 527 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981)) (internal quotation marks omitted).

94 461 U.S. 171 (1983).

95 *Id.* at 172–73 (alteration in original) (footnote omitted) (internal quotation marks omitted).

96 *See id.* at 182 (“We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum . . . but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes.”).

97 Stone, *supra* note 84, at 50.

98 *Id.* (“In many of its decisions assessing the constitutionality of content-neutral restrictions, the Court employs a deferential standard that resembles the rational basis standard of equal protection review.”).

99 *Id.*

Court's treatment of "time, place, and manner" restrictions is a paradigmatic example of the deferential standard often applied to content-neutral regulations. For example, in *Clark v. Community for Creative Non-Violence*, the defendant sought to sleep in parks outside of the campgrounds designated for camping as a protest in support of the plight of the homeless.<sup>100</sup> The Court held that a park rule prohibiting sleeping in tents outside of designated campgrounds was constitutional. The Court found that

All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable.<sup>101</sup>

The Court held that "[r]easonable time, place, or manner restrictions are valid even though they directly limit oral or written expression."<sup>102</sup> Even when demanding that a content-neutral restriction be limited such that it does no more than what is essential to further the intended goal, the Court has found that such a standard is met whenever the governmental interest "would be achieved less effectively absent the regulation."<sup>103</sup> Many of the content-neutral standards the Court reviews are decided under this deferential standard.

However, Stone found that the Court is not always so deferential. In some instances, the Court employs an intermediate standard of review. In applying the intermediate standard, the Court looks more deeply into the substantiality of the asserted governmental interest and demands the government prove that its use of a less restrictive alternative would seriously undermine substantial governmental interests.<sup>104</sup> For example, in *Grace*, the Court acknowledged the legitimacy of the government's need to keep decorum,<sup>105</sup> which motivated the federal law that prohibited the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement in the United States Supreme Court build-

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100 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289-90 (1984).

101 *Id.* at 298 (footnote omitted).

102 *Id.* at 298 n.8.

103 Stone, *supra* note 84, at 51 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (internal quotation marks omitted); *see, e.g., Clark*, 468 U.S. at 297 (upholding a sleeping prohibition in national parks because the regulation was reasonably designed to ensure that the parks were adequately protected); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815-16 (1984) (rejecting the argument that a city is constitutionally required to adopt an ordinance that would have had a less severe effect on the expressive activity of plaintiffs).

104 Stone, *supra* note 84, at 52.

105 *United States v. Grace*, 461 U.S. 171, 182 (1983).

ing and on its grounds.”<sup>106</sup> However, the Court still remained “unconvinced that the prohibitions . . . sufficiently serve[d] that purpose to sustain its validity insofar as the public sidewalks on the perimeter of the grounds [we]re concerned.”<sup>107</sup> Similarly, in *Village of Schaumburg v. Citizens for a Better Environment*,<sup>108</sup> the Court held that a city should protect its citizens against fraud by requiring solicitors to inform the public of the uses made of their contributions, instead of imposing a blanket ban on solicitation.

These cases highlight the fact that intermediate review enables a more searching review into the motivations and the effectiveness of a content-neutral regulation. However, unlike in its application of strict scrutiny, which is often described as “strict in standard, fatal in fact,”<sup>109</sup> the Court is still able to uphold the regulation in question if the relevant criteria are met.

Moving next to strict scrutiny, Stone noted that when the Court applies its highest standard of review to a content-neutral regulation, it “focuses on the same considerations as intermediate review, but insists on a compelling rather than substantial governmental interest and requires a showing that the challenged restriction is ‘necessary’ to achieve that interest.”<sup>110</sup>

Though this textual difference seems marginal, the distinction is anything but. Whereas regulations can survive intermediate scrutiny, the application of the strict scrutiny standard is often times fatal to the regulation in question.<sup>111</sup>

What triggers this disparate treatment? What does the Court look to when trying to determine which standard of scrutiny to apply? Stone suggests that the Court applies a stricter standard of review the

<sup>106</sup> *Id.* at 172–73 (alteration in original) (footnote omitted) (internal quotation marks omitted).

<sup>107</sup> *Id.* at 183.

<sup>108</sup> 444 U.S. 620, 637–38 (1980) (explaining how the village’s legitimate interest in preventing fraud could be achieved by less intrusive means than a blanket ban on solicitation).

<sup>109</sup> Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal citations omitted).

<sup>110</sup> Stone, *supra* note 84, at 53.

<sup>111</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 582–83 (1983) (holding that Minnesota’s “use tax” violates the First Amendment); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982) (holding that the disclosure provisions of the Ohio Campaign Expense Reporting Law violate the First Amendment); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982) (holding that a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses violates the First Amendment); *NAACP v. Button*, 371 U.S. 415, 438–39 (1963) (holding that a Virginia statute broadening the definition of solicitation of legal business violates the First Amendment).

more free speech is threatened.<sup>112</sup> Though content-neutral regulation at the very least indirectly affects the ability of people to speak freely, the Court is concerned with the *extent* to which the speech is threatened. However, the Court balances this concern with consideration of the government's need to regulate certain undesirable behaviors. Thus, the Court has calibrated the balance such that the greater the threat to free speech and the weaker the countervailing government interest in regulation, the stricter the standard employed. The two main factors that affect this calibration are (1) "the extent to which the challenged restriction reduces the total quantity of public debate," and (2) "the extent to which the challenged restriction limits important opportunities for the free expression of particular groups, individuals, or causes."<sup>113</sup> Stone then illustrates his point by discussing a number of cases. I will focus on two—*Buckley v. Valeo*<sup>114</sup> and *NAACP v. Button*.<sup>115</sup>

In *Buckley*, the Court invalidated the expenditure limitations of the Federal Election Campaign Act of 1971, which prohibited any person from spending more than \$1,000 on behalf of the campaign of any political candidate, but upheld the Act's provisions that prohibited any person from contributing more than \$1,000 to a political candidate directly.<sup>116</sup> Motivating the Court's decision was the belief that the former provision had a severe effect on the opportunities for free expression while the latter provision allowed for alternate means of expression. Specifically, the Court stated that the expenditure limitation was a "restriction on the amount of money a person or group can spend on political communication" which "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,"<sup>117</sup> while the contribution limitation "entail[ed] only a marginal restriction upon the contributor's ability to engage in free communication."<sup>118</sup> Under the contribution limitation, the individual was still able to contribute to political action committees or other organizations formed to support the candidate.

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112 See Stone, *supra* note 84, at 58 (explaining the correlation between "the extent to which a challenged law actually interferes with the opportunities for free expression and the Court's use of the strict, intermediate, and deferential standards of review").

113 *Id.* at 59.

114 424 U.S. 1 (1976) (per curiam).

115 371 U.S. 415.

116 *Buckley*, 424 U.S. at 143.

117 *Id.* at 19.

118 *Id.* at 20–21.

When assessing the constitutionality of the contribution limitation, the Court stated that it was “unnecessary to look beyond the Act’s primary purpose . . . in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”<sup>119</sup> The Court explained that “[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>120</sup> This deferential language stands in stark contrast to the Court’s discussion of the expenditure limitation, where it stated that “a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.”<sup>121</sup> The Court continued and found that while the restrictions were content-neutral, they “limit[ed] political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”<sup>122</sup> Because of the nature of and extent to which First Amendment rights were implicated, the constitutionality of the expenditure provisions turned on “whether the governmental interests advanced in its support satisfy the *exacting scrutiny* applicable to limitations on core First Amendment rights of political expression.”<sup>123</sup>

Thus the Court’s opinion in *Buckley* illustrates that the way in and extent to which First Amendment rights are affected determine the Court’s choice in standard of review. Specifically, the Court reviewed regulations that fundamentally limited the opportunities for political expression under a strict scrutiny standard while it examined regulations that merely curtailed a specific means of political expression but left open alternate vehicles under a lesser standard. While the former necessarily reduces the quantity of speech, the latter does not.

Regulating the use of links threatens to fundamentally limit opportunities for expression on the Web. It would limit the opportunities for cultural expression, political expression, and everything in between. If a blogger cannot link to the newspaper article upon which she is providing commentary, then she is unable to communicate credibility to her reader. More importantly, without links, her blog post will never have a chance of making its way onto the first page of a Google search. Were the hypothetical regulation to allow individuals to include Web addresses in their Tweets but prohibit hyperlinks,

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119 *Id.* at 26.

120 *Id.* at 25 (citations omitted) (internal quotation marks omitted).

121 *Id.* at 39.

122 *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

123 *Id.* at 44–45 (emphasis added).

then that regulation would fundamentally alter the way we communicate on the Web. If an individual cannot include a link to a clip from yesterday's *Daily Show* on her Facebook profile, then she is prohibited from communicating preferences using the language of the Web. Such a regulation would create a different language on the Web—a slower language, a less efficient language, resulting in a net decrease in the total amount of communication on the Web.

