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Illinois Business Law Journal
University of Illinois College of Law
504 E. Pennsylvania Avenue
Champaign, IL 61820
law-iblj@illinois.edu

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BLOCKBUSTER'S $1 BILLION BID ON CIRCUIT CITY

I. Introduction

On April 14, 2008 Blockbuster Inc. announced publicly its offer to purchase electronic retailer Circuit City Inc. Blockbuster has been in talks with Circuit City for months regarding an acquisition. [1] On February 17, 2008 Blockbuster sent a letter to Circuit City Chairman Philip Schoonover offering over $1 billion for the transaction. [2] This is equivalent to $6 to $8 a share in cash for the company. [3]Blockbuster also stated that they were willing to pursue alternative deal structures to enable Circuit City shareholders to receive stock. [4] Circuit City is hesitant about the deal and has yet to reveal to Blockbuster its long-term corporate plans and performance data. [5] This paper will evaluate the benefits and negatives of the acquisition as well as discuss whether this merger should occur.

II. Why Circuit City Should Consider the Merger

The Blockbuster-Circuit City merger can result in benefits for both companies. Both Blockbuster and Circuit City have been suffering financially. Since January 6, 2008 Blockbuster had an outstanding debt of $758 million. [6] This debt was a result of Blockbuster's losing competition with various growing video rental alternatives on the rental market, such as mail-order DVDs from Netflix Inc., video-on-demand from cable services, and the sale of DVD's. [7] Circuit City also has been fighting a losing battle against its competitors, Best Buy and Wal-Mart. [8] Circuit City's shares had fallen from $30 in mid-2006 to $3.44 in March of this year. [9] After laying off 3,400 retail workers and receiving a $7.3 million tax benefit, Circuit City finally achieved a profit of $4.85 million for its fiscal fourth quarter. [10]

However, unlike Circuit City, it appears that Blockbuster is rising back to success. Nine months ago, Jim Keyes was brought in as Blockbuster's new CEO in order to revive the company. [11] Mr. Keyes focused on slashing costs, changing Blockbuster's online strategy, and improving the availability of merchandise. [12] His approach has worked as the projected first quarter net income for Blockbuster is $30 million, a drastic increase from last year's net loss of $49 million. [13] Keyes believes that Blockbuster's merger with Circuit City will result in even more success for the business. [14] First, the merger may result in cost savings by closing overlapping stores, cutting duplication at each company's head office, delivering products more effectively, and teaming up on advertising. [15] Store closings may prove to be a large cost savings since 95% of Circuit City stores are located within 5 miles of Blockbuster stores. [16]

Furthermore, Keyes plans to redesign Blockbuster and Circuit City into a "user friendly one stop shop with solutions for the consumers." [17] For example, Circuit City stores would have movie and game rentals available while Blockbuster would have hardware, such as portable media players for sale. [18] Instead of advertising low prices, a combined chain could attract consumers with a wide range of products and services. [19]

III. Riskiness of the Merger

On the other hand, the Blockbuster-Circuit merger may be plagued with problems. One such problem is the cost of purchasing Circuit City. Buying Circuit City would add significantly to Blockbuster's already outstanding $789 million debt load. [20] Circuit City is questioning whether or not Blockbuster would be able to pay the money necessary for the merger to occur. [21] Blockbuster stated that it could sell additional stock, borrow, and possibly get an investment from its largest shareholder, Carl Icahn, who has applauded Blockbuster's merger. [22] Another issue is that Blockbuster would be purchasing a larger company. Blockbuster's market capitalization of $630 million is about $80 million below Circuit City's $656.6 million. [23]

Furthermore, the potential deal threatens to distract both companies from solving their own issues with their financial state in the market. [24] The Blockbuster and Circuit City merger has been compared to the K-Mart and Sears merger. [25] Both K-Mart and Sears, like Blockbuster and Circuit City, had been struggling to combat rivals, such as Wal-Mart and Target. [26] However, after the Sears and K-Mart deal, business for the merged entity has continued to spiral downward. [27] It is questionable whether the merger between Blockbuster and Circuit City, like the Sears and K-Mart merger, will just hasten the demise of the two companies.

