

Place and Cyberspace¹

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For cyberlibertarians, the other shoe is rapidly dropping. In a curious inversion, those who argued less than a decade ago that cyberspace was a place all its own – and therefore unregulatable by territorial governments³ – are finding their arguments and assumptions used for a very different end. Instead of concluding that cyberspace is outside of the physical world, courts are increasingly using the metaphor of cyberspace as a “place” to justify application of traditional laws governing real property to this new medium. Dan Hunter’s excellent article⁴ explains how and why this is happening with uncanny accuracy, pointing to the power of metaphor in influencing legal thinking and the particular strength of metaphor in making the new seem familiar.⁵ He also quite

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³ See, e.g., David Johnson & David Post, *And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law*, in **Coordinating the Internet** 62 (Brian Kahin & James Keller, eds., 1997); David R. Johnson & David Post, *Law and Borders -- The Rise of Law in Cyberspace*, 48 **Stan. L. Rev.** 1367 (1996); David G. Post, *Governing Cyberspace*, 43 **Wayne L. Rev.** 155 (1996); David G. Post, *Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace*, 1995 **J. Online L.** art. 3. Johnson and Post would doubtless be appalled by the use to which their “cyberspace as place” metaphor is currently being put.

⁴ Dan Hunter: *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 **Calif. L. Rev.** __ (forthcoming 2003). Hunter’s work builds on the path-breaking analysis of Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 **Berkeley Tech. L.J.** 561 (2001), and Jonathan J. Rusch, *Cyberspace and the “Devil’s Hatband,”* 24 **Seattle U. L. Rev.** 577, 591-92 (2000). It is also part of his broader project on cognitive science and thinking about law. See, e.g., Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 **Emory L.J.** 1197 (2001).

⁵ *Id.* at __. As Post puts the problem, “[t]hese are new things . . . and thinking about new things is hard, because we only really can understand old things. Post, *Jefferson*, *supra* note __, at __. See also Harmeet Sawhney, *Information Superhighway: Metaphors as Midwives*, 18 **Media, Cult. & Soc’y** 291, 291-92 (1996).

For analogous work on the role of metaphor in law in another context, see Thomas W. Joo, *Contract, Property and the Role of Metaphor in Corporations Law*, 35 **U.C. Davis L. Rev.** 779 (2002).

correctly observes that reliance on the “cyberspace as place” metaphor is leading courts to results that are nothing short of disastrous as a matter of public policy.⁶ Finally, he concludes that there is no way for the Internet to escape the firmly-entrenched spatial metaphor, either by replacing it with another metaphor or by eschewing metaphor altogether. Already, he concludes, the idea of cyberspace as a place is too well established in our minds.⁷ The result is a paper that is both extraordinarily important and profoundly depressing.

In this essay, I do not challenge Hunter’s argument that the “cyberspace as place” metaphor is rampant, nor his conclusion that judicial use of the metaphor has had pernicious consequences. Rather, I focus my attention on the logical steps that courts

For a somewhat different take on Internet law, emphasizing the role of perspective, see Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 *Geo. L.J.* __ (forthcoming 2003).

⁶ Hunter, *supra* note __, at __.

⁷ *Id.* at __. Hunter cites ample evidence of the use of the metaphor by courts and commentators. He is certainly correct that it seems pervasive. In addition to the many examples he cites, see Ivan K. Fong, *Law and New Technology: The Virtues of Muddling Through*, 19 *Yale L. & Pol’y Rev.* 443, 458-59 (2001) (discussing examples from trademark metatagging and computer program source code). There are, to be sure, other metaphors that have been offered in the Internet context, though many of them are at root about place. See, e.g., Jonathan J. Rusch, *Cyberspace and the “Devil’s Hatband,”* 24 *Seattle U. L. Rev.* 577 (2000) (noting the many comparisons of the Internet to the “frontier” or the “Wild West.”); cf. Sawhney, *supra* note __, at 304 (noting the multiplicity of transportation related metaphors for the Internet: superhighway, pipeline, etc.). Most notably (and perhaps ironically, given his role in the “cyberspace as place” metaphor), David Post analogizes the Internet to a language. See David G. Post, “*The Free Use of Our Faculties*”: *Thomas Jefferson, Cyberspace, and the Language of Social Life*, 49 *Drake L. Rev.* 407 (2001). But these alternative metaphors have not caught on as the place metaphor has.

Indeed, even those whose main message is to warn of the dangers of centralizing control over the Internet fall back on spatial metaphors to help them make their point. See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, <http://www.eff.org/~barlow/Declaration-Final.html> (referring to “the global social space we are building” in declaring cyberspace to be unregulable, and suggesting to nations that cyberspace “does not lie within your borders.”); Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999) (framing his argument in terms of the “architecture” of the Internet); Lawrence Lessig, *Architecting Innovation*, 49 *Drake L. Rev.* 397 (2001) (same).

Personally, my inclination is to resist the idea that we cannot think through new problems for ourselves without reliance on imperfect analogies to the ideas of the past. Thus, I would be happiest in a world in which we looked to context and effect, not metaphor, to help us decide what to do. Cf. Richard T. Ford, *Save the Robots: Cyber Profiling and Your So-Called Life*, 52 *Stan. L. Rev.* 1573, 1573 (2000) (“too many commentators seem to think that describing a matrix of data crunching devices as a new *space* somehow actually *creates* a new space”). But for purposes of this article, at least, I will accept Hunter’s conclusion that metaphor will influence our thoughts.

seem to me to be missing as they move from metaphor to decision. Thus, in Part I I explain why the “cyberspace as place” metaphor is actually not a particularly good one, and suggest some ways courts might take account of the differences between the real world and the metaphorical space of the Internet. In Part II, I observe that even if one accepts the place metaphor *in toto*, it does not follow that everything in this new place must be owned, or that the things that are owned must have essentially complete rights of exclusion. My conclusion is somewhat more optimistic than Hunter’s. While acknowledging the dangers of the cyberspace as place metaphor, and the fact that courts have already started down the wrong road, I suggest that courts and commentators who think seriously about the nature of the Internet still have ample room to make reasoned policy decisions. It is easy to be misled by metaphor, but we need not be its slaves.

I. “The Internet Is Just Like a Place”

A. No, It Isn’t

We speak of the Internet in spatial terms,⁸ and in certain respects users may experience some aspects of the Internet as a location. But even a moment’s reflection will reveal that the analogy between the Internet and the physical world is not particularly strong.