A limitation on the use of hyperlinks is therefore more comparable to the expenditure limitation than the contribution limitation at issue in *Buckley* and should be subject to a similarly exacting scrutiny. Like the expenditure limitation, regulation of hyperlinks will likely suffer from a constitutional defect because there are few alternatives to convey a message on the Web without hyperlinks. The hyperlink is the virtual world's currency.<sup>124</sup>

In *NAACP v. Button*, the Court addressed an as-applied action arising from a Virginia law that prohibited any organization from retaining a lawyer in connection with litigation to which it was not a party and in which it had no pecuniary right or liability.<sup>125</sup> The Court held in favor of the NAACP and found the law unconstitutional as applied to the NAACP. In the opinion, the Court recognized that, as applied to the NAACP, in Virginia, in the middle of the Second Reconstruction, the mere existence of such a law could effectively shut down the good work of the NAACP in defending the rights of African Americans living in the South.<sup>126</sup> In doing so, the Court stressed that for the NAACP, litigation is an important, unique, powerful form of political expression and association.

Professor Stone made two important observations about *Button*. First, unlike in *Buckley*, the *Button* Court did not find the statute at issue unconstitutional because it effectively prohibited “the reasonable use of virtually every means of communicating information,” but rather, because the law prohibited what was “the most effective form of political expression available.”<sup>127</sup> In fact, the Virginia law left the NAACP free to pursue its objectives by a number of alternative means such as leafleting, picketing, newspapers, and political donations.

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124 While I related links to currency because of the discussion of *Buckley*, influential journalist Jeff Jarvis previously suggested this notion. In a post on his blog, BuzzMachine, he wrote, “In this new world, links are currency. Links grant authority. Links build branding. Links equal value.” Jeff Jarvis, *Wired*, BUZZMACHINE (Aug. 13, 2005, 10:23 AM), <http://www.buzzmachine.com/2005/08/13/wired/>.

125 *NAACP v. Button*, 371 U.S. 415 (1963).

126 *Id.* at 434–36.

127 See Stone, *supra* note 84, at 61 (quoting *Buckley*, 424 U.S. at 18 n.17; *Button*, 371 U.S. at 431) (internal quotation marks omitted).



However, the Court acknowledged that leafleting could not supplant litigation. As vehicles of speech, they were two entirely different beasts with two entirely different effects, audiences, and messages. Additionally, the Court seemingly supported the idea that a regulation that forces a speaker to use an alternate vehicle of speech is unacceptable if that alternate vehicle is significantly less effective than the original vehicle. Stone's second observation is that in *Button*, the strict scrutiny applied resulted from two important and distinct factors: "(1) the law substantially limited the availability (2) of a very important means of political action."<sup>128</sup> Stone's articulation of the distinct factors is important—any law that limits the availability of a certain type of speech does not trigger strict scrutiny. Rather, it is only those laws that limit valuable speech that raise important constitutional concerns.

Thus *Buckley* and *Button* both stand for the proposition that the content-neutral doctrine is an effects-based doctrine. This means that of primary concern in assessing the constitutionality of a given content-neutral legislation is the net effect on valued speech. A regulation that encumbers a vehicle of expression such that it threatens the total quantity and quality of expression is subject to an exacting standard of scrutiny by the courts. Furthermore, Stone notes, "in at least some circumstances, the Court will consider the severity of the restrictive effect of a content-neutral law as applied to different speakers, and thus hold such a law unconstitutional as applied to some speakers and constitutional as applied to others."<sup>129</sup> These two points are important to remember as we think about hyperlink regulation in the next Part. First, does the law in question limit the quantity or quality of important expression? Second, are there some constituencies for whom this law is especially concerning? When reviewing a content-neutral regulation of hyperlinks, the Court should seriously consider both of these questions.

### III. REGULATING HYPERLINKS

The First Amendment prohibits the government from restricting the freedom of speech, freedom of the press, the right of people to peaceably assemble, and the right to petition the government for a

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<sup>128</sup> *See id.*

<sup>129</sup> Stone, *supra* note 84, at 63 (discussing *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 101–02 (1982), in which the Court held that a disclosure provision of Ohio's campaign reporting law was unconstitutional as applied to the Socialist Workers Party). Notably, the *Button* case was also an as-applied challenge.

redress of grievances.<sup>130</sup> Part I explained why, in many instances, hyperlinks should be categorized as one of these forms of protected communications. Part II provided a loose framework with which to think about the constitutionality of regulations that limit the robust use of links. This Part will consider various laws, such as trademark and copyright law, that have been used to challenge hyperlink use, and assess the constitutionality of their application.

#### A. *Trademarks and Servicemarks*

A trademark or servicemark (hereinafter collectively referred to as “trademark” or “mark”) is any word, name, symbol, or device used by a manufacturer or merchant to identify his goods or services and distinguish them from those manufactured and sold by others.<sup>131</sup> The stated goal of trademark law is to secure to the owner of the mark the “good will of his business and protecting the public against spurious and falsely marked goods.”<sup>132</sup> Thus, trademarks serve two important interests. First, they ensure that consumers do not mistakenly purchase one good, thinking it is another good. The corollary to this point is that it ensures that trademark owners do not lose profits because of the deceptive actions of a third party. Second, trademarks ensure that a seller’s good will and reputation are not diluted. Dilution can occur by blurring or by tarnishment.<sup>133</sup> The former occurs when customers simply see the mark used in the context of goods or services not produced by the trademark owner. The latter occurs when the unauthorized use of a trademark actually harms the reputation of the product or the company associated with the trademark.

To bring a trademark infringement action, a plaintiff must show that the defendant has used the mark “in connection with the sale, offering for sale, distribution, or advertising of any goods or services” and additionally, that the challenged use of the mark will cause consumer confusion.<sup>134</sup>

This confusion may arise as to the source, origin, sponsorship, or endorsement of the defendant’s product or service. Courts consider a variety of factors to determine the likelihood of confusion, including the strength of the original trademark,<sup>135</sup> the similarity between

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130 U.S. CONST. amend. I.

131 15 U.S.C. § 1127 (2006).

132 S. REP. NO. 79-1333, at 1274-75 (1946).

133 15 U.S.C. § 1125(c) (2006).

134 15 U.S.C. § 1114(1) (a) (2006).

135 See Sally M. Abel, *Likelihood of Confusion*, in TRADEMARK LAW AND THE INTERNET: ISSUES, CASE LAW, AND PRACTICE TIPS 211, 211 & n.2 (Lisa E. Cristal & Neal S. Greenfield eds., 2d

the two marks,<sup>136</sup> the similarity of the underlying good or service,<sup>137</sup> the similarity between the channels of trade between the two products,<sup>138</sup> the sophistication of the target market,<sup>139</sup> the wrongful intent of the potentially infringing user,<sup>140</sup> evidence of actual confusion,<sup>141</sup> and whether the challenged use is within the original trademark owner's zone of natural expansion.<sup>142</sup> Ultimately, no mechanical rule determines likelihood of confusion, and each case requires a weighing of the facts and circumstances of the particular mark.<sup>143</sup>

In order to establish a federal dilution claim, the trademark in question must be a "famous" mark, and the defendant must be engaged in a commercial use of that mark that is likely to cause dilution by blurring its distinctiveness or disparaging the mark.<sup>144</sup>

It is important to note that trademark law, like copyright law, recognizes parody, news and commentary, nominative use,<sup>145</sup> and other First Amendment-based defenses.<sup>146</sup> Trademark law on the Internet has primarily been triggered by infringing behavior arising from the

ed. 2001) (citing *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976)).

136 *Id.* at n.3 (citing *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986)).

137 *Id.* at n.4 (citing *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 463 (7th Cir. 2000); *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 717 (Fed. Cir. 1992)).

138 *Id.* at n.5 (citing *Blazon, Inc. v. Blazon Mobile Homes Corp.*, 416 F.2d 598, 600 (7th Cir. 1969)).

139 *Id.* at n.6 (citing *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 1576 (Fed. Cir. 1983)).

140 *Id.* at n.7 (citing *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 258 (2d Cir. 1987)).

141 *Id.* at n.8 (citing *Ambrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1543–45 (11th Cir. 1986)).

142 *Id.* at n.9 (citing *Fed. Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 172 (2d Cir. 2000)).

143 *See In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (recognizing how various evidentiary factors play greater or lesser roles, depending on the particular determination).

144 *See Abel*, *supra* note 134, at 229–30.

145 For an excellent review of the dominant claims in linking law, see Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1280 (2001), who, with respect to nominative use, writes:

Not all use of another's trademarks constitutes infringement. Words that are trademarks may also be used in their normal descriptive sense. In many cases, trademarks may describe a person, a place, or an attribute of a product. For example, one may say, "Let's take a vacation to Disney World," or, "I have the data in Excel," without violating the trademark rights of Walt Disney or Microsoft. Thus, trademark law recognizes a "nominative use" defense when the mark is used only "to describe the goods or services of [a] party, or their geographic origin."

*Id.* (alteration in original) (footnotes omitted) (quoting 15 U.S.C. § 1115(b)(4) (Supp. V 1999)).

146 *Id.* at 1317.

questionable use of domain names<sup>147</sup> and metatags.<sup>148</sup> However, linking has also triggered some trademark actions.