IV. Conclusion

Although Blockbuster seems to have many good ideas to reinvigorate both businesses through offering a wide range of products and services, creating a "one stop shop," however, the reality of a successful merger is questionable. Both companies have suffered financially. Blockbuster is already $789 million in debt. Furthermore, Blockbuster would be purchasing the bigger company since Circuit City has about $80 million more market capitalization. As a result, Blockbuster could be in over its head with the costs of the merger. Already, Blockbuster is having trouble coming up with the money to purchase Circuit City. Blockbuster claims that they may have to sell stock or borrow money in order for the merger to go through. Even though a cost savings may result from the store closings and advertising costs, this may not be enough to get Blockbuster and Circuit City out of their downward financial spiral. Therefore, both companies should proceed with caution in this merger.

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HOME IS WHERE THE MOST ECONOMICALLY BENEFICIAL LAWS ARE: FINDING THE BEST LOCATION TO INCORPORATE YOUR BUSINESS

I. Introduction

There are very few requirements for a business to be incorporated in a given state. The business must usually have a registered agent in that state, but rarely are there requirements to construct an office or actually engage in commercial transactions. [1] From the outset, it seems as though finding the best location to incorporate a business would be quite simple. This prediction, however, could not be farther from the truth. Finding the right place to "set up camp" is a long and crucial process; but if done properly, the initial research can lead to the creation of a business that uses state law to its advantage rather than demise.

II. The Advantages of Incorporation

Before figuring out where to incorporate a new business, the first question to ask is whether to incorporate. There are many tax benefits for both small businesses and large corporations, such as potential tax deferrals and deductions.
[2] Moreover, initial capital is often easier to acquire because a corporation can sell shares and raise equity capital, which generally does not have to be repaid and incurs no interest. [3] The issuance of individual shares also limits liability by prohibiting creditors from seizing personal assets if the corporation incurs too much debt. [4] The major downside of incorporation is that the entrepreneur inevitably reduces his or her percentage of ownership in the company; however,

depending on the type of company being created, this factor may outweigh every single one of the advantages of incorporation.

III. Issues to Consider when Selecting a State

When selecting a state for incorporation, there are a few general questions one might want to ask before making a decision. For example, within the state being considered, what is the minimum number of people required to form a corporation? What is the minimum capital requirement? What kinds of fees and taxes are required? The state of Delaware taxes non-Delaware resident shareholders of S-corporations (corporations that do not pay income taxes) on their distributive share of S-corporation income based on the percentage of that income derived from Delaware sources. [5] If a Delaware corporation has no Delaware-source income, these taxes are not an issue. [6] This may seem like a lot of legal jargon, but proactive research into state law is crucial to the economic success of a new, start-up business.

Proactively researching a state's requirements for incorporation is rarely going to be sufficient, even for those entrepreneurs already holding a juris doctorate degree. It is worthwhile to find a knowledgeable corporate attorney because the requirements of each state are not always that obvious. For example, it is important to know whether the corporation is allowed to keep its books and records outside the state, whether it is required to have a corporate bank account in that state, and whether the corporation is allowed to have its principle place of business outside the state. [7] A corporate attorney most likely has the expertise to not only think of these questions, but to answer them.

IV. The Benefits of Incorporating in Delaware

Rumor has it that Delaware is the best location for incorporating a business. So what does Delaware have that other states do not? For starters, Delaware's body of law is more business-oriented than any other location in the country. [8] Its advanced business court system is equipped to handle complex legal litigation, making it the state of choice for large corporations, foreign corporations, and many fast-growing companies. [9]

For those entrepreneurs with very little knowledge of the law, Delaware offers a home for new business that is supported by much more than prestige. Because the body of law tends to protect owners and shareholders more effectively than most other states' laws, predatory consumers (and lawyers) tend to be more hesitant in creating controversy with up-and-coming corporations. [10]

For those entrepreneurs who simply need "an entity and a bank account to purchase or hold property, accept payments as a contractor, or receive investment money," Delaware offers a headquarters for all stages of business. [11] This is convenient for those entrepreneurs with an eye on expanding a company across many different states. [12] However, Delaware can also prove just as convenient for those who want to form a company but then "leave it on a shelf" for future business operations. [13]