As a technical matter, of course, the idea that the Internet is a place in which people travel is not only wrong but faintly ludicrous. No one is “in” cyberspace. The Internet is merely a rather simple computer protocol – a piece of code that permits

⁸ See Hunter, *supra* note __, at __ (citing copious examples).

computer users to transmit data between their computers using existing telephone networks. There were computer networks before the Internet that similarly relied on telephonic exchange of data.⁹ The real genius of the Internet was that its simple, end-to-end design allowed many different people to write different programs that everyone could use by adopting the same simple communications protocol.¹⁰ Technologically, anyone is free to transmit data onto the network. Whether that data arrives at a particular location depends on whether the user at that location has configured her computer to accept data in that particular form and from that particular source. If so, the data – whether it is email, a request to download information, an mp3 file, or a virus – is read by the recipient computer. But regardless of the form the data takes, it is data and not people who are doing the traveling here.¹¹ Data have been traveling on wires and through the airwaves for centuries at the behest of humans, but no one thinks the television, the telegraph or the telephone are “places” within which people travel.¹²

⁹ For a discussion of the prevalence of private “bulletin board systems” in the late 1980s and early 1990s, see, e.g., Debra B. Burke, *Cybersmut and the First Amendment: A Call for a New First Amendment Standard*, 9 *Harv. J. L. & Tech.* 87, 91-92 (1995).

¹⁰ On the importance of the end-to-end design of the network, see J.H. Saltzer et al., *End-to-End Arguments in Systems Design*, available at <http://web.mit.edu/Saltzer/www/publications/endoend/endoend.pdf> (Apr. 8, 1981), reprinted in *Innovation in Networking* 195 (Craig Partridge ed. 1988); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 *UCLA L. Rev.* 925 (2001).

¹¹ *Cf. Voyeur Dorm v. City of Tampa*, 265 F.3d 1232 (11th Cir. 2001) (holding that a live sex show broadcast over the Internet from a house in Tampa did not violate a local zoning ordinance prohibiting adult entertainment, because the entertainment was not physically provided at that location, but sent to remote users).

¹² Indeed, the analogy to the telephone is more exact than it might at first appear. Most Internet users even today access the Internet through a dial-up modem. A “modem” is a converter that takes data from a computer and converts it to analog sounds that can be sent over a telephone line just like the human voice. For these users, the technical reality of Internet communication is essentially identical to telephonic communication. Only what is being “said” and the way it is perceived differ.

The idea of cyberspace as a physical place is all the more curious because the instantiation that most resembles travel to the casual user – the World Wide Web – is in fact much more like a traditional communications medium. People may speak of “visiting” Web sites, but of course they don’t do any such thing. They send a request for information to the provider of the Web site, and the provider decides to send back data: the Web page itself. Because this process is automated, and because most Web site owners have decided in advance to make their Web pages available to anyone, it may appear that one has simply gotten to a page by clicking a button. But in fact the page is voluntarily sent by its creator to the Web user, a fact which should have significance in a number of the Internet property cases.¹³

The cyberspace as place metaphor seems instead to act at some more conceptual level. Even if we understand somewhere in the back of our minds that we are not really going anywhere, perhaps when we access the Internet it seems so much like we are in a different physical space that for all intents and purposes we accept cyberspace as a “real” place. There are two problems with this argument. The first is that most users of the Internet surely do not experience it as anything remotely resembling a real place. While William Gibson wrote beautifully of the visual representations of computer code in cyberspace,¹⁴ it is probably no accident that he did his writing on a manual typewriter.¹⁵

¹³ See *infra* notes __-__ and accompanying text.

¹⁴ See William Gibson, *Neuromancer* (1984); William Gibson, *Count Zero* (1985); William Gibson, *Mona Lisa Overdrive* (1988). Cf. Neal Stephenson, *Snow Crash* (1992) (offering a similar spatial conception of “the MetaVerse”).

¹⁵ See, e.g., <http://books.guardian.co.uk/authors/author/0,5917,96528,00.html> (interview with William Gibson).

Despite the utopian dreams of early cyberspace “pioneers,”¹⁶ the Internet is hardly replete with ICE palaces¹⁷ and visual data structures. It is a medium that transmits mostly text, images, and more recently sounds, just as television does. People may speak occasionally of being “lost in” or “transported” by a television show or movie – or for that matter a book – but we hardly surrender our understanding that “television space” is merely a series of images being transmitted to us. Nor do we think that when catalogs or letters are delivered to our door, we have magically entered into a store or a friend’s house.

What’s really different about the Internet is interconnection: the fact that links can “take” us from one Web page to another. We aren’t limited to reading the mail that comes to us, or to visiting the stores in our town. With a click of the mouse, we can see information offered on billions of Web pages by millions of people and companies from all over the world. Further, we can move from a page in Switzerland to one in Swaziland merely by following a link. Perhaps it is this automatic connection to pages that come from distant lands that makes us feel as though we are traveling through cyberspace. But if so, it is surely the supreme irony of the cyberspatial metaphor. For it is this automatic interconnection between data offered by different people in different places that makes the Internet so *different* from the real world. And indeed it is this very interconnection that users of the cyberspace as place metaphor threaten to eliminate by getting courts to think that the Internet is “just like” the physical world.¹⁸ In short, we may instinctively

¹⁶ See, e.g., Michael Benedikt, *Cyberspace: Some Proposals*, in **Cyberspace: First Steps** 119 (Michael Benedikt ed. 1991); Marcos Novak, *Liquid Architectures in Cyberspace*, *id.* at 225; Alan Wexelblat, *Giving Meaning to Place: Semantic Spaces*, *id.* at 255.

¹⁷ Intrusion countermeasure electronics, in Gibson’s terminology. See Gibson, *supra* note __, at __.

¹⁸ See *infra* notes __-__ and accompanying text (discussing these cases).

feel that cyberspace is a place, perhaps because we long to make new things seem familiar. But there is no particular reason why we should think this way. Certainly it is not the way the Internet really works.

B. It's Like A Place, Except . . .

But perhaps Hunter is right, and we've already conditioned ourselves to think of the Internet in spatial terms to such an extent that there is no going back.¹⁹ Even if this is true, it does not follow that we must blindly accept a one-for-one correspondence between cyberspace and the real world. There are obvious differences between the way things work in the real world and the way they work online. Here are just a few examples:

- While in the physical world I can occupy only one place at a time, on the Internet it is trivial to be everywhere at once – and indeed, it's often hard to avoid doing so.
- Physical stores have spatial constraints that limit the number of customers who can enter the store. While there are some constraints on simultaneous usage of a Website or the Internet itself, for most users and for most purposes bandwidth is effectively infinite.
- Physical places exist in proximity to one another, and human senses can perceive what is happening next door. In cyberspace, by contrast, there is no “next door.” Nor is there a public street or sidewalk from which one might observe behavior that occurs in a particular Internet space.

¹⁹ See Hunter, *supra* note __, at __ (suggesting that the cyberspatial metaphor is ineradicable).

- The Internet consists only of information, and information is a public good. A Web site is trivial to copy, and copying it does not deprive its creator of the use of the original site.²⁰ By contrast, chattels are much harder to copy, and real property is by definition impossible to duplicate. In order to make use of someone else's real property, I would have to deprive them of some control over it.