In one early case on the subject, a court ruled that linking does not inherently create commercial dilution and would not issue an order enjoining the defendant from linking to the plaintiff's homepage simply because the plaintiff disapproved of the link.<sup>149</sup> In that case, Eric Corley and his company, 2600 Enterprises, were defendants to copyright, trademark dilution and infringement, and unfair competition accusations by Ford Motor Company. Corley's company registered the domain name [www.fuckgeneralmotors.com](http://www.fuckgeneralmotors.com) which redirected visitors to the official website of Ford Motor Company located at [www.ford.com](http://www.ford.com). Ford argued that this unauthorized linking disparaged the company's brand name, confused potential customers, and prevented it from fully exploiting the value of its mark. The court denied Ford's request for an injunction, finding that linking alone is not sufficient to sustain a commercial dilution claim and holding that an infringement claim cannot simply be based on the fact that an Internet user might face difficulty in finding the correct homepage.<sup>150</sup>

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147 See generally Jennifer Golinveaux, *What's in a Domain Name: Is "Cybersquatting" Trademark Dilution?*, 33 U.S.F. L. REV. 641 (1999) (reviewing the application of trademark infringement and dilution theories to "cybersquatting," or registering a trademarked name as a domain name before the owner of the trademark).

Domain names are labels used to uniquely identify the numerical addresses which are associated with computers connected to the Internet. Domain names consist of words or recognizable combinations of characters, and offer an alternative way of identifying these long and difficult-to-remember numerical addresses. Domain names usually end with an extension such as ".com", and often provide an indication of who owns or is using the domain name, for example, "nike.com."

Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames, and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA 243, 244 n.2 (1998).

148 See generally Kuester & Nieves, *supra* note 147, at 247 (describing meta-tags as "text coding which is hidden from normal view and located within a specially designated portion of the HTML code which generates the Web page. Web page designers use this hidden HTML code to designate keywords which are communicated to search engine software. This is an important associational tool for the Web page designer since search engines are often unable to properly index a particular Web page based on the text of the page. In its cooperation with a search engine, a meta-tag keyword may be thought of as a 'pre-hyperlink' since a hyperlink is often created by a search engine in a search results phase when a user performs a search using that keyword").

149 *Ford Motor Co. v. 2600 Enters.*, 177 F. Supp. 2d 661, 665 (E.D. Mich. 2001) ("If the FTDA's 'commercial use' requirement is to have any meaning, it cannot be interpreted so broadly as to include any use that might disparage or otherwise commercially harm the mark owner."); see also *Voice-Tel Enters., Inc. v. Joba, Inc.*, 258 F. Supp. 2d 1353, 1363 (N.D. Ga. 2003) (stating that extending a dilution claim to the use of a hyperlink would exceed the purpose of the Lanham Act's antidilution provision).

150 In excellent language, the court held that Ford did not have a cause of action for its various claims of trademark dilution, trademark infringement, and unfair competition. The court stated that Congress did not intend the Federal Trademark Dilution Act to

Notably, while the briefs of both sides discussed whether an injunction on linking based on trademark violations would impinge on Corley's First Amendment rights, the court did not reach the constitutional claim, finding instead that Ford did not bring an adequate trademark claim. Despite this, the *Ford Motor* case is notable because it places important limits on trademark law. First, it protects the practice of hyperlinking without authorization by the owner of the destination site and, in doing so, limits the scope of the federal dilution claim. If every unauthorized hyperlink were subject to a dilution claim, the Internet would be a very different place. Linking would quickly become a practice only feasible for those individuals and companies able to pay the costs associated with obtaining authorization from website owners. This concern was echoed in *ACLU of Georgia v. Miller*, in which a federal court in Georgia overturned a statute that criminalized the use of trademarks in a manner that "falsely impl[ied] that permission . . . ha[d] been obtained."<sup>151</sup> The court held that the Georgia statute violated the First Amendment because of the implication such a law had on unauthorized hyperlinking. The statute stated that

It shall be unlawful for any person . . . knowingly to transmit any data through a computer network . . . if such data uses any . . . trade name, registered trademark, logo, legal or official seal, or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use [it] for such purpose when such permission or authorization has not been obtained . . . .<sup>152</sup>

The court found that the regulation threatened the use and proliferation of hyperlinks, central to communication on the Internet.<sup>153</sup> Accordingly, the court applied heightened scrutiny, demanding that the regulation serve a compelling State interest and be narrowly tailored so as to not unnecessarily encumber the use of hyperlinks.

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be used by trademark holders as a tool for eliminating Internet links that, in the trademark holder's subjective view, somehow disparage its trademark. Trademark law does not permit Plaintiff to enjoin persons from linking to its homepage simply because it does not like the domain name or other content of the linking webpage.

*Ford Motor*, 177 F. Supp. 2d at 664.

151 *ACLU of Ga. v. Miller*, 977 F. Supp. 1228, 1234 (N.D. Ga. 1997) (internal quotation marks omitted) (granting plaintiffs' motion for a preliminary injunction); see GA. CODE ANN. § 16-9-93.1 (2007).

152 GA. CODE ANN. § 16-9-93.1.

153 *ACLU of Ga.*, 977 F. Supp. at 1233 n.5 (N.D. Ga. 1997) ("The appearance of the seal, although completely innocuous, would definitely 'imply' to many users that permission for use had been obtained. Defendants have articulated no compelling state interest that would be furthered by restricting the linking function in this way.").

Another reason why the *Ford Motor* case is important is because it limited the scope of the federal infringement claim by finding that moderate customer confusion was not enough to sustain injunctive relief. Though the link might have led to customer difficulty in finding the Ford homepage, the court dismissed Ford's claim. Similarly, in *Knight-McConnell v. Cummins*, the court held that "[t]he mere appearance on a website of a hyperlink to another site will not lead a web-user to conclude that the owner of the site he is visiting is associated with the owner of the linked site."<sup>154</sup> Central to the judge's decision was the understanding that customer confusion online can be easily rectified with a few keystrokes and clicks of the mouse. Additionally, both the *Ford Motor* and *Knight-McConnell* courts emphasized that the links had to compete with the mark owner's business before they would recognize a trademark infringement action, reminding us of the important non-commercial role that hyperlinks often play online.

These recent decisions have, notably, protected the use of hyperlinks. However, neither of the cases spent considerable time on the narrow-tailoring issues that would undoubtedly arise from assessing prohibitions on linking under a strict scrutiny standard of review. A regulation that prohibits linking without exception would likely not withstand a narrow tailoring assessment because website owners can take active steps to prevent linking, or, at the very least, the effectiveness of linking. The availability of self-help mechanisms makes prohibitions on linking more constitutionally suspect.

One step website owners can take is to prohibit search engines from indexing their sites. To do so, owners can implement a Robots Exclusion Standard (also known as a robots.txt file).<sup>155</sup> This bit of code signals to the indexing search engine that the website does not want to be indexed and included among the search engine's results. While it is still possible for other websites to link to a site that employs a robots.txt file (because the website is still published to the public Internet), the robots.txt file reduces public exposure and awareness of the site by placing it beyond the reach of search engines.

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154 *Knight-McConnell v. Cummins*, No. 03 Civ. 5035 (NRB), 2004 U.S. Dist. LEXIS 14746, at \*7 (S.D.N.Y. July 29, 2004).

155 As described by Google on its Webmaster Tools Help page, "[a] robots.txt file restricts access to your site by search engine robots that crawl the [W]eb. These bots are automated, and before they access pages of a site, they check to see if a robots.txt file exists that prevents them from accessing certain pages." See *Block or Remove Pages Using a Robots.txt File*, GOOGLE WEBMASTER TOOLS HELP (Oct. 9, 2010), <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=156449>.

Alternatively, if website owners are concerned with deep links, or hyperlinks that connect the viewer to a specific page *within* a website instead of the homepage, they might install a paywall, or simple password protection, to ensure that people cannot access the contents of the site without first obtaining permission. While an entity can still link to the site that is behind the paywall, the link does not divulge any content. Websites like the *Wall Street Journal* employ paywalls, preventing people from accessing their content without first registering with the website. While these solutions do not prevent people from linking to sites like the *Wall Street Journal*, they limit the content accessed, which is often a key motivation behind linking lawsuits.

Requiring websites to undertake these efforts toward self-help before enjoining the use of hyperlinks recognizes the values embedded in the architecture of the Internet. When someone publishes something on the Internet, she publishes to a public network, not to a private intranet. Consequently, the argument that simply providing the address information or directing people to a publicly available website or Web page somehow violates trademark law seems intuitively wrong. The alternative threatens to allow trademark law to encroach on and potentially eliminate an entire medium of communication. By virtue of publishing material on the Internet, the author implicitly accepts the underlying architecture of the Internet: link and be linked.

While traditional trademark infringement and dilution claims should recognize the dynamics of the digital world, both claims still have an important place on the Internet. Customer confusion is a concern in both the analog and digital worlds. I only suggest that the doctrine be developed in a way that recognizes the important role hyperlinks serve in furthering First Amendment values. One area in trademark jurisprudence that particularly threatens that balance is the initial interest confusion doctrine, an untraditional trademark claim that is quickly gaining traction in a number of circuits. I argue that the doctrine should be applied very rarely, if at all, to hyperlinks.