V. The Benefits of Incorporating in Your Home State

For the majority of small businesses, incorporation in one's home state is often the easiest and least expensive option. This is because most states have laws that require entrepreneurs to re-register a Delaware company in the state where it is actually doing business, and unfortunately, re-registration involves more than a few hours of paper work. [14] Not only will the new business be subject to all the same taxes and fees as an in-state company, but there is also the added expense of registering as a "foreign corporation" in the home state and any annual fees in both states. [15]

VI. Conclusion

Though it is important to research state law and get advice from legal professionals about incorporation, sometimes the best advice comes from fellow entrepreneurs who have come before you. If you cannot answer the question — "What is the state's court system's reputation of fairness in business practices?" — then you probably have not yet found a "home" for your business. All businesses are different, so the key to success is finding the state with the most economically beneficial laws for*your* specific entrepreneurial interests.

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PROBING SPYGATE: WILL THE NFL INDEMNIFY KEY WITNESS?

I. Introduction

From the moment of its initial disclosure, the National Football League's (NFL's) so-called Spygate incident had the potential to be one of the more notorious sports scandals in recent memory. During the first game of the 2007 season, a videographer on the New England Patriots sideline was caught taping the hand signals of New York Jets offensive coaches, a violation of Article 9 of the NFL Constitution and Bylaws.[1] The intrigue was apparent: the league's modern-day dynasty had been caught red-handed, begging the question of whether the Patriots had broken league rules at any other times during its championship era. The NFL's first-year commissioner, Roger Goodell, addressed the issue quickly, fining the team and head coach Bill Belichick a combined $750,000 and taking away a first-round draft pick.[2] Despite its rapid action, the NFL's handling of the situation added to the mystery. After announcing the penalty, the league destroyed the tapes it confiscated from the Patriots.[3] Further fueling the controversy, U.S. Senator Arlen Specter publicly rebuked the Patriots, accusing the team of "stonewalling" his own investigation into the matter.[4]

The questions followed the then-undefeated Patriots to Super Bowl XLII, when the Boston Herald reported that Matt Walsh, a former Patriots employee, allegedly taped the St. Louis Rams walk-through practice the day before New England's surprise upset of the Rams in

Super Bowl XXXVI.[5] Since that report, the NFL has expressed a desire to speak with Walsh regarding his knowledge of any potential wrongdoing by the team.[6] Walsh, for his part, has suggested he has damaging information, but his legal representation is demanding full indemnity before revealing his knowledge or role in any malfeasance.[7] The negotiations over the scope of an indemnity agreement have lasted for months, keeping the league in the dark as to what Walsh really knows.[8]

II. The Negotiations

Matt Walsh worked for the New England Patriots from 1996 to 2003, primarily shooting football video.[9] He claims he is willing, though reticent, to speak with NFL officials for fear that the Patriots will retaliate by suing him.[10] Walsh's attorney says that even if he were to prevail in a court action regarding the accuracy of his statements, the cost of engaging in a legal battle against and NFL franchise would be substantial.[11] Walsh has also expressed concern that the league could take away his 401k retirement plan.[12]

As a result, Walsh's attorney is seeking full indemnity from the league to immunize him from potential legal action.[13] Goodell has consistently stated that he is willing to provide indemnity in exchange for Walsh's cooperation, but talks between attorneys for each side have dragged on for months without an agreement on the scope.[14] NFL spokesman Greg Aiello says the league has offered Walsh full immunity on two conditions: that he is truthful and he hands over any materials he took from the Patriots.[15] Walsh's attorney, Michael Levy, claims that this offer falls short of full immunity.[16] Levy asserts that a standard indemnification agreement protects against untruthfulness as long as there is no bad faith.[17] In essence, Walsh wants to ensure that he cannot be sued even if mistakenly makes false statements. The NFL's indemnity offer would maintain the prospect of litigation if there is any want of truthfulness whatsoever.