We may turn to the cyberspatial metaphor out of familiarity or ignorance, or even because we consciously decide it is close in certain ways to what the Internet is or should be. But no one could credibly maintain that the Internet is “just like” the physical world. At most, the Internet is like the physical world *except in certain respects in which it is different*.

C. Getting to “Except”

Courts can and should take those differences into account.²¹ They can do so without rejecting the metaphor of cyberspace as place, simply by using the metaphor as a point of departure. The “except” is critical. Without it, courts have cabined the law so that it cannot respond to changed circumstances.

Hunter correctly points out that a number of courts have made this mistake in a variety of contexts. In particular, the series of courts applying the doctrine of trespass to

²⁰ Copying may have other pernicious effects, of course, particularly on incentives to create. Intellectual property protection exists not because information is like physical property – it isn't – but because unrestrained copying will leave creators with too little incentive to develop new works. For a general discussion of this standard theory of intellectual property, see **Robert P. Merges et al., *Intellectual Property in the New Technological Age*** 12-20 (2d ed. 2000).

²¹ *Accord* O'Rourke, *Analogy*, *supra* note __, at 561 (“rather than searching for analogies, courts and legislators could more profitably devote their energies to understanding how the Internet differs from physical space, evaluating whether those differences call for new legal rules . . .”).

chattels to email and Web site access²² have shown a remarkable lack of sensitivity to the differences between the Internet and the real world. As Dan Burk has observed, while these courts nominally apply the doctrine of trespass to chattels to cyberspace, they are in fact using the rather different and more expansive doctrine of trespass to real property.²³ They ban third parties from “entering” a Web site without permission, sometimes on the

²² For courts applying the doctrine of trespass to chattels to the Internet, *see, e.g.*, eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000); Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000); America Online v. National Health Care Discount, Inc., 174 F. Supp. 2d 890 (N.D. Iowa 2001); Oyster Software, Inc. v. Forms Processing, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244 (Ct. App. 2001). *But see* Ticketmaster Corp. v. Tickets.com, 2000 Copyright L. Decs. ¶128,146 (C.D. Cal. Aug. 10, 2000); Express One Int’l v. Steinbeck, 53 S.W.3d 895 (Tex. App. 2001) (no cause of action for conversion of information posted online, because information was not property). Not surprisingly, more claims are coming. *See, e.g.*, <http://www.newsbytes.com/news/02/176156.html> (discussing suit by Homestore.com against Bargain.com for collecting real estate listings from its site and making them available to bargain.com users).

Many commentators have discussed the application of trespass to chattels to the Internet. Most are critical, especially of those cases that apply the doctrine to Web sites rather than spam and disregard the requirement of damage. *See, e.g.*, Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, [draft at 234] (working paper 2002); Dan L. Burk, *The Trouble With Trespass*, 4 **J. Sm. & Emerging Bus. L.** 27 (2000); Edward W. Chang, *Bidding on Trespass: eBay, Inc. v. Bidder’s Edge, Inc. and the Abuse of Trespass Theory in Cyberspace Law*, 29 **AIPLA Q.J.** 445 (2001); Bridget A. Clarke, *When Not to Pour Spam Into an Old Bottle: Intel v. Hamidi*, **J. Internet L.**, Nov. 2001, at 19; Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 **U. Dayton L. Rev.** 179 (2001); Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 **U. Pa. L. Rev.** 119, 145-147 (2001); Maureen A. O’Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 **Vand. L. Rev.** 1965 (2000); Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of An Appropriate Analogy*, 16 **Berkeley Tech. L.J.** 561 (2001) [hereafter O’Rourke, *Analogy*]; Maureen A. O’Rourke, *What the Future Holds: Policy Choices in the Global E-Marketplace*, 7 **Roger Williams U. L. Rev.** 151, 152 (2001); Susan M. Ballantine, Note, *Computer Network Trespasses: Solving New Problems With Old Solutions*, 57 **Wash. & Lee L. Rev.** 209 (2000); Steve Fischer, Note, *When Animals Attack: Spiders and Internet Trespass*, 2 **Minn. Intell. Prop. Rev.** 139 (2001). But a few are more favorable. *See, e.g.*, Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 **Vill. L. Rev.** 117 (2002); I. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 **U. Chi. L.F.** 217; I. Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, 1996 **J. Online L.** art. 7, <http://www.wm.edu/law/publications/jol/hardy.html>. *Cf.* John D. Saba, Jr., *Internet Property Rights: E-Trespass*, 33 **St. Mary’s L.J.** 367 (2002) (suggesting that trespass is appropriate only in certain circumstances).

²³ Burk, *supra* note __, at 53-54; *see also* Hunter, *supra* note __, at __; O’Rourke, *Analogy*, *supra* note __, at 596-97. For an explicit argument that real property is the right analogy, *see* Brief Amicus Curiae of Reed Elsevier Inc. et al. Supporting Affirmance, eBay Inc. v. Bidder’s Edge, Inc., No. 00-15995 (9th Cir. filed July 12, 2000) (on file with author).

grounds that the third party will fill up the site,²⁴ sometimes because they assume that Internet bandwidth, like real property, should be inherently inviolate.²⁵ An even more serious problem is the judicial application of the Computer Fraud and Abuse Act,²⁶ designed to punish malicious hackers, to make it a crime to seek information from a publicly available Web site if doing so would violate the terms of a “browse-wrap” license.²⁷

These courts have failed to understand how the Internet is different from the physical world. They do not see that no one “enters” Web sites. Rather, the defendants in these cases merely sent requests for information to a Web server the plaintiff had itself made open to the public, and the plaintiff’s own server sent information in return.²⁸ They do not see that the requests for information that Verio or Bidder’s Edge sent do not

²⁴ *eBay*, 100 F. Supp. 2d at 1064-66.

²⁵ *Cf. eBay*, 100 F. Supp. 2d at 1071-72 (articulating an alternative theory to its holding of actual injury to eBay’s servers: that any use of eBay’s servers inherently deprives eBay of its property). While the discussion of inherent injury in *eBay* was clearly dictum, it is this dictum and not the court’s holding that actual injury was likely that courts have pointed to in subsequent cases. *See, e.g., Register.com*, 126 F. Supp. 2d 238; *Oyster Software*, 2001 WL 1736382; *Intel*, 114 Cal. Rptr. 2d 244.

²⁶ 18 U.S.C. § 1030.

²⁷ *See, e.g., EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001); *Register.com*, 126 F. Supp. 2d 338.