The initial interest confusion doctrine looks at whether the defendant's use of the plaintiff's mark was done in a manner calculated "to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion."<sup>156</sup>

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<sup>156</sup> *Dr. Seuss Enters. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997); *see also Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 257–58 (2d Cir. 1987) ("Confusion, or the likelihood of confusion, not competition, is the real test of trademark infringement." (quoting *Cont'l Motors Corp. v. Cont'l Aviation Corp.*, 375 F.2d 857, 861 (5th Cir. 1967)) (internal quotation marks omitted). For the Ninth Circuit's express

This doctrine is troubling because unlike the traditional elements of infringement claims, which require customer confusion or likelihood thereof at the point of sale, the initial interest confusion doctrine merely requires customer confusion or likelihood thereof *pre-sale*—at the point of “initial interest.” Professor Jennifer Rothman noted in a recent article on the subject that nearly every federal circuit has adopted the initial interest confusion doctrine, and trademark cases are increasingly being decided on initial interest confusion grounds.<sup>157</sup> Even more concerning, Rothman finds that only a small number of courts have questioned the doctrine, and no court has explicitly rejected it.<sup>158</sup>

In *Blockbuster Entertainment Group v. Laylco, Inc.*, Blockbuster filed a complaint alleging that defendants’ use of the name Video Busters infringed Blockbuster’s trademarks, and sought to enjoin Video Busters from using their name to market video products and services identical to those marketed by Blockbuster.<sup>159</sup>

The court ruled in favor of Blockbuster, stating that the fact “[t]hat a customer would recognize that Video Busters is not connected to Blockbuster after entry into a Video Busters store . . . is unimportant. The critical issue is the degree to which Video Busters might attract potential customers based on the similarity to the Blockbuster name.”<sup>160</sup> The court’s central concern was that a small, no-name company might attract customers to its place of business by using a name somewhat similar to the name of its more popular competitor.

Hyperlinking cases are often perfect illustrations of the confusion that may occur pre-sale. For example, if Sally enters a trademark, like Coca-Cola, into a search engine as her search query, she may initially be confused by the results returned by the search engine. The first search result is recent news articles about Coca-Cola. The second search result is the official website for the Coca-Cola Company. The fourth result is a Wikipedia article on Coca-Cola. The tenth result is a link to Coca-Cola’s Facebook page. The twelfth result is for a cake that uses Coca-Cola as an ingredient.<sup>161</sup> If this is not confusing

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adoption of the language, see *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1061–66 (9th Cir. 1999).

<sup>157</sup> Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 *CARDOZO L. REV.* 105, 108–09 (2005).

<sup>158</sup> *Id.*

<sup>159</sup> *Blockbuster Entm’t Grp. v. Laylco, Inc.*, 869 F. Supp. 505, 508 (E.D. Mich. 1994).

<sup>160</sup> *Id.* at 513.

<sup>161</sup> These results are actual results. I conducted the search was on August 18, 2010, on [www.bing.com](http://www.bing.com), using the search term “Coca Cola.”



enough, none of the sponsored links located on the right hand side of the search results page are for the Coca-Cola Company!

However, this confusion is quickly fixed. Sally can simply scan the descriptions of the returned results to identify the site that she is looking for. Or, if she is unable to identify the correct site based on her scan of the search results and she ends up clicking on the wrong link, she can easily press the “back” button on her browser and try again. The effect of initial, pre-sale confusion is considerably less harmful in the digital world than it is in the analog world because the digital world requires the expenditure of considerably less effort to dispel any potential confusion.<sup>162</sup>

This argument has been recognized by some courts. In *Chatam Internationall v. Bodum, Inc.*, a federal district court in Pennsylvania found that Web surfers are unlikely to be deterred by a few false starts.<sup>163</sup> The *Chatam* case arose out of a dispute involving competing claims for the use of the Internet domain name “Chambord.” The animating idea in the *Chatam* opinion is that, unlike in the analog world, where mistakenly showing up at the wrong storefront will likely cost time, effort, and money to fix, in the digital world such a mistake is fixed nearly instantaneously.<sup>164</sup> Furthermore, the potential effects of initial confusion on the Internet must also be considered. One federal district court assessing a claim by the Network Network—a company which provides consulting and training to help people create and manage computer networks—against the Nashville Network—a cable television network that broadcasts country music and country lifestyle programs—acknowledged this very point, saying “[u]nlikely indeed is the hapless Internet searcher who, unable to find information on the schedule of upcoming NASCAR broadcasts or ‘Dukes of Hazzard’ reruns, decides to give up and purchase a computer network maintenance seminar instead.”<sup>165</sup>

The analysis above highlights the importance of assuring that the meaning of a law created for the analog world is not lost in its translation to the digital world. An analog world doctrine that aims to protect consumers and protect corporate goodwill must not inadvertent-

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162 See Rothman, *supra* note 156 (putting forth a similar argument).

163 *Chatam Int'l v. Bodum, Inc.*, 157 F. Supp. 2d 549, 559 (E.D. Pa. 2001) (“[A] consumer attempting to access an upscale liqueur product is unlikely to be dissuaded, or unnerved, by the sight of coffee makers and other housewares, having first brought up the coffee maker’s screen.”).

164 *Id.* (“Internet surfers are inured to the false starts and excursions awaiting them in this evolving medium.”).

165 *Network Network v. CBS, Inc.*, No. CV 98-1349 NM(ANX), 2000 WL 362016, at \*9 (C.D. Cal. Jan. 18, 2000).

ly stifle a robust medium of communication. Application of these doctrines to hyperlink use must recognize the quantity and quality of the speech threatened. If trademark laws dangerously limit productive uses of hyperlinks, then the law must be modified or limited in its application.

*B. E-Trespass*<sup>166</sup>

The archaic property rights claim of trespass to chattels was originally crafted to protect “a person’s tangible property from being disposed impaired, or deprived of use by another.”<sup>167</sup> Thus, a physical impairment resulting to the property as a result of a trespass generally gave rise to a cause of action while harmless interference was excused. Parlayed into the online world, this tort has generally been invoked to protect the unauthorized access or use of data through Web crawling, hacking, and recently, hyperlinking.<sup>168</sup> In *Ticketmaster Corp. v. Tickets.com, Inc.*, the district court rebuffed the idea of e-trespass arising from hyperlinking, stating that “it is hard to see how entering a publicly available website could be called trespass.”<sup>169</sup>

At issue in the case was that [www.tickets.com](http://www.tickets.com) provided deeplinks to pages within the Ticketmaster website, bypassing the homepage and thus facilitating more efficient purchase by navigating users of [www.tickets.com](http://www.tickets.com) directly to the relevant page on [www.ticketmaster.com](http://www.ticketmaster.com). Ticketmaster brought a charge of trespass because of the Tickets.com practice of deeplinking.

A doctrine that restricts deeplinking because of trespass concerns suffers grave constitutional problems because it is not narrowly tailored. Condoning trespass claims will limit the legitimate use of linking, and thus such regulation suffers from overbreadth. Instead, courts should, as they have thus far, place the onus on the website owner to limit access through a .txt file or through technological barriers such as password protection or forced redirection.

Under a strict scrutiny standard, regulations must be narrowly tailored. Because of the availability of self-help via mechanisms such as paywalls, the courts should continue to apply a light touch when interpreting the law in this area. Technological self-help should be an

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<sup>166</sup> This term was developed by John D. Saba, Jr., in his article *Internet Property Rights: E-Trespass*, 33 ST. MARY’S L.J. 367 (2002).

<sup>167</sup> *Id.* at 372 (citing RESTATEMENT (SECOND) OF TORTS § 218 (1965)).

<sup>168</sup> See, e.g., Michael Dockins, Comment, *Internet Links: The Good, the Bad, the Tortious, and a Two-Part Test*, 36 U. TOL. L. REV. 367, 375 (2005).

<sup>169</sup> *Ticketmaster Corp. v. Tickets.com*, CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553, at \*11 (C.D. Cal. Mar. 27, 2000).

important consideration, if not a threshold factor, in determining the validity of a trespass claim.

### C. Copyrights

Under U.S. copyright law, copyright protection automatically attaches to every creative work as soon as the work is created and “fixed in any tangible medium of expression.”<sup>170</sup> The intentional creation of a work substantially similar to a copyrighted piece and the subsequent use of that work in a manner that violates the copyright owner’s exclusive rights on reproduction, distribution, adaptation, performance, and public display is considered infringement.<sup>171</sup>

There are a number of affirmative defenses to copyright infringement. Certain fair uses of the content—such as criticism, comment, news reporting, teaching, scholarship, or research—are all protected exceptions to copyright law.<sup>172</sup>

The nexus of copyright law and hyperlink law hinges largely on whether the link extends beyond fair use. If so, linking might trigger liability for copyright infringement. In the *Ticketmaster* case referenced above, in addition to the e-trespass claims, Ticketmaster raised a number of copyright claims.<sup>173</sup> In one claim, Ticketmaster contended that, although the URLs were strictly functional, “they [we]re entitled to copyright protection because there are several ways to write the URL, and, thus, original authorship is used.”<sup>174</sup> The court ruled against Ticketmaster on this claim and held that a URL is simply an address, “open to the public, like the street address of a building, which, if known, can enable the user to reach the building.”<sup>175</sup> In a second copyright claim, Ticketmaster claimed that the deeplink to its site caused the unauthorized public display of Ticketmaster event pages in violation of Ticketmaster’s exclusive rights of reproduction and display. On this claim, the court held that [www.tickets.com](http://www.tickets.com) connected users *directly to the originating Ticketmaster site* containing all the elements of that particular Web page, including information that

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170 17 U.S.C. § 102 (2006).

171 17 U.S.C. § 106 (2006).

172 17 U.S.C. § 107 (2006).

173 *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBK, 2003 WL 21406289, at \*4 (C.D. Cal. Mar. 7, 2003).

174 *Id.* at \*5.