III. Further Attempts at the Truth

In addition to the NFL's Spygate probe, there have been additional notable attempts to uncover more information. The aforementioned Senator Specter has commenced his own Spygate investigation, but claims his staff has been rebuffed in its attempts to speak with personnel from the Patriots and Jets, who employ several coaches who formerly worked under Belichick.[18] Specter says he suspects that the NFL is only offering conditional immunity in an attempt to discourage Walsh from speaking out.[19]

A former member of the St. Louis Rams tried a different strategy. Willie Gary, who played on the 2002 Super Bowl team, brought a federal lawsuit against the Patriots in February 2008.[20] Gary filed suit in New Orleans, the site of Super Bowl XXXVI, and accused New England of fraud, unfair trade practices, and engaging in a pattern of racketeering.[21] The claim was withdrawn in March, however, after Gary's lawyers acknowledged that the suit was intended to illicit testimony from Walsh.[22] Eventually, they determined the strategy to be futile because Walsh would be able to exercise his 5th Amendment right against self-incrimination in any legal proceeding.[23]

IV. Conclusion

The prolonged indemnification negotiations involving the NFL and Matt Walsh call into question the intentions of both parties. The longer the NFL goes without accommodating Walsh, the more it appears they do not want his information to become public. For his part, Walsh's insistence that he be indemnified from good faith mistakes could reinforce speculation that his insinuations are empty.

In this instance, however, it is the NFL that should consider compromising for the long-term good of its product. Though it is reasonable to demand utter truthfulness, the prospect of defending a lawsuit against a multi-billion dollar entity would sufficiently deter many people from speaking out. Regardless of what Walsh may say, the integrity of the league was brought into issue by the conduct of the Patriots, not Walsh. Thus, the NFL's real targets should be those within its ranks whose actions may tarnish the league's competitive reputation. Suing Walsh would serve little remedial purpose for the NFL, and by enabling his cooperation, all of his claims would be subject to extensive public scrutiny. If Walsh is found to be untruthful on any matter, the NFL would not necessarily need to resort to litigation to rehabilitate its image or seek redress against Walsh. The league would be vindicated in the all-important court of public opinion, while Walsh would forever be branded a prevaricator.

The league's failure to offer Walsh full indemnity may, rightly or wrongly, perpetuate Senator Specter's notion that the NFL does not want Walsh to speak out. Though the league would like to hold the threat of litigation over anyone who speaks falsely of it, the NFL's own handling of Spygate has contributed to the ongoing questions over the initial investigation. The destruction of the tapes, along with the apparent closing of ranks within the league establishment has exacerbated the situation. Enabling the testimony of Matt Walsh would give the league the opportunity to tackle the integrity issues raised by Spygate and potentially bring a measure of closure to this prolonged saga.

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[13] Fish, *supra* note 10.

[14] Chadiha, *supra* note 3.

[15] Fish, *supra* note 10.

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CYBERBULLYING: A MODERN PROBLEM

I. Introduction

A girl kills herself because she finds out the boy she liked on MySpace.com ("Myspace") was actually a couple of girls, allegedly assisted by their parents, making fun of her. [1] Another teenager is lured to a girl's home and beaten repeatedly in retaliation for comments made on MySpace.com, while the beating is filmed for posting on MySpace. [2]. These events and others have highlighted the lack of adequate criminal laws about online harassment and online bullying – sometimes called cyberstalking or cyberbullying.

This article will examine the recent cases of cyberbullying, address examples of current laws that deal with cyberbullying and cyberstalking, and, finally, explain what needs to be changed about current laws to address the developing criminal area of cyberbullying.

II. Cyberbullying in the News

A. Megan Meier

A month is a long time in the life of a 13-year-old girl. In one month, Megan Meier, a 13-year-old Missouri girl befriended a 16-year-old boy over MySpace named Josh Evans. [3] They flirted through MySpace, but then problems began when Evans began insulting Megan. [4] Evans sent Megan a cruel message, ending their friendship by saying "I hear you're not nice to your friends." [5]. Then, Megan told her mother about the very mean messages being left about her on the Internet that said things like, "Megan Meier is a slut" and "Megan Meier is fat." [6] These messages escalated over a two-day period. [7] Shortly after on October 16, 2006, Megan killed herself. [8]

Later it was revealed that Josh Evans was a fake identity, created by a girl who knew Megan and the girl's mother. [9] One of the major problems with finding the parents of cyberbullies responsible for their childrens' actions is the lack of a state or federal crime that applies to cyberbullying. [10]. No charges have been filed against the young girl and mother who, along with another friend, created the profile and initiated the harassment. [11]