It is worth noting as an aside that browse-wrap licenses are of dubious validity as a matter of contract law. Unlike click-wrap licenses, where the party to be bound expressly assents to terms, there is no express agreement in such a case. Indeed, there is here not even the fiction of assent a minority of courts have used to justify shrinkwrap licenses. As a result, no court to actually consider the enforceability of a browse-wrap in the contract law context has found it to be an enforceable contract. *See, e.g., Specht v. Netscape Comm. Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001) (“Defendants’ position, if accepted, would so expand the definition of assent as to render it meaningless.”); *Westcode, Inc. v. RBE Electronics*, 2000 WL 124566 (E.D. Pa. 2000); *Ticketmaster Corp. v. Tickets.com*, 2000 WL 525390 (C.D. Cal. 2000). Even *Register.com* enforced the terms of use in the CFAA and trespass contexts only because it was clear that the defendant was aware of the terms. Given this, it is truly startling that courts seem willing to find violations of a criminal statute where they would not even find breach of contract.

²⁸ This fact distinguishes the trespass and CFAA cases I discuss here from true cases of unauthorized access, in which crackers exploit software bugs to gain access to a computer system or part thereof that the owner never intended to open to the outside world. It is this latter set of cases that the CFAA and other computer crime statutes were designed to deal with.

exclude others from using the site. They do not see that cases of this sort are really efforts to control the flow of information to or from a site, and that information is a public good to which we have never applied the “inviolability” rules of intellectual property.²⁹ The courts have not understood these things, and so they get the cases wrong.

But courts could understand these things – could get the cases right – even within the framework of the cyberspatial metaphor. In other contexts, courts have proven receptive to the idea that Internet law can both rely on a framework designed for the real world and yet can modify that framework to take account of the peculiarities of cyberspace. For example, rote application of personal jurisdiction rules and the metaphors of the physical world leads inexorably to the conclusion that anyone who puts up a Website is amenable to suit anywhere on the planet, on the theory that they have sent their “products” into each and every forum. While a few early cases took that position,³⁰ most courts quickly recognized that more was needed.³¹ A number of courts developed an Internet-specific “interactivity” test for jurisdiction: passive Websites didn’t confer jurisdiction wherever viewed, but interactive Web sites did.³² This test has its problems,

²⁹ The fact that information is what is really at stake in these cases is most clear in *Intel v. Hamidi*, 114 Cal. Rptr. 2d 244 (Ct. App. 2001), in which Intel objected to email from a former employee because of its content, and in *eBay v. Bidder’s Edge*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), in which eBay filed a variety of intellectual property claims in an effort to get control over its uncopyrightable data before finally prevailing on the trespass to Web server theory. See also Chang, *supra* note __, at 466 (“eBay transmogrifies cyber-trespass theory into a remedy that protects intellectual property interests, rather than personal property interests.”).

³⁰ See, e.g., *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). For criticism, see Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 **Va. J. L. & Tech.** (1996), <http://www.student.virginia.edu/~vjolt/vol1/BURK.htm>.

³¹ See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997).

³² See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). For a discussion of these cases, see Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 **Berkeley Tech. L.J.** 1345 (2001).

and courts have started to move away from it. Significantly, the test the courts seem to be moving towards uses the traditional standards for determining personal jurisdiction, but applies them with sensitivity to the nature of the Internet, recognizing that not every Web site is necessarily a purposeful availment of the benefits of every forum state.³³ Thus, acceptance of the traditional due process framework for personal jurisdiction has not prevented courts from considering the practical differences between the Internet and other forms of communication.

A second example concerns the dormant commerce clause. The Supreme Court has repeatedly held that states are not free to regulate interstate commerce in a way that imposes undue and potentially conflicting burdens on those who sell products or services nationwide.³⁴ In *Healy v. Beer Institute*, for example, the Court struck down a Connecticut statute that required beer merchants to swear that they weren't charging a different price in a neighboring state than they did in Connecticut.³⁵ Most dormant commerce clause cases in the physical world have focused on intentional state efforts to burden out of state providers in order to benefit local ones.³⁶ On the Internet, by contrast, courts have applied the dormant commerce clause somewhat differently. On the one hand, courts are more likely to invalidate state regulation of the Internet under the

³³ See, e.g., *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000); *Millenium Enterprises v. Millenium Products*, 33 F. Supp. 2d 907 (D. Or. 1999) (both rejecting *Zippo* approach); *ALS Scan v. Digital Service Consultants*, __ F.3d __ (4th Cir. 2002) (modifying the *Zippo* approach). Geist chronicles the rejection of the *Zippo* test in favor of a test based on purposeful availment of the benefits of doing business in the forum, coupled with a reliance on the jurisdiction in which the effects are felt in the case of intentional torts. See Geist, *supra* note __, at 1371-80.

³⁴ See, e.g., *Quill v. North Dakota*, 112 S. Ct. 1904, 1913 (1992); *City of Phila. v. New Jersey*, 437 U.S. 617, 626-27 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144-45 (1970). For a good discussion of the Internet cases, see Dan L. Burk, *Federalism in Cyberspace*, 28 *Conn. L. Rev.* 1095, 1123-34 (1996).

³⁵ 491 U.S. 324, 336-37 (1989).

³⁶ This was arguably the effect of the regulations at issue in *Quill* and *Healy*.

dormant commerce clause, because the inherently interstate nature of Internet communications means that a larger class of people will be burdened with understanding and complying with a multitude of regulations.³⁷ Further, because a single Web page is accessible in all 50 states, the burden of complying with inconsistent regulations is greater than it is in the physical world.³⁸ On the other hand, because Internet communication is more malleable than physical goods are, it may be easier to comply with some sorts of state regulations. Courts have taken the ease of compliance into account in determining that state anti-spam statutes do not violate the dormant commerce clause,³⁹ while striking down other statutes that reach too broadly.⁴⁰ They have, in short, adapted a constitutional doctrine based on the physical world to accommodate the somewhat different character of the Internet.

Government regulation of indecent speech on the Internet has also been fertile ground for metaphoric debates. When Congress passed the Communications Decency Act in 1996, it sought to preclude Internet sites not only from disseminating

³⁷ See *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down Internet anti-pornography statute on dormant commerce clause grounds); Burk, *Federalism*, *supra* note __, at 1131-32 (suggesting that states cannot simply regulate Internet commerce because of the burdens this would place on out-of-state companies). *But see* *Hatch v. Superior Court*, 80 Cal.App.4th 170, 194-195, 94 Cal.Rptr.2d 453 (2000) (California statute which makes it a crime to transmit harmful matter over the Internet to a child, does not violate the Commerce Clause); *People v. Hsu*, 82 Cal.App.4th 983, 99 Cal.Rptr.2d 184 (2000) (same); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 **Yale L.J.** 785 (2001) (suggesting that most state statutes won't raise dormant commerce clause problems).

³⁸ Burk, *supra* note __, at 1132. In particular, it may be impossible for a Web site owner to comply with two inconsistent state regulations, since the same page will be viewed in both states, while an offline company could presumably ship different products to different states.

³⁹ See *Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 115 Cal.Rptr.2d 258 (Ct. App. 2002); *State v. Heckel*, 143 Wash.2d 824, 24 P.3d 404 (2001).