175 *Id.*

clearly identified the site as belonging to Ticketmaster, and thus was not in violation of any of Ticketmaster's public display rights.<sup>176</sup>

Both of these copyright concerns were quickly dismissed by the court without much ink spilled on the nature of hyperlinks and their need for heightened protection. While copyright, like trademark, is a recognized exception to traditional First Amendment rights, the *Ticketmaster* court engaged in a measured reading of copyright law to ensure the exception did not overtake the rule. Courts should continue to deal with traditional copyright claims in this manner, carefully balancing legitimate government interests with our constitutional right to free speech.

A developing concern in the area involves hot news appropriation, a common law extension of copyright law. Because of the decreasing revenues among traditional news outlets caused by the rise of blogs and news aggregators, news outlets are threatening to wield the "hot news" appropriation doctrine against aggregators and bloggers that link to their websites. The hot news appropriation doctrine was first articulated by the Supreme Court in *International News Service v. Associated Press*.<sup>177</sup> The facts of the case were straightforward: the Associated Press (AP) was spending a substantial amount of money reporting in Europe during World War I, sending the news back to the United States, and distributing the news to its member newspapers on the East Coast of the United States for dissemination to the public. The International News Service (INS), leveraging the difference in time zones, paraphrased the AP stories and sold them under its own name to the West Coast where the AP did not have as much of a footprint. The Court held that under federal common law, such hot news is protectable under the tort of misappropriation within unfair competition law.<sup>178</sup>

This ruling marked the creation of an important and amorphous addition to traditional copyright law. The addition effectively allowed the copyright of facts in certain circumstances, specifically when those facts were obtained by the "sweat of the brow"<sup>179</sup> of the individual or entity. This labor theory of property runs counter to traditional copyright doctrine, which prevents the copyrighting of facts or laws

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176 *Id.* at \*6. Moreover, the court noted that the link on the Tickets.com website to the Ticketmaster event page contained the following notice: "Buy this ticket from another online ticketing company. Click here to buy tickets. These tickets are sold by another ticketing company. Although we can't sell them to you, the link above will take you directly to the other company's [web]site where you can purchase them." *Id.*

177 248 U.S. 215 (1918).

178 *Id.* at 245-46; *id.* at 246-48 (Holmes, J., dissenting).

179 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

of nature. Under traditional copyright doctrine,  $e=MC^2$  is not copyrightable despite the significant labor Albert Einstein exerted in discovering it. Justice Brandeis, voicing his displeasure with the result reached by the majority in *INS*, noted in dissent that, “[t]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”<sup>180</sup> *INS* became more firmly entrenched in our jurisprudence when the *Restatement (Third) of Unfair Competition* recommended preservation of the hot news doctrine, though limiting its application to instances like those of *INS* that constitute “unusual circumstances” that “present the most compelling case for protection against appropriation.”<sup>181</sup>

The U.S. District Court for the Southern District of New York renewed interest in the doctrine in its decision in *Barclays Capital, Inc. v. Theflyonthewall.com*.<sup>182</sup> In this case, the court invoked the hot news doctrine and its sweat-of-the-brow theory when justifying its decision to require the Internet-based financial news site Theflyonthewall.com to delay its reporting of the stock recommendations of research analysts from three prominent Wall Street firms. The court ordered Theflyonthewall.com to wait until 10 AM EST before publishing the facts associated with analyst research released before the market opens, and for research issued after the opening bell, the site was ordered to wait at least two hours after the opening bell.

The opinion is the first to apply the hot news doctrine to the Internet, though this is not the first time a court came across the issue. In 2007, the AP sued All Headline News (AHN) for copying and re-writing stories by AP reporters, distributing the stories to clients, and displaying the stories on the AHN website.<sup>183</sup> The U.S. District Court for the Southern District of New York granted AHN’s motion to dismiss the trademark claim and the claim of unfair competition, but declined to dismiss the hot news misappropriation claim.<sup>184</sup> The case was settled soon after.

The hot news doctrine is already controversial, and applying it to the Internet makes it doubly so. That is because time in the digital world runs on an entirely different continuum than time in the ana-

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180 *Id.* at 250 (Brandeis, J., dissenting).

181 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995).

182 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

183 *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009). AHN provides news, weather, and other content for websites, wireless applications, digital signage, interactive applications, and broadcast and print use.

184 *Id.*

log world; everything ages faster on the Internet. Thus, applying the hot news doctrine on the Internet is like applying an analog understanding of time to the digital context—a mapping that endangers the free flow of information on the Internet. News that might remain “hot” in the analog world has often already cooled in the digital one.

With favorable precedent in New York, there is considerable talk about bringing similar suits to test the reach of the doctrine. First in line is Rupert Murdoch, founder, chairman, and CEO of News Corp., who has intimated that News Corp. will wage a war with aggregators, specifically Google News.<sup>185</sup> To test the waters, Murdoch recently brought suit against Briefing.com, a news aggregator focusing on the financial sector, alleging, among other claims, hot news misappropriation.<sup>186</sup> The suit has since settled, with Briefing.com admitting to hot news appropriation.<sup>187</sup>

News aggregators collect and post the headlines and ledes of stories posted on major news sites and embed the content with links to the sites on which the full story can be found. The claim alleged by news content providers like Murdoch is that such an action constitutes unauthorized copying and redistribution of the type of factual information that is prohibited by the hot news doctrine. A similar sentiment was expressed by GateHouse Media, a company that filed a lawsuit against the New York Times Corporation claiming that Boston.com, an affiliate of the New York Times Corporation, proffered “unauthorized verbatim copies of . . . headlines and the first sentences thereof (the ‘ledes’) as first published by” GateHouse Media’s various publications.<sup>188</sup> Of particular concern to GateHouse Media was the “Your Town” tab on Boston.com that provided an aggregation of news stories from various local sources, including *Wicked Local News*, *Daily News Tribune*, and the *Newton TAB*—all of which are owned and operated by GateHouse Media. Though GateHouse alleged cop-

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185 See Interview by Marvin Kalb with Rupert Murdoch, Chairman and CEO, News Corp., in Washington, D.C. (Apr. 6, 2010), available at [http://kalb.gwu.edu/2010/Rupert\\_Murdoch/337-THE%20KALB%20REPORT-RUPERT%20MURDOCH.pdf](http://kalb.gwu.edu/2010/Rupert_Murdoch/337-THE%20KALB%20REPORT-RUPERT%20MURDOCH.pdf) (“And we’re going to stop people like Google and Microsoft, or whoever, from taking our stories for nothing.”).

186 Complaint at 2, *Dow Jones & Co. v. Briefing.com, Inc.*, No. 10-cv-03321 (S.D.N.Y. Apr. 20, 2010).

187 Jonathan Stempel, *Dow Jones and Briefing.com Settle “Hot News” Lawsuit*, ABC NEWS (Nov. 15, 2010), <http://abcnews.go.com/Business/wireStory?id=12154885>.

188 Complaint at 2, *GateHouse Media v. New York Times Co.*, No. 1:08-cv-12114 (D. Mass. Dec. 22, 2008), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-12-22-Gatehouse%20Media%20Complaint.pdf>.

yright claims, not hot news misappropriation, the claims are remarkably similar.

The copyright claim in GateHouse's complaint was that the inclusion of the headline and lede violated copyright. This seems counterintuitive. Copying such a small portion of a story is likely fair use. Copyright scholar Tim Wu argues that the principal question in fair use is whether the excerpt in question is a substitute for the story.<sup>189</sup> The headline and lede cannot be understood to be a substitute for the entire story. These two things merely provide the main idea.

So what made the GateHouse's claim non-frivolous? The claim carried weight because of the practicalities of the situation. The way in which we read newspapers is changing. A number of reports are showing that while more and more people, upwards of 57%, are going online for their news, fewer people are getting their information from newspapers.<sup>190</sup> Google News and other aggregators are a more likely destinations than a single paper's website, with 31% choosing the aggregator and only 8% picking a news site.<sup>191</sup> That same report found that 44% of U.S. visitors to Google News do not click on any headlines, preferring instead to read the headline, lede, and any other snippet provided.<sup>192</sup> The study showed that aggregators like Google News are a *destination* for news instead of a starting point, thus placing aggregators in direct competition with news content producers. These numbers tell us that what GateHouse and Rupert Murdoch are taking issue with is not the unauthorized use of the headline and lede of their articles; rather, they are concerned about the use of the hyperlink, lede, *and the link*. What is it about the use of the combination of a headline, lede and a hyperlink that makes both GateHouse and Murdoch so angry? It is because with that trifecta, people have everything they need by way of news. If one of those pieces is missing, they might need to still visit a newspaper. But, with all three, we know, at the very least, that 44% of Google News readers are set.

This raises the question—why? Why is that simple, tantalizing trifecta enough news for a growing number of people on the Web?

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189 Saul Hansell, *The Associated Press to Set Guidelines for Using Its Articles in Blogs*, N.Y. TIMES, June 16, 2008, <http://www.nytimes.com/2008/06/16/business/media/16ap.html>.

190 Robin Wauters, *Report: 44% of Google News Visitors Scan Headlines, Don't Click Through*, TECHCRUNCH (Jan. 19, 2010), <http://techcrunch.com/2010/01/19/outsell-google-news/>.