B. Victoria Lindsay

On March 30, 2008, Victoria Lindsay was lured to a friend's house, where she was soon after attacked by six girls. [12] The girls slammed her head into a wall, and then punched her over and over until she was unconscious. [13] Then, once Victoria woke up, the girls began beating her again. [14] One of the girls filmed the beating the entire time, with the intent of posting the video on the popular video Website YouTube.com ("YouTube"). [15] The mother of one of the girls who took part in the beating claims that the beating was in retaliation for comments Victoria had made on MySpace. [16] The girls were charged under assault and battery, but nothing involving the creation of the video with the intent of putting it on the Internet. [17] Victoria's father said the motivation was to become famous on the internet, and is calling , along with others, for something to be done about the "shock Websites" that motivate children to create shocking videos in order to become Internet stars. [18]

C. JuicyCampus

A Website that allows anonymous posting of any information one wishes, JuicyCampus.com ("JuicyCampus"), encourages university students to spread gossip and rumors about their classmates, professors, and others. [19]. The information posted ranges from asking who has had sexual relations with a certain professor to rating the hotness (or ugliness) of various sororities to identifying which people on campus are gay. [20] The implications of this Web site and others like it have not been fully explored, but the spreading of rumors and the escalating popularity of JuicyCampus implicate the possibilities of cyberharassment and cyberbullying.

III. Current Laws

In Missouri, where Megan Meier lived and was bullied, the state statutes do not account for situations of online stalking or harassment. [21] The statute accounts for repeated harassment, and for credible threats of death or serious physical injury, but does not mention online harassment. [22] The Missouri governor is looking into changing the laws to respond to cases similar to Megan Meier's suicide. [23] The town of Florissant, one county away from where Megan lived, passed an internet harassment ordinance in Megan's memory to ensure that there are laws to protect children who are victims of online harassment and bullying. [24]

A Florida statute goes further in covering cyberbullying than Missouri and many other states. [25] Unlike the Missouri statute, it specifically mentions cyberstalking – defining it as electronic communications that cause "severe emotional distress" and serve "no legitimate purpose." [26] A statute like this can encompass more situations, including Megan Meier's suicide. However, it likely will not cover the beating of Victoria, which is allegedly motivated by posting a controversial video on YouTube.

Washington state has a fairly broad cyberstalking statute. [27] Washington, unlike many states, separates out cyberstalking into its own statutory section. [28] In addition to covering situations of harassment and intimidation, the statute says that, "A person is guilty of cyberstalking if he or she, with intent to…embarrass any other person…makes an electronic communication to such other person or a third party…using any lewd…words, images, or language…anonymously or repeated whether or not conversation occurs."

[29] By including situations of embarrassment and those involving lewd language, even those many anonymously, individuals who bully others online can be punished. [30] This could facilitate prosecutions against individuals posting on JuicyCampus. Ignoring issues with jurisdiction, an individual who anonymously posts a sexual or lewd rumor on JuicyCampus about someone else may be able to be convicted under the statute.

Given this range of statutes related to the problem of cyberbullying, and the lack of consistency in terminology – "online stalking," "online harassment," "cyberbullying," etc – state law has a way to go to adapt to the new situations involving online bullying.

IV. What Needs to Change

As explored above, there are a variety of types of statutes which may be applied, based on the state in which the cyberbullying occurs. Some states make mean, crude messages on popular Websites illegal, whereas others require a credible threat of death or serious physical injury or severe emotional distress. [31]

The reason that change is needed to protect individuals from cyberbullying is the psychological effect the Internet has on its audience, which is over one-third children and teenagers aged three to seventeen. [32] Individuals online feel more empowered to say what they want or anything that comes to mind, a phenomenon dubbed by experts as the "online disinhibition effect." [33] People say and do things in cyberspace that they would not do in face-to-face conversations for three reasons – (1) they can be anonymous, (2) they are not seen and (3) the conversations are not in real time. [34] In addition, the response to these uninhibited actions is especially dramatic in "emotionally vulnerable young people" who can be more easily manipulated when they go online. [35] When teenagers and others are cruel online, it brings real-world consequences like the suicide of Megan Meier. Additionally, the online disinhibition effect can be translated into the real world, as in the beating of Victoria Lindsay which was allegedly motivated by the desire to post a video on YouTube.