⁴⁰ *Pataki*, 969 F. Supp. at 160; *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Booksellers' Foundation for Free Expression v. Dean*, 2002 WL 1173669 (D. Vt. 2002) (striking down anti-pornography statute that punishes conduct on the Internet without regard to where it occurs); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001) (same); *Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001).

constitutionally unprotected obscene speech, but also speech that was merely “indecent,” “lewd” or “harmful to minors.”⁴¹ Here too the courts were asked to choose among metaphors: was the Internet more like a bookstore or library, in which indecent speech must be permitted, or like a radio or television broadcast in which otherwise protected speech could be forbidden?⁴² In *Reno v. ACLU*,⁴³ the Court concluded that the Internet was deserving of full First Amendment protection, not the lesser protection afforded broadcast media. In so doing, the Court considered how well each metaphor actually applied to the Internet. It distinguished *Pacifica* in part on the ground that

the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material. . . .

Each medium of expression ... may present its own problems. Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its "invasive" nature.

⁴¹ 47 U.S.C. §223(a) (Supp. 1997).

⁴² See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The special First Amendment rules for broadcast media have been devastatingly criticized on their merits, see, e.g., **Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Regulating Broadcast Programming*** 203-36 (1994), but the law clearly treated the two media differently. *Id.* at 203.

⁴³ 521 U.S. 844 (1997).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident."⁴⁴

The Internet was not entirely like either a bookstore or a television station, but the Court was able to use both metaphors as points of departure. It considered how the particular characteristics of existing media were thought to justify different regulatory regimes, and compared the characteristics of the Internet to determine what level of regulation should be permitted in what was clearly a new medium. Further, Justice O'Connor's concurrence suggested that the Court was sensitive not only to how the Internet differed from any of the existing media offered as analogies,⁴⁵ but also to how the nature of the

⁴⁴ *Id.* at 867, 868-69 (citations and footnotes omitted).

⁴⁵ *See id.* at 889-90:

A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for

Internet might change over time in ways that affected its regulability.⁴⁶ This latter issue returned in 2002, when the Court considered the constitutionality of the CDA's successor statute, COPA. A fractured Court held that the statute's command to apply contemporary community standards to the Internet was not itself unconstitutional, though the Court remanded the case for consideration of other constitutional problems.⁴⁷

In all of these cases, courts have avoided becoming prisoners of the metaphors they used. They have shown the power to adapt laws and metaphors constructed with the physical world in mind to take account of the rather different world of the Internet. In short, the brief history of Internet law to date suggests that courts have the ability to escape the confines of a metaphor when then need to. The problem is a more limited one: that so far they have simply not succeeded in doing so where the "cyberspace as place" metaphor is concerned. Hunter is right to worry about the consequences of this failure, but I believe he is wrong to suggest that it is global or inevitable.

II. The Equation of Place and Property

There is a second conceptual leap in the Internet trespass cases. The decisions have not only assumed that cyberspace is a place akin to the physical world, but they

example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

⁴⁶ *Id.* at 890 ("Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway."). *See also* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 *Emory L.J.* 869, 886-89 (1996); Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 *Mich. L. Rev.* 395 (1999).

⁴⁷ *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002).

have further assumed that any such place must be privately owned by someone who has total control over the property. This is a common assumption these days; it sometimes seems as though our legal system is obsessed with the idea that anything with value must be owned by someone.⁴⁸ But as any scholar of real property will tell you, not all land is privately owned, and even land that is privately owned frequently does not fall totally within the dominion of the owner. To reach the results in cases like *eBay*, *Verio* and *Hamidi*, a court must conclude that a particular type of property is appropriate for the Internet.

A. The Internet and Public Space

While we often think of physical space as being privately owned, much of it is not. Our society could not exist without abundant public space. Not only would we be poorer if there were no parks, no wilderness, and no public libraries and museums, but the market economy itself would suffer without the constant support provided by roads, bridges, airports, and the other infrastructure of modern government. And life as we know it would be impossible if we did not reserve the air and water as a public commons.⁴⁹

⁴⁸ See, e.g., Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 **Yale L.J.** 1717, 1725 (1999) (“There has been inexorable pressure to recognize as an axiom the principle that if something appears to have substantial value to someone, the law must and should protect it as property.”). Rochelle Dreyfuss describes this instinct as “if value, then right.” Rochelle Cooper Dreyfuss, *Expressive Generosity: Trademarks as Language in the Pepsi Generation*, 65 **Notre Dame L. Rev.** 397, 405 (1990). See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 **Va. L. Rev.** 149, 167 (1992) (“A culture could not exist if all free riding were prohibited within it.”); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 **Yale L.J.** 1687, 1715 (1999); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 **Tex. L. Rev.** 893 (1997) (all decrying this trend).

⁴⁹ For a description of a world in which one company has monopoly control of the air we breathe, see **Total Recall** (cite film).

Public spaces sometimes provide a subsidy to the poor: anyone can enter a city park, while a private garden would exist only if it could charge enough to be self-supporting. More importantly for our purposes, public infrastructure serves a vital economic purpose. Roads, lighthouses, and indeed our system of government have some of the characteristics of a public good: it is difficult to exclude non-paying users.⁵⁰ Further, coordination is important to efficient use of this infrastructure. While it is possible to imagine privatizing all the public infrastructure in our economy, from roads to a postal service to jails to courts,⁵¹ it is not likely that the result will be both convenient and competitive. Imagine paying a different toll every time you turned a corner; roads that only worked with certain types of cars; and police forces that obeyed no limits except those set by a private employer. For such a world to be theoretically efficient, we would have to have competitive choices in each of these areas. But the very fact of that competition would create dramatic inefficiencies in production and require a breathtaking number of transactions to “clear” the rights necessary to live one’s life. We have public space in the physical world not by accident, or because it is left over space that no one wants, but because it is a necessary part of a functioning system of property.⁵²

⁵⁰ As Ronald Coase has pointed out, public goods are sometimes provided privately. See R.H. Coase, *The Lighthouse in Economics*, 17 **J.L. & Econ.** 357, 374-76 (1974). But the fact that a public good can sometimes be provided privately – usually in some form of limited commons arrangement – does not mean that private ownership is necessarily the most efficient form of provision.

⁵¹ For an innovative effort along these lines, see Stephenson, *supra* note __.

⁵² For a discussion of a related problem – “anticommons” property, in which ownership in necessary inputs is too divided to permit efficient usage – see Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 **Harv. L. Rev.** 621 (1998); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 **Sci.** 698 (1998). The anticommons problem can be solved either by making the property in question a public resource or by concentrating ownership in fewer hands. On the Internet, the latter option doesn’t seem realistic. A search engine needs to access billions of Web sites owned by tens of millions of different parties; there is no way to consolidate those rights. Cf. Rose, *Romans*, *supra* note __, at [draft at 21] (anticommons in intellectual property should be solved by granting limited public access rights).