191 *Id.*

192 *Id.*

Notably, it is counterintuitive that an accompanying hyperlink would make people *less* likely to visit the linked website, since the hyperlink provides no additional substantive content. The mere fact that it makes people less likely to visit a linked site indicates that the link itself has some independent expressive value, as described above. What is expressed is credibility. Were Google News or Boston.com to simply list snippets without the link, people might not trust the aggregator as much. As is the case with Google, the aggregators themselves often have little or no independent credibility as news providers. Their effectiveness at delivering news is contingent on their ability to gain the trust of their prospective readers. Linking to established news organizations provides just that credibility—the ability for a reader to independently verify the accuracy of the aggregator if she so desires.

The speed of the Internet, the information overload it facilitates, and the development of applications like Twitter all encourage communication in short sound bytes. In our relationship with news, the headline and the lede communicate the main idea, the ten-second sound byte we are seeking. The aggregator collects all of the ten-second sound bytes in which we might be interested and includes links that allow us to learn more about the stories that most intrigue us. Thanks to Twitter, we must now communicate in 140 characters or less. In 140 characters, the headline, the lede, and the link must be “all the news that’s fit to print,” because it is all the news that will *fit*.<sup>193</sup> Curbing the use of any one element of the trifecta will curb the usage of a growing, important medium of communication.

Aggregators also serve an important purpose for the user—allowing her to receive and process news in a way that ensures broad exposure to information but that also recognizes the time and cognitive capacity constraints that limit her ability to process all of the news available on the Internet.

On the other hand, content providers are concerned that if their customers opt to get news from aggregators and no longer visit their websites, they will be unable to continue to monetize their content production. This argument is fair and important. If it is an accurate representation of the effect of aggregators, the future of journalism depends on a proper solution. However, even assuming that aggregators irreparably damage the content owner’s business model, the question still remains: are aggregators in fact violating copyright or triggering hot news misappropriation? Are headlines, ledes, and

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193 For comparison, this sentence is 139 characters.



links protected under some labor theory of property? Is there a more narrowly tailored solution that achieves the goals of content providers without making our style and methods of communication online illegal?

The first two questions are beyond the scope of this Article. The answer to the third is yes. Content providers can protect all of their content—headline, lede, and body—by constructing a paywall. Alternatively, content providers can limit access by including a robots.txt file on their websites. If an aggregator cannot scrape content because a site is not indexed by a search engine, then linking becomes a manual process requiring a human being, decreasing the likelihood of aggregators including such content on their sites.

Of course, the use of these technological fixes comes with consequences for content providers. Not being indexed or requiring a paywall can damage the visibility of a website and potentially damage the ability of a website to make money. However, this decision is one that content providers must make. Allowing content providers to wield a legal claim that effectively shuts down one medium of communication just so that they can maintain existing business models is not wise and threatens the meaning and purpose of the law. Though the narrow tailoring requirement may frustrate content providers and the alternate solutions may not be as effective, a strict scrutiny standard is still necessary to protect the Internet as we know it.

The Ninth Circuit in *Kelly v. Arriba Soft Corp.*<sup>194</sup> recognized the importance of interpreting laws in the light of the broader public benefit when it held that search engines may use thumbnails of images without violating copyright. The court found the use of thumbnails to be transformative because the images were not sold as pictures but rather facilitated the identification of the images indexed in the search engine. The court noted the “public benefit of the search engine and the minimal loss of integrity to Kelly’s images.”<sup>195</sup> In *Kelly*, the court preserved the function of the search engine in the face of a copyright claim that would otherwise have effectively debilitated it.

Courts considering copyright and hot news misappropriation claims against aggregators should consider the *Kelly* ruling and rationale as instructive. Imagine the ramifications of the alternative position—a position that decries the communication of the main ideas of a copyrighted work and citation to the source all in one breath. Would we be prohibited from talking about news articles as well? Ac-

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194 280 F.3d 934 (9th Cir. 2002), *withdrawn, re-filed at* 336 F.3d 811 (9th Cir. 2003).

195 *Id.* at 942.

knowledging the First Amendment value of links and recognizing the availability of technological self-help that would prevent, or at least limit, linking would seem to imply that prohibiting hyperlinks by aggregators would be very much like using a hatchet when a scalpel is needed—and required—under the Constitution.

#### D. Contributory Infringement

If not directly committing copyright and trademark violations, many argue that hyperlinks are at least *contributing* to these violations and consequently should be regulated under a theory of contributory infringement. Derivative liability extends to those who facilitate direct infringement of intellectual property.<sup>196</sup> Hyperlinks create relationships between the website containing the hyperlink and the website being linked. Determining the exact nature of this relationship impacts how a court views linking liability.

The liability arising from linking to a website containing copyright-infringing content is controlled by one case right now, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,<sup>197</sup> though there are two major cases that set the stage for *Grokster*: *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*<sup>198</sup> and *Universal City Studios, Inc. v. Corley*.<sup>199</sup> Unlike in other areas discussed so far, third party liability cases have not generated positive law supporting the widespread use of hyperlinks.

In *Intellectual Reserve*, the district court in Utah prohibited website operators from posting the URLs for three independent websites allegedly containing copyrighted material. Utah Lighthouse Ministry was ordered to remove all links to websites that it knew, or had reason to know, contained material alleged to infringe copyright. In making its ruling, the court disregarded Utah Lighthouse Ministry's First Amendment defenses, holding that "the First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law."<sup>200</sup>

The notion of third party liability was affirmed on the other side of the country in *Corley*. In *Corley*, the Second Circuit granted an injunction prohibiting Eric Corley from linking to websites containing the disputed DeCSS code. DeCSS was developed to overcome limita-

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196 *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911).

197 545 U.S. 913 (2005).

198 75 F. Supp. 2d 1290 (D. Utah 1999).

199 273 F.3d 429 (2d Cir. 2001).

200 *Intellectual Reserve*, 75 F. Supp. 2d at 1295.

tions in the existing technology that prevented computer users from being able to play DVDs on computers using the Linux operating system.<sup>201</sup>

However, a federal district court in Illinois took a narrower approach in *Comcast of Illinois X, L.L.C. v. Hightech Electronics, Inc.* by holding that linking itself is not enough to constitute contributory infringement and that such liability requires a more direct tie between the defendant and the infringing website, such as receiving compensation in exchange for linking.<sup>202</sup>

Notably, neither the *Intellectual Reserve* nor the *Corley* court addressed the bounds of narrow tailoring under which prohibitions on linking were found to be constitutional. The *Corley* Court at least recognized the First Amendment implications of their decision, but simply held that the injunction was sufficiently narrowly tailored to pass muster under the Constitution.

In *Grokster*, the Supreme Court finally addressed the issue of the narrow tailoring requirement as it relates to contributory copyright infringement online, though wholly unrelated to links. The Court held that those who distribute devices that are capable of both lawful and unlawful use in a manner that *intentionally* promotes illegal use, “as shown by clear expression or other affirmative steps taken to foster” illegal use, “[are] liable for the resulting acts of infringement by third parties.”<sup>203</sup> In doing so, the Court narrowed the scope of liability for third parties and allowed the Internet to flourish. Specifically, the Court held:

[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.<sup>204</sup>

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201 See *Corley*, 273 F.3d at 459. To prevent any potential unauthorized viewing or copying of their content, movie studios worked with the computer and electronics industries to develop an encryption standard—Content Scramble System (“CSS”). Industry-wide, all DVDs were encrypted using CSS, and all authorized DVD players possessed the “player keys” to decrypt the DVD. DeCSS is a computer program designed to circumvent CSS.

202 See *Comcast of Ill. X, LLC v. Hightech Elecs., Inc.*, No. 03 C 3231, 2004 WL 1718522, at \*7 (N.D. Ill. July 29, 2004).

203 See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

204 *Id.* at 937.

The Court's decision here is so important because it recognizes the First Amendment rights at stake online. While *Grokster* does not directly address hyperlinks per se, the case places third parties implicated in the online copyright debate in a protected space. Importantly, however, the Court's decision in *Grokster* is an interpretation of a *statute*, the Digital Millennium Copyright Act (DMCA), not of the *Constitution*. Thus, while the Court recognizes the importance of third party intermediaries to the architecture of the Internet and as a result grants them immunity under the statute, it falls short of granting third parties a *constitutional* privilege.

This notion of a constitutional privilege to disseminate information was recognized most prominently in *New York Times Co. v. Sullivan*.<sup>205</sup> There the Court showed a deep concern for the positive rights embedded in the Constitution. The Court extended a constitutional privilege to newspapers *because* of their role as an incredibly important, unique medium of communication. In doing so, the Court held that the libel law at issue was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments."<sup>206</sup>

The *Sullivan* Court compared it to the nearly absolute protection accorded public officials in libel suits brought by private citizens.<sup>207</sup> The reason for the official privilege is said to be that the threat of lawsuit would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government"<sup>208</sup> and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."<sup>209</sup> The Court argued that "[a]nalogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer."<sup>210</sup>

The role of newspapers when *Sullivan* came down was so critical to democracy and the First Amendment that the Court found that the Constitution "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."<sup>211</sup> In so finding, the Court instituted its actual malice standard, a standard so high that it has since made it nearly impossible for a

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205 376 U.S. 254 (1964).

206 *Id.* at 264.

207 *Id.* at 282.

208 *Barr v. Matteo*, 360 U.S. 564, 571 (1959).

209 *Id.* (quoting *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949) (Hand, J.)).