Although certain state and federal laws do not address these situations, some jurisdictions are changing their laws and special interest groups are getting involved. Cities like Flossiant, Missouri have enacted ordinances to fill in the gaps of current state laws. Parry Aftab, a lawyer famous for her work in Internet law, and the Wired Safety Group have created a Website to address the issue of cyberbullying –StopCyberbullying.org. [36] The Website educates individuals about cyberbullying and what steps can be taken to eliminate it. [37] The National Crime Prevention Council also has a campaign targeted toward children to help them recognize cyberbullying and to explain how to eliminate it called "Delete Cyberbullying." [38].

So, while there are strides being made to address the problem of cyberbullying, many states' laws need to change to address the issues that arise when there is no recourse for punishing individuals who have acted criminally. Despite the fact that the girls that abused Victoria Lindsay and the two young men that guarded the door of the house where she was trapped are being charged with various counts of assault and battery, Megan Meier's family has no recourse against the family that cyberbullied their daughter. [39]

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PRIMARY DEALERS CREDIT FACILITY: CHANGES FOR MARKET LIQUIDITY

I. Introduction

On March 17, 2008, Bear Stearns, one of the oldest and largest global investment firms on Wall Street unexpectedly collapsed and was sold to J.P. Morgan Chase & Co at a fire-sale price of $2 a share in stock, approximately $236 million.[1] With the rumors about Bear Stearns' losses in the mortgage industry circulating in the market, investors pulled their money out, the firm was short on cash, and the deepening losses left Bear Stearns with no other choice but to sell to their white knight, J.P. Morgan Chase & Co.[2] With the help of the Federal Reserve, the acquisition price was later revised to approximately $10 per share, totaling $1 billion; however, even the revised deal was still much lower thanthe company's value of $20 billion in January 2007.[3]

In response to the ongoing credit crisis and the sudden crash of Bear Stearns, the Federal Reserve ("Fed") took several measures to help ease the market. Wanting to ensure that other investment banks can avoid a crash like Bear Stearns, on March 16, 2008, the Fed Board of Governors announced a new loan program and established the "Primary Dealer Credit Facility" ("PDCF").[4] This new program is designed to help struggling investment banks avoid a liquidity crisis.[5]

II. Primary Dealers Credit Facility: What is it and what purpose does it serve?

The PDCF is a new lending facility established by the Fed for the newly launched loan program. The program allows the biggest twenty securities dealers, the primary dealers in the market, to temporarily obtain emergency loans and borrow money directly from the central bank, similar to the discount windows available to commercial banks.[6] The Fed acts as a lender of last resort and lends overnight loans to the investment companies at a low interest rate of

2.5%.[7] This program is the broadest use of the Fed's lending authority since the 1930s.[8] The Fedinitially planned to have the PDCF placed for at least six months, but there may be an extension depending on the conditions of the market.[9]

Through the PDCF, emergency loans are available everyday. The primary purpose of the program is to provide funding to individual dealers that are unable to fund its holding of securities in the broader repurchase
("repo") market.[10] Poor liquidity in trading particular classes of securities creates the impairment to fund securities in the repo market and this ultimately prevents investment companies from using these securities as collateral.[11] The PDCF will effectively provide temporary financing for collateral in the repo market in exchange for the Wall Street firms submission of their hard-to-trade-securities.[12] Later, the investment banks that submitted these hard-to-trade-securities will buy them back at a higher price usually the next
day.[13] The overall objective of the new program is to improve market liquidity, encourage primary dealers to be more inclined to lend to each other, and to provide relief to the distressed market for mortgage-linked securities.[14]

III. The Fed's Programs and Potential Problems

Within the first three days, the PDCF provided an average daily borrowing of $31.3 billions to investment firms.[15] Earlier in April the lending hit a high of $38 billion, but now the amount of loans have gradually declined.[16] The week ending on April 16, the daily borrowing through the lending program averaged approximately $24.804 billion.[17]