So too with the Internet. Even the staunchest advocates of propertization on the Internet tend to take for granted all sorts of public spaces. We assume that telephone companies will pass our data along on a nondiscriminatory basis,⁵³ even as we deregulate telephony⁵⁴ and resist any kind of nondiscrimination obligation for cable modems.⁵⁵ We assume that no one will own the top level domain names that we all use to communicate, even as we grant property rights in second-level domains.⁵⁶ We assume that the protocols that make up the Internet are free for the world to use, even as we permit the patenting of improvements to those protocols.⁵⁷ And we assume that search engines and

⁵³ For a discussion of the question of nondiscriminatory carriage of Internet traffic, see James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 **Fed. Comm. L.J.** 225 (2002). For a discussion of Internet “peering” arrangements among providers, see Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame On You – Fool Us Twice Shame on Us: What We Can Learn From the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 **Wash. U.L.Q.** 89 (2001).

⁵⁴ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁵⁵ The Federal Communications Commission has so far refused to compel cable companies to provide broadband Internet access on nondiscriminatory terms, though the Federal Trade Commission did require a form of such access as a condition of the AOL-Time Warner merger. See Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 **Berkeley Tech. L.J.** 631 (2001). For discussion of the open access issue, see Lemley & Lessig, *supra* note __; Christopher S. Yoo, **Yale J. Reg.** [cite]; Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable* 16 **Berkeley Tech. L.J.** 677 (2001); Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 **U. Colo. L. Rev.** 819 (2000).

⁵⁶ For a discussion of the domain name allocation process and its flaws, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 **Duke L.J.** 17 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 **DUKE L.J.** 187 (2000); Jonathan Weinberg, *ICANN as Regulator* (working paper 2002). See also Graeme Dinwoodie & Lawrence Helfer, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 **Wm. & Mary L. Rev.** 141 (2001); Kesan & Shah, *supra* note __; Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 **J. Sm. & Emerging Bus. L.** 149 (2000); Timothy Wu, *Application-Centered Internet Analysis*, 85 **Va. L. Rev.** 1163 (1999).

⁵⁷ The Internet runs on a set of open, nonproprietary protocols in large part because the Internet Engineering Task Force (IETF), the SSO that controls the TCP and IP protocols, had a long-standing policy that it would not adopt proprietary standards. That policy has now changed. The World Wide Web Consortium (W3C) also recently considered changing its policy to permit proprietary Web standards, prompting a firestorm of criticism. See, e.g., Janice Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 **Berkeley Tech. L.J.** [starting page], [draft at 5-6] (forthcoming 2002) (describing this debate); Wade Roush, *Web Tolls Ahead?*, *Innovation* 20 (Jan/Feb. 2002). At this writing, the W3C appeared likely to adhere to its royalty-free patent-licensing policy. See Margaret Kane, *W3C Retreats*

other data collectors will enable us to cull information from the vast archive we have collectively created, even as we begin to impose liability on search engines for finding things we don't like.⁵⁸ In short, we rely on public "space" on the Internet, just as we do in the real world. Indeed, even at this early stage in the Internet's development the public accessibility of its key features is so deeply ingrained that we don't think about it. We simply take it for granted. Only when that accessibility is under attack do we even become aware of the baseline assumption of openness.

The cyberspatial metaphor, then, doesn't determine whether something will be owned. Courts that apply the metaphor still have a choice to make: is this the sort of space that should be public or private? On the Internet, there are good reasons to think that the balance should be tilted in favor of public space in many contexts. The economic rationale underlying much privatization of land – the tragedy of the commons⁵⁹ – simply does not apply to information goods. It is possible to imagine physical bandwidth or

From Royalty Policy, News.com, Feb. 26, 2002, <http://news.com.com/2100-1023-845023.html>. Assertions by IBM and Microsoft of patents that allegedly cover ebXML and SOAP have also caused huge controversy in the Internet standards community. *See, e.g.*, David Berlind, *IBM, Microsoft Plot Net Takeover*, **Enterprise**, April 11, 2002; cite ebxml. IBM later backed down on its ebXML patent. *See* email from Robert Sutor to the ebXML Joint Coordinating Committee, April 18, 2002 (on file with author). It remains to be seen whether the open nature of the Internet will survive this shift to proprietary standards. For an argument that the Net is moving in this direction, see **Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World** (2001).

⁵⁸ Plaintiffs have filed a number of suits challenging the propriety of linking to content or displaying search results. *See, e.g.*, *Kelly v. Ariba Soft*, 280 F.3d 934 (9th Cir. 2002) (collection of images by search engine to display in search results was fair use, but linking to the images on the searched site was illegal); *Yahoo!, Inc. v. La Ligue Contre le Racisme & L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (noting French criminal conviction of Yahoo! for permitting members to auction Nazi paraphernalia, but refusing to enforce the French judgment on First Amendment grounds); Anick Jesdanun, *Lawsuits Nip at the Heart of the Web*, **S.F. Chron.**, June 10, 2002, at E1 (detailing more such claims). For a prescient discussion of this issue, see Edward A. Cavazos & Coe F. Miles, *Copyright on the WWW: Linking and Liability*, 4 **Rich. J. L. & Tech.** art. 3 (1997); Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in the Virtual World*, 82 **Minn. L. Rev.** 609, 631 (1998).

⁵⁹ *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 **Science** 1243, 1244 (1968).

server capacity being overconsumed, though the danger of that currently seems remote.⁶⁰ But it is not possible to imagine overconsumption of a non-rivalrous thing like data. My use of your data does not deplete it or prevent your use in the same way that my use of your land might.⁶¹ From an economic perspective, the more people who can use information, the better.⁶²

Further, some of the differences between the Internet and the real world – notably the absence of physical proximity online – suggest that we should be more worried about the consequences of privatizing online space. If Sotheby’s kicks me out of their auction house, I can stand on the street outside, observing who enters and who leaves with a Picasso, and asking people to share information with me. If eBay kicks me off their site, I have no similar power online. So even if the goal were to mimic the rights that private physical property provides in the online world, granting private property rights online wouldn’t necessarily achieve that goal. The effective rights that courts have granted in

⁶⁰ See, e.g., Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age* [draft at 18] (working paper 2001) (“On the Internet, problems of physical infrastructure and overcrowding are less apparent”). It is significant that in none of the Internet trespass cases was there any real threat of such physical overuse. In *eBay*, the only case that focused significant attention on the issue, the use in question never consumed more than 2% of eBay’s server capacity. *eBay, Inc. v. Bidder’s Edge*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000). Subsequent cases posed even less of a threat. Indeed, the courts in *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000); *Oyster Software, Inc. v. Forms Processing*, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001); and *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Ct. App. 2001) all acknowledged that the defendant’s conduct would not harm the servers or impose capacity constraints. They nonetheless found trespass to chattels because they followed *eBay*’s dictum in concluding that such harm need not be proven.