210 *Sullivan*, 376 U.S. at 282.

211 *Id.* at 283.

public figure to bring a claim seeking damages arising out of a defamation claim against a newspaper. The standard was created to protect the medium and the purpose of the medium. A newspaper serves its function when it is free to comment and report on issues of public interest, including public figures. To apply a lower standard would threaten the newspaper's ability to serve its purpose.

The same sentiment should extend to protect new media as they emerge. The Internet is a powerful medium whose power derives from the robust use of links. Without the hyperlink, navigation would be nearly impossible, and filtering content would be incredibly time-consuming. It is for this reason that hyperlink users must be granted a similar constitutional privilege. Doing so recognizes that to allow a lesser standard to limit the use of links would threaten an important medium of communication that uniquely supports our free speech values.

Extending such a constitutional privilege does not mean allowing linking when it clearly intends to facilitate illegal behavior. Rather, applying the doctrine developed in *Sullivan*, courts should demand an intent-based standard that requires plaintiffs to show that defendants possessed the requisite *mens rea* to facilitate illegal behavior. Such a high standard recognizes the constitutional privilege that runs to hyperlinks and to their users.

So how might we apply such a standard? At the time this article was written, the U.S. Immigration and Customs Enforcement (ICE) division of the Department of Homeland Security was very much in the midst of its War on Copyright Infringement.<sup>212</sup> One prong of its attack was to execute warrants against a number of websites, authorizing ICE to seize the domain names of the sites.<sup>213</sup> The seizures were motivated by a concern that the sites were either directly or indirectly infringing on copyrights. The targeted sites made it easier for people to access the potentially illegal content.

Under a *Sullivan*-type standard, without a clear intent to violate copyright law, the sites seized should not be charged with violating copyright law. So in the case of Torrent Finder, one of the domains seized in a raid that took place on November 26, 2010, the question

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212 EXEC. OFFICE OF THE PRESIDENT, 2010 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT (2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty\\_strategic\\_plan.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf).

213 See Mike Masnick, *Who Needs COICA When Homeland Security Gets to Seize Domain Names?*, TECHDIRT (Nov. 29, 2010, 6:35 AM), <http://www.techdirt.com/articles/20101128/15302012021/who-needs-coica-when-homeland-security-gets-to-seize-domain-names.shtml>.

is—did the owners of that site intend to infringe copyright? Determining intent is a complex and nuanced enterprise and is beyond the scope of this Article.<sup>214</sup>

The lower court decision in *Corley* adopted a *Sullivan*-style position. In applying the DMCA to links, Judge Kaplan recognized the First Amendment concerns arising out of hyperlink regulation and thus applied a heightened standard of scrutiny. To avoid applying the DMCA in a manner that would burden substantially more speech than is necessary to further the government's legitimate interests, Judge Kaplan adopted the standards of *Sullivan* and demanded:

[C]lear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.<sup>215</sup>

The Second Circuit did not adopt Judge Kaplan's standard on appeal.<sup>216</sup>

In some ways, the statutory language of the DMCA recognizes the important role of hyperlinks and grants it a sort of privilege. Con-

<sup>214</sup> However, here is one way to think about it: Torrent-Finder is a website that aggregates and displays links to other sites. It functions as a search engine that searches 152 independent torrent sites and trackers from one location. See TORRENT-FINDER, <http://torrent-finder.info/> (last visited Mar. 27, 2011). In this sense it is like SideStep or Hipmunk—websites that function as metasearch engines—searching and consolidating data from a number of individual travel websites. Thus, the technology that underpins both Torrent-Finder and SideStep are, for our purposes, identical. SideStep is just an illustrative example of how metasearch can be a productive and useful tool. Thus, with SideStep as our exemplar, it becomes clear that the technology underpinning Torrent-Finder is not inherently illegal, and thus mere use of the technology does not imply intent.

However, Torrent-Finder is not out of the woods of copyright liability yet. Though the technology may lend itself to dual uses, the creators of Torrent-Finder might have intended for it to be used for illegal purposes. Ascribing intent to an entity is a tricky enterprise and one that requires very specific showings of proof, as we saw in *Sullivan*. However, the text on the website and the advertising language used by Torrent-Finder provide initial guidance. Torrent-Finder promised that it was a “100% legal website, in strict compliance with all local laws and copyright agreements.” Application and Affidavit for Seizure Warrant at 30, *In re Torrent-Finder.com*, Civ. No. 10-2822M (C.D. Cal. Nov. 17, 2010), available at <http://www.docstoc.com/docs/67610787/45705510-Operation-in-Our-Sites-2-0>. However, the site also very prominently displayed the torrent websites from which it scraped—PSP Pirates, the Pirate Bay, and Pirateuropa were among them.

A third potential element of intent (and the last for this analysis) is consumer use and the owner's knowledge of that use. If Torrent-Finder is used solely for furthering illegal activity and the owners of the site have knowledge of this and actively continue to support that activity, then it can be argued that this supports a finding of intent.

<sup>215</sup> See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 341 (S.D.N.Y. 2000), *aff'd sub nom.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

<sup>216</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 457 (2d Cir. 2001).

gress recognized the potentially stifling effects of such broad statutory language and thus created safe-harbor provisions within the statute itself. One safe harbor provision was designed specifically to immunize “service providers” that use “information location tools,” such as hyperlinks, from charges of contributory infringement. The relevant language of the statute provides:

A service provider shall not be liable . . . for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyper-text link, if the service provider—

(1) (A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity . . . .<sup>217</sup>

This provision specifically invokes the “actual knowledge” standard and in doing so creates a very high standard under which to implicate linkers in a contributory infringement claim.

The effect of this provision is, however, largely limited by the definition of “service provider.” The statute states that “the term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor.”<sup>218</sup> While the language of the definition could theoretically encompass businesses that operate websites or other Internet services or facilities, there has yet to be significant discourse on the provision. The limited instances of judicial interpretation of the statutory language have been favorable. As one court stated, “[a] plain reading of [17 U.S.C. § 512(k)] reveals that ‘service provider’ is defined so broadly that we have trouble imagining the existence of an online service that would not fall under the definitions.”<sup>219</sup>

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<sup>217</sup> 17 U.S.C. § 512(d) (2006).

<sup>218</sup> 17 U.S.C. § 512(k)(1)(B) (2006).

<sup>219</sup> *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 658 (N.D. Ill. 2002) (emphasis omitted), *aff'd*, 334 F.3d 643 (7th Cir. 2003). Courts have held that Amazon, eBay, and Aimster all qualify as “service providers” under this definition. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (affirming district court ruling that Aimster is a

However, the legislative history on the subject is somewhat more limiting. The House Report on the bill includes hyperlinks under its definition of information location tools and further states that “[i]nformation location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need.”<sup>220</sup> Unfortunately, the discussion that follows focuses largely on directories like Amazon or eBay and search engines like Yahoo! or Google as service providers that employ information location tools.<sup>221</sup> Echoing this sentiment, the stated goal of the provision was “to promote the development of information location tools generally, and Internet directories such as Yahoo!’s in particular.”<sup>222</sup>

The continued interpretation of this provision of the DMCA will be important in the development of linking law. While a broad reading is definitely supported by the text of the statute, the legislative history is potentially limiting. And, notably, the *Corley* court did not address information location tools and the safe harbor that extends to service providers that employ them.

Additionally, however, courts should recognize something comparable to the constitutional privilege recognized in *Sullivan*. This will ensure that the protections afforded hyperlinks are not limited to the DMCA but extend across all laws threatening the robust use of hyperlinks.

### E. Contracts

The assault on links seemed to reach fever pitch with the news of websites that simply included a prohibition on external links in their terms of service. In April 2010, the largest Japanese business newspaper, the *Nikkei*, severely restricted the ability of people to link to its

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service provider); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (holding that Amazon meets the DMCA definition of service provider); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (acknowledging the broad definition of a service provider and stating that eBay “clearly” falls within this definition).

<sup>220</sup> H.R. REP. NO. 105-551, pt. 2, at 58 (1998), available at <http://gozips.uakron.edu/~dratler/2006cyberlaw/materials/sec512leghist.htm>.

<sup>221</sup> As noted in a recent district court decision, Directories are particularly helpful in conducting effective searches by filtering out irrelevant and offensive material. The Yahoo! Directory, for example, currently categorizes over 800,000 online locations and serves as a ‘card catalogue’ to the World Wide Web, which over 35,000,000 different users visit each month. Directories such as Yahoo!’s usually are created by people visiting sites to categorize them. It is precisely the human judgment and editorial discretion exercised by these cataloguers which makes directories valuable.

*Viacom Int’l, Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010).

<sup>222</sup> H.R. REP. NO. 105-551, at 58.



site.<sup>223</sup> Specifically, the *Nikkei* now requires those who wish to link to it to first complete a detailed written application providing, among other things, reasons for linking to the site.<sup>224</sup>

The motivation behind the move was to protect its content, to ensure that its paywall would not be breached, and to prevent the linking of its content from “inappropriate” sites.<sup>225</sup> The company argued that links to individual stories could lead to manipulation and confusion and could ultimately threaten the accuracy of the financial markets.<sup>226</sup> To restrict the use of such a provision would threaten the ability of websites to craft a terms of service agreement suitable to their needs, and thus would infringe on their right to contract.