In addition, the Fed has also been auctioning super-safe Treasury securities to big investment banks through the Term Auction Facility.[18] As of April 17, 2008, there have been four auctions and on the fourth, the Fed auctioned another $24.999 billion securitieswhere the bidders paid an interest of 0.1% and the Fed received bids of $35.1 billion worth of securities.[19] The auction program is intended to help financial institutions and the troubled mortgage market.[20] Since theFed has sold or lent Treasury securities, the total securities auctioned amount to $300 billion, and the Fed stated that it will continue to make as much as $200 billion worth of Treasury securities available through weekly auctions.[21] The Fed has taken large measures to ease the market through changes of monetary policy and assist in increasingmarket liquidity by putting new programs and facilities in place, but there may be some potential for unwanted consequences.

Currently, some expert are recommending that the Treasury borrow more money than the government needs, then to take the excess and leave the remaining proceeds on deposit at the Fed.[22] There has also been some talk about issuing debt under the Fed's name rather than the Treasury's.[23] It can be argued that these additional recommendations were made because the current "solutions" to the recent credit crunch are insufficient in benefiting the market in the long-run. The lowered interest rates, changes in monetary policy, and the creation of the PCDF are in reality, "quick fixes" to the crisis not long-term solutions for the market. Allowing investment banks to rely on the Fed as a bailout may provide relief for some big investment banks on Wall Street for now, but for the Fed there is growing pressure to keep the funds coming. Before the credit crunch in August, the Fed had $790 billion in Treasury securities on its balance sheet, about 87% of its total assets; however, since the crunch, the balance has decreased to $490 billion over the last eight months.[24] With investment houses borrowing left and right, the Fed like any other central bank could fall short on funds if the current crisis continues to escalate. It is also true that theFed, like any other central banks, can easily print out more money if they find themselves in trouble; however, as easy as it sounds, there are consequences for such actions.[25] With more printing comes inflation and lower interest rates for short-term loans.[26]

IV. Conclusion

Since the market crisis began in August it has been a struggle for all. The Fed acted quickly to bring some assist the depressed market including lowering interest rates, federal fund's rates, and establishing the PCDF, and creating other facilities like the Term Auction Facility and discount windows hoping to ease the market. These measures have provided more liquidity for the market now, but there is no knowing how long the benefits and the funds will last. The Fed has more or less implemented "quick fixes" but have not proposed long-term changes that could potentially prevent and deal with future market problems. More permanent provisions should be implemented for a more stable future.

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IS YOUR AD DECEPTIVE?

I. Introduction

Small business owners often take out an advertisement in a local paper or, more in line with the times, advertise on a website. The advertisement, however, can sometimes create liability for the business owner if the ad is found to be deceptive. [1] This article will discuss the different sources of the law regarding deceptive advertising and then generally describe what makes an advertisement deceptive. It will then explore the trends and adaptation of the law regarding web logs and advertising. In conclusion, this article will present considerations that a small business owner should take into account when deciding to post an advertisement.

II. Sources of Deceptive Advertisement Regulation

Laws regulating deceptive advertising exist at both the state and federal levels. Modern advertisement law was shaped in the early twentieth century with the intention of encouraging the dissemination of truthful information and sanctioning the spread of false information. [2] The Federal Trade Commission Act allows this federal action and specifically states that the agency is empowered to prevent the use of unfair or deceptive practices in commerce. [3] The Lantham Act also provides a federal cause of action for false advertising. [4] Although the Lantham Act primarily focuses on trademarks, unfair competition is addressed in section 43(a), and creates civil liability for the use of deceptive advertising in commerce. [5]

Most states have passed their own deceptive trade practices laws. [6] These laws are usually similar to their federal counterparts and are called little FTC (Federal Trade Commission) acts. [7] The little FTC acts allow for the state to intervene in situation of unfair trade practices but unlike the FTC Act, often allow individuals to bring actions for violations of the state's deceptive trade practice law. [8]

Individuals and business also have avenues to challenge or dispute deceptive advertising outside of the state or federal government. The FTC has stated that local organizations may be in a better position to resolve local disputes. [9] The Better Business Bureau is an example of such an organization that creates incentives for small business owners to refrain from unfair trade practices. The National Division of the Council of Better Business Bureaus offers a forum for both consumers and competitors to bring claims regarding deceptive advertising. [10] The availability of information from organizations such as the Better Business Bureau provides market incentives for fair trade practices. The market often corrects for deceptive advertisements through lower sales from duped consumers and the resulting skeptical consumer base. [11]