⁶¹ See, e.g., Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age* [draft at 3] (working paper 2001).

⁶² A separate concern is the “public goods problem,” which occurs when creators have insufficient incentive to develop new ideas because it is cheap and easy to copy what they have created. But this problem hardly justifies application of real property models to the Internet. Intellectual property law is designed to deal with the public goods problem, and already provides substantial incentives to develop new works. Indeed, because intellectual property protection is expanding day by day, reliance on real property law as a supplement seems less appropriate today than ever before.

the Internet trespass cases exceed anything any of the plaintiffs could have obtained offline.

This is not to suggest that there should be no ownership of Internet “spaces” at all. Rather, my point is that private and public spaces must coexist on the Internet, just as they do in the real world.⁶³ As a result, one cannot look at any given part of the Internet and assume that it must or should be private property. It might be appropriate to declare that space private, but it might not.⁶⁴

B. How Private is Private?

Even were we to decide not only that the Internet is like a physical place but that it is a physical place that should be privately owned, that still would not justify the results in the trespass cases. It is incorrect to think of private property as a unitary phenomenon. Rather, to rely on a time-honored metaphor, property itself is a “bundle” of rights that attach to a particular piece of property. What sticks are in the bundle, and who holds them, may vary from case to case. To take two examples, the rights we normally grant to owners of intellectual property or personal property differ in significant respects from the rights we give to owners of real property.⁶⁵ This is particularly important in the Internet

⁶³ Carol Rose suggests that the Internet might be divided into private and public spaces with very different characteristics, sharing different needs. Rose, *supra* note __, at 154.

⁶⁴ Many have argued for the creation of public space online, often on a public trust model. See, e.g., Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 *Or. L. Rev.* 647 (2001); Molly S. van Houweling, *Cultivating Open Information Platforms: A Land Trust Model*, 1 *J. Telecom. & High Tech. L.* __ (forthcoming 2002). See generally Lessig, *Future*, *supra* note __ (articulating the metaphor of the Internet as an “information commons”).

⁶⁵ See, e.g., Chang, *supra* note __, at 465 (“the law has apportioned different bundles of rights to different types of property.”). For example, patents and copyrights expire. The law sometimes compels licensing of those rights at a mandated rate. And copyright, trademark and trade secret law prevent only some types of uses of a protected work. Indeed, the differences are sufficiently great that there is a substantial debate

trespass context both because the courts are nominally applying the law of personal rather than real property⁶⁶ and because the underlying issue in many of these cases is really one of intellectual property, not the sanctity of a Web site. Intellectual property rights are notably incomplete, limited in a variety of ways in order to advance the ultimate public good.⁶⁷

over whether IP is really property at all. See generally Stephen L. Carter, *Does It Matter Whether Intellectual Property is Property?*, 68 *Chi.-Kent L. Rev.* 715, 716 (1993)

⁶⁶ The doctrine of trespass to chattels traditionally required actual harm to the chattel, while trespass to land was actionable whether or not the owner's interest in the land was injured. See, e.g., Burk, *supra* note ___, at 32-37, 53-54.

⁶⁷ The Supreme Court has repeatedly invoked the limited and instrumental nature of intellectual property rights, not hesitating to limit those rights when the public interest has so required. See, e.g., *id.* at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare"); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work ... and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors ... and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.").

Various statutory provisions reflect this balancing. See, e.g., 15 U.S.C. s 1125(a) (1994) (protections for news reporting and noncommercial use in federal dilution statute); 17 U.S.C. s 102(b) (idea-expression dichotomy); *id.* s 107 (fair use doctrine); *id.* s 108 (right to make library copies); *id.* s 110 (right to make certain miscellaneous copies and performances); *id.* s 117 (right to copy computer software); 35 U.S.C. s 112 (requirement of public disclosure of patents); and numerous commentators have alluded to it. See, e.g., 1 Paul Goldstein, *Copyright* s 1.14, at 1:40 (2d ed. 1995); L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright* 120-22 (1991); Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock-Out" Programs*, 68 *S. Cal. L. Rev.* 1091, 1198 (1995); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 *U. Dayton L. Rev.* (1997); Pierre N. Leval & Lewis Liman, *Are Copyrights for Authors or Their Children?*, 39 *J. Copyright Soc'y* 1, 11 (1991); Litman, *supra* note 77, at 967- 68; Menell, *supra* note 17, at 1082; Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 *J.L. & Com.* 509, 515 (1996). These are only a few of the innumerable citations on this point.

Physical resources are also subject to different rules depending on their nature. We have different sets of rights for air,⁶⁸ minerals, land and water. Water may be a particularly appropriate analogy to the electrons that are at issue in the Internet trespass cases, as both flow according to the laws of physics. As Blackstone put it, water “is a movable, wandering thing, and must of necessity continue common by the law of nature so that I can only have a temporary, transient, usufructary property therein: wherefore, if a body of water runs out of my pond into another man’s, I have no right to reclaim it.”⁶⁹ On one view, the Internet trespass cases are all about chasing down water in order to reclaim it.

Even within the narrower context of private land, not all rights are uniform. Private property is held in a variety of forms; the fee simple is only one extreme example.⁷⁰ Property may be held subject to reversionary interests, or only for a period of years, or without a right to make certain kinds of uses of the land.⁷¹ Different parties may own land and the buildings thereon.⁷² Parties may jointly own overlapping rights to use the same piece of property. Carol Rose and Elinor Ostrom have both written of “limited

⁶⁸ It is, if you will forgive the expression, “as free as the air to common use.” See *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

⁶⁹ 2 **William Blackstone, Commentaries** *18. For a cautionary amendment, see Richard A. Epstein, *Title*, 76 **Ind. L.J.** 803, n.14 (2001).

⁷⁰ For a discussion of those forms, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 **Yale L.J.** 1 (2000).

⁷¹ See generally **Jesse Dukeminier & James Krier, Property Law**.

⁷² For example, employees of Stanford University may buy houses on the Stanford campus, but the campus owns the land on which the house is built, and restrictive covenants prevent the house from being resold except to another member of the Stanford community. Similarly, much of the land in Hawaii is owned not in fee simple, but in long-term leasehold interests. See, e.g., Eric Stephen O’Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 **Geo. L.J.** 501, 506-07 (2001).

common property,” regimes in which property is held in common by a subset of the general public or in trust for the benefit of a particular group.⁷³ Property interests of all sorts may be limited by easements or covenants, both those recorded with the property itself and those implied for some public purpose. And property interests are hardly immutable; the fundamental legal rights associated with ownership have changed over time.⁷⁴

Remedies for incursions upon property interests also vary depending on the nature of the interests on both sides. While the normal rule is that property is protected by injunctive relief, that is not always the case. In some cases courts will permit infringement of a property right to continue, perhaps requiring the interloper to pay damages to compensate the property owner.⁷⁵ Further, courts do not always conclude that an unwanted incursion upon real property is illegal. Under the doctrine of trespass, physical intrusion onto the land is itself actionable. But under the law of nuisance, certain more intangible intrusions onto private space – the playing of loud music next

⁷³ See, e.g., **Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*** 23 (1990); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems*, 83 **Minn. L. Rev.** 129, 139-43 (1998).