Though the argument is compelling, the enforceability of such a term seems inherently wrong. The question remains whether or not a contracting out of one’s basic rights, like the right to free speech, is enforceable. On this point, the Supreme Court has held that the First Amendment does not trump laws of general applicability. In *Cohen v. Cowles Media Co.*,<sup>227</sup> two newspapers published the name of a source who had provided information on the condition of anonymity. The source sued for breach of contract, and the newspapers raised a First Amendment defense that enforcing the contract would stifle their right to free speech. The Supreme Court held that “the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law.”<sup>228</sup>

Many scholars have criticized the *Cohen* decision, arguing that it effectively allows parties to “use property and contract [law] to cordon off information from public purview without First Amendment scrutiny.”<sup>229</sup> The ability to contract our rights away seems unsettling, even unconscionable, especially when considering how unthinkingly many of us click “agree” in response to the terms of service presented by many sites.

The holding in *Cohen* should be limited to only those circumstances where the contract in question is one as significant as whistleblowing under the condition of anonymity. In *Cohen*, both sides were

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223 See Hiroko Tabuchi, *Nikkei Restricts Links to Its New Web Site*, N.Y. TIMES, Apr. 8, 2010, <http://www.nytimes.com/2010/04/09/technology/09paper.html>.

224 *Id.*

225 *Id.* (internal quotation marks omitted).

226 *Id.*

227 501 U.S. 663 (1991).

228 *Id.* at 672.

229 Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1089 (2001).

for a position that would promote First Amendment values, placing the Court in a very difficult position. Allowing a newspaper to print what they wish, on one hand, was central to First Amendment jurisprudence; on the other hand, enforcing the contract would encourage whistle-blowing and protect an individual's right to engage in anonymous speech. A situation where the government interests are not so compelling on either side might shift the debate.

Such a reading of *Cohen* would reconcile well with the development of modern contract law. While there is of course an independent public policy rationale for upholding contracts, the *Restatement (Second) of Contracts* specifically states that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."<sup>230</sup> Given that there is no legislation on the subject of contracts, the question is whether the First Amendment supports a public policy against the enforcement of such terms.

In the context of linking, there is a compelling First Amendment right to link. A website's interest in preventing the link can be served by other, less Draconian methods. The *Nikkei* can put up a paywall or install a robots.txt file. The availability of these options decreases the relative importance of the *Nikkei's* reliance on a contract to prevent linking when weighed against an individual's First Amendment rights to link.

The Court famously held that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment]."<sup>231</sup> This famous footnote from *United States v. Carolene Products Co.* reminds us that the Court is authorized to express heightened concern when the rights enumerated in the Bill of Rights are at stake. The discussion in Part II of the standard applied to content-neutral regulation speaks directly to the judiciary's long-held belief that First Amendment rights are to be carefully balanced with the legitimate interests of other interests in a way that ultimately promises free, unfettered speech.

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<sup>230</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

<sup>231</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Thus, First Amendment values provide a strong argument in favor of finding contracts that prohibit linking unenforceable. This is because the public policy costs of enforcement are outweighed by the extraordinary public policy benefits of non-enforcement.

#### IV. CONCLUSION

As hyperlinks grow in their role as both a medium and a message in our daily lives, granting them certain First Amendment protections becomes increasingly important. Because hyperlinks play a dual role as both a medium and a message, hyperlink regulation can theoretically be subject to content-based and content-neutral regulation. This Article argues that any regulation of hyperlinks should be reviewed under a strict scrutiny standard that recognizes and balances the importance of hyperlinks in preserving First Amendment values with legitimate governmental needs. Though it is beyond the scope of this Article, I do not intend that such a standard always prove “fatal in fact.” There are instances when legitimate state interests would justify limitations on the use of links. Preventing the use of links to intentionally distribute criminal materials is one such instance.

The above Part III details how courts might consider thinking about allegations of trademark infringement, e-trespass, copyright infringement, contributory infringement, and contract violation as a result of hyperlink use. In doing so, the section highlights two important points. First, there are limitations to First Amendment law: trademark, copyright, and common law contract and tort claims are not ignored in the pursuit of First Amendment values. However, these limitations must exist in a way that recognizes the evolving scope of protected First Amendment activity. First Amendment jurisprudence must reflect the changing forms of communication, and the authorized curtailments of these rights must be updated accordingly. Second, while thus far hyperlink cases have generally been decided favorably, very few of them address the relationship between hyperlinks and the First Amendment.

There are a number of concerns that arise from the treatment of hyperlinks as First Amendment-protected speech. Foremost among these concerns is the implication of such recognition on the behavior of search engines. Search engines provide users with links to websites based on the user’s search query. If search engines can claim First Amendment rights over their use of links, then regulating them becomes difficult—more specifically, regulating them becomes potentially unconstitutional. Search engines would be able to filter and

prioritize search results under the protection of the First Amendment.

Some prominent First Amendment scholars, like Larry Tribe,<sup>232</sup> would likely support this state of the world. After all, they might argue, if a search engine makes its practices clear to its users, the users can decide for themselves if they want to continue using that service as their search engine of choice. If they disagree with or dislike the search engine's filtering, then they could always switch to another search engine.

However, such a world is dependent on the number of search engines on the market, the competitive offerings of those search engines, the ability of new search engines to enter the market, and the associated switching costs.

Imagine a world where there were only three major search engines: Gaggle, Yamoo, and Bang. New entrants in this imaginary world would find it difficult to gain traction,<sup>233</sup> and so Gaggle, Yamoo and Bang would function as an effective oligopoly in the search market. Now, imagine that all three of these search engines made lucrative deals with various content providers so that Gaggle prioritized all the content created by NBC and the *New York Times*, Yamoo prioritized all content created by Fox and the *Washington Post*, and Bang prioritized all content created by CBS and the *Chicago Tribune*.

Such a world might strike some as deeply unsettling. At the very least, however, it would represent a major shift in how the Internet works. It would eliminate the democratizing effects of the Internet. The Internet would simply become another medium by which incumbent media giants communicate their messages. Perhaps the most unsettling feature of this idea is its likelihood of becoming reality. The recently announced Comcast-NBC merger,<sup>234</sup> when unders-

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<sup>232</sup> See Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address at the First Conference on Computers, Freedom, and Privacy (Mar. 26, 1991), in *THE HUMANIST*, Sept.-Oct. 1991, at 15, available at [http://epic.org/free\\_speech/tribe.html](http://epic.org/free_speech/tribe.html) (arguing that networks and network associations, rather than individual network users, should be treated as the primary beneficiaries of First Amendment rights).

<sup>233</sup> This idea is not simply imaginary. See, e.g., Tom Krazit, *Bug Testers: Google Is Clean, Bing Is Buggy*, CNET NEWS (Sept. 15, 2009, 12:35 PM), [http://news.cnet.com/8301-30684\\_3-10353495-265.html](http://news.cnet.com/8301-30684_3-10353495-265.html) (reporting on an independent survey of bug testers, which revealed that Microsoft's recently launched search engine was responsible for "more than half the total bugs reported" by the survey's respondents).

<sup>234</sup> See Press Release, Comcast and General Electric, Comcast and GE to Create Leading Entertainment Company (Dec. 3, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=938>.

tood in conjunction with the *Comcast Corp. v. FCC* case recently decided by the D.C. Circuit,<sup>235</sup> forecasts the future of prioritized content on the Internet.

The power of the Internet demands that information remain easy to access and easy to convey. It is for this reason that the law must provide robust protection for the use of hyperlinks. However, hyperlinks are more than simply a necessary element of the current manifestation of the Web. They are also the mechanism that will allow us to realize the Web of tomorrow—the Semantic Web. The Semantic Web is the next logical step in achieving Tim Berners-Lee’s vision of a universal medium for the exchange of data. It actually links individual bits of data, instead of just documents. Instead of linking one Web page to another Web page, the Semantic Web will allow individuals to link one piece of data with another piece of data.

Berners-Lee’s World Wide Web Consortium (W3C) has taken the lead in developing the standards and articulating the vision of the Semantic Web. They describe it by painting the following picture:

There is lots of data we all use every day, and it is not part of the web. I can see my bank statements on the web, and my photographs, and I can see my appointments in a calendar. But can I see my photos in a calendar to see what I was doing when I took them? Can I see bank statement lines in a calendar?

Why not? Because we don’t have a web of data. Because data is controlled by applications, and each application keeps it to itself.<sup>236</sup>

The goal of the Semantic Web that Berners-Lee describes is to “allow[] a person, or a machine, to start off in one database, and then move through an unending set of databases which are connected not by wires but by being about the same thing.”<sup>237</sup> Whereas the current Web uses hyperlinks to create a Web of documents, the Semantic Web would weave together data in a way that shows the relationships between the linked data.

Of course, no one knows how we will ultimately engage with the Web years from now. The Semantic Web might very well be the Web of the near future, unless some other new, better idea takes its place. But, until we know, the humility that animated the technical decisions made by the founders of the Internet should similarly guide the

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<sup>235</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (prohibiting the FCC from regulating Comcast’s practice of prioritizing content).

<sup>236</sup> W3C *Semantic Web Activity*, WORLD WIDE WEB CONSORTIUM, <http://www.w3.org/2001/sw/> (last visited Mar. 27, 2011).

<sup>237</sup> *Id.*

decisions of those now responsible for maintaining it—our lawmakers—be they judicial or legislative.