⁷⁴ The clearest example is the enclosure movement, in which the law went from recognizing the right of an animal owner to graze the animal on another’s private but unfenced land to the opposite assumption. See, e.g., **David Dery, *Cowboy Culture*** 308-10 (1981); R. Benjamin Brown, J.D., Ph.D., *Enclosing America: Creating Private Property Rights in the Nineteenth Century*, Center for the Study of Law and Society working paper 2001. Rusch notes the unchecked growth of fences, in which enterprising property owners fenced off lakes, roads, and other public resources in order to privatize them. Rusch, *supra* note __, at 582-85. A number of scholars have referred to the unchecked growth of intellectual property rights as a “second enclosure movement.” See, e.g., James Boyle, *Fencing Off the Genome: The Second Enclosure Movement?* (working paper 2002); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 **Berkeley Tech. L.J.** 777 (2000).

⁷⁵ In intellectual property law, for example, there are a number of compulsory licenses mandated by the copyright statute. See, e.g., 17 U.S.C. §§ 111, 114, 115, 119. In addition, the Supreme Court has on several occasions suggested that injunctive relief may not be appropriate against certain types of infringement. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001). examples from real property law??

door, say, or the emission of pollutants – are only actionable if the harm they cause the property owner exceeds the benefits associated with the conduct.⁷⁶ Even if we accept the metaphor of cyberspace as real property, therefore, we are left with a variety of legal means to implement that idea. As Dan Burk has persuasively argued, in the Internet cases that have come up so far an absolute right to exclude is the wrong choice as a policy matter.⁷⁷

The nuisance cases are particularly significant because they show that even in the context of real property, there is room to focus on the defendant's conduct. Nuisance law therefore permits us to weigh the costs and benefits of exclusion – perhaps administratively a more costly approach than an absolute rule,⁷⁸ but almost certainly the right approach when considering the creation of a fundamentally new right that would change the established patterns of behavior on the Internet.⁷⁹ The cyberspatial metaphor does not impel us inexorably towards an absolute right of exclusion. Rather, we should ask whether, in the context of the Internet, the defendant's conduct is one that intrudes on some fundamental right we want to confer on the owner of a Web server.

In the Internet trespass cases that have been litigated so far, the defendant's conduct has fallen into two basic categories: an attempt to acquire information and an attempt to convey information.⁸⁰ Acquisition of information is normally a good thing, so

⁷⁶ See, e.g., Burk, *supra* note __, at 53.

⁷⁷ *Id.* at 49-54. See also Hunter, *supra* note __, at __.

⁷⁸ Cf. Edward Lee, *Rules and Standards for Cyberspace* (working paper 2001).

⁷⁹ See Burk, *supra* note __; cf. Thomas W., Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357, 394-95 (2001).

⁸⁰ Tim Wu suggests that we might distinguish between these two on the grounds that an attempt to acquire information from outside requires a different sort of conduct than an attempt to send information to the

long as the information is available in a public place and is not itself protected by intellectual property law. *eBay*, *Verio* and *Oyster* all involved efforts to download unprotected information from a publicly accessible Web site. This is unexceptional conduct that it makes little social sense to enjoin. In Burk's terms, access to eBay's public data by those who would promote competition is "locally objectionable but globally beneficial."⁸¹ By contrast, the downloading of copyrighted songs, text or software from a Web page without authorization can have market-destructive effects. Similarly, acquiring information from a non-public source by hacking into a private computer system is conduct that deserves to be prohibited. But we do not need a broad doctrine of trespass or even nuisance to reach that result. Intellectual property and computer crime laws already punish the improper acquisition of information, without also punishing socially beneficial uses.

Dissemination of information can also be either good or bad, depending on the context. Dissemination of unprotected speech – obscenity, true threats, defamation, and false statements of fact – serves no social function and has great capacity for mischief. By contrast, dissemination of other kinds of information is generally desirable as a social matter. The only exception may be where the recipient is overwhelmed with large quantities of undesired information. *Hamidi* involved an effort to disseminate protected speech of relevance to a particular targeted audience and therefore deserves to be

outside. See Wu, *supra* note __, at 1169. But in both cases the defendant has engaged in some affirmative conduct; the real question is whether the law should prohibit that conduct on the basis of its effects, not because of the form it takes. Accord Orin S. Kerr, *Are We Overprotecting Code? Thoughts on First-Generation Internet Law*, 57 **Wash. & Lee L. Rev.** 1287 (2000) (suggesting that the law is wrongly regulating computer code based on its form rather than what it does).

⁸¹ Burk, *supra* note __, at 52.

protected, even though Intel might not like the message.⁸² The *Cyber Promotions* cases, by contrast, involved bulk, unsolicited commercial email that in many cases also made false representations as to its source. While there is some speech value to spam, its social harm outweighs its value, and so it should probably be prohibited. But once again, we don't need a broad doctrine of trespass to reach this result. Statutes that prohibit spam, obscenity, defamation and libel already exist, and they do not also punish desirable social conduct like Hamidi's.

In short, to call something property is only to begin the inquiry, not to end it. Our society has many different rules of property to account for many different situations. The rights and remedies we do give to private property owners depend at least in part on the social value of allocating control to the property owner, and the social value of the use that defendants make of that property. When we apply these principles to the Internet, we find that existing tort law already does a rather good job of punishing undesirable conduct. Adding a particular form of strong property protection into the mix threatens to deter a good deal of valuable use of the Internet, without adding much value in stopping bad uses.

III. Conclusion

Metaphors exist to help us think through new problems by analogizing them to old ones. But blind application of the "cyberspace as place" metaphor to reach a

⁸² See, e.g., *Hill v. Colorado*, 530 U.S. 703, 728 (2000) ("the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be the opportunity to win their attention.'"); Kreimer, *supra* note __, at 146-47 ("a great deal will turn on the question of whether, in non-commercial cases, the courts will give priority to the metaphor of property rights in the servers or to" the First Amendment).

particular result obscures more than it illumines. This doesn't mean that the metaphor can't be valuable. Thinking about the Internet by reference to the real world is fine, if for no other reason than that courts must apply a host of real-world laws to the Internet. But it will serve its purpose only if we understand its limitations – the ways in which the Internet is *not* like the physical world. Courts must also understand that metaphor is no substitute for legal analysis. “Property” is a doctrinal tool that we use in creating a just society. To reify it – to make it a talisman whose very invocation renders us incapable of thinking through the optimal social result – is to exalt form over substance. Choosing form over substance is rarely a good idea, and surely not on the Internet, where the form itself is nothing but a metaphor.