III. What is Deceptive Advertising?

The FTC has described its analysis of deceptive advertising to consist of three elements. [12] The first element is that the deception must be a representation, omission, or practice that is likely to mislead the customer. [13] In the most obvious situations, a statement or representation that expresses a claim that is simply untrue is deceptive advertising. It is important to note, however, that the FTC has found an advertisement deceptive through an implied claim as well. [14] An implied claim is one that a consumer would reach when reading the advertisement even if it is not explicitly stated. [15] Both express and implied claims require proof that the claim is true in the order to prevail if the advertisement is challenged. [16]

The second characteristic that the FTC uses to analyze a deceptive advertising claim is that of the reasonable consumer. [17] The characteristics of the consumer group is considered when judging if an advertisement is deceptive. [18] The advertisement is viewed in the circumstances where it was placed to determine if a consumer would reasonably reach a conclusion that is false or misleading. [19] The advertiser is not liable for any conclusion reached by an extreme viewpoint or wild train of thought.

The third and final characteristic used in the analysis is to determine if the representation, omission, or practice is material. [20] The question of materiality basically hinges on whether the representation would affect the consumer's decision regarding the product. [21] Statements or omissions on the part of a business that affect health or safety are also considered to be automatically material. [22] The overall aim of this part of the analysis is to determine if an injury has occurred of if the potential for injury (economic or health) exists. [23] Although the characteristics above do not fully describe all the factors regarding liability for a deceptive advertisement, this framework generally describes the characteristics used by the FTC.

IV. Web Logs and Deceptive Advertising

Information advertising is the type of advertising that asserts factual claims to a wide audience. [24] It is only when the factual claims are unproven or simply untrue that the advertiser may be liable for deceptive advertising. [25] When the advertisement is not in a traditional medium, or the advertisement does not specifically endorse a product, the traditional analysis becomes more difficult. The internet has given rise to web logs or 'blogs' that convey information on everything from consumer products to philosophy. This type of information is just as likely to create misleading or untrue conclusions in the mind of consumers yet is the creator liable for deceptive advertising? A pure weblog is unlikely to lead to liability for deceptive advertising because it does not propose a commercial transaction. If the blog only conveys information it is likely not to be considered commercial speech and not subject to the restrictions of federal law such as the Lantham Act or the FTC Act. [26] When blogs become sponsored, the distinction between non-commercial and commercial speech becomes more unclear. If a blog is completely sponsored and is no longer only disseminating information or entertaining, it becomes very similar to a traditional advertising campaign. [27] Regulation preventing deception of the public should apply here as well. [28] Overall, a balancing act must be employed in middle ground situations. Courts and regulatory bodies must balance the suppression of speech against the potential harm to consumers from deceptive messages.

V. Conclusion

The discussion above has a few lessons and implications for the small business owner. First, deceptive advertising is regulated on a variety of levels. Federal, state, unofficial, and market forces all regulate advertising. Despite this myriad of regulation, the framework for determination of deceptive advertising remains somewhat similar across these groups. If an advertisement does not mislead a reasonable consumer, then the representation, omission, or practice is unlikely to raise any eyebrows. Fortunately for the small business owner, the framework can be applied across regulatory bodies as well as across media.

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[9] – Federal Trade Comm'n, *supra* note [1] at 4.

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[24] – Goodman, *supra* note [2] at 700.

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BREACH OF FIDUCIARY DUTY SUITS ARISING OUT OF YAHOO'S REJECTION OF MICROSOFT'S OFFER

Last month, Yahoo!, the California-based Internet service provider, rejected a "generous" offer by U.S. software giant, Microsoft. [1] Microsoft's 62 percent premium above Yahoo!'s share was aimed at maximizing synergies that existed between both companies. Microsoft hoped to gain a greater market advantage in the internet search industry while enjoying a majority share of the projected $80 billion market by year 2010. [2] Following Yahoo!'s rejection, some disgruntled Yahoo shareholders have sought legal remedies to voice their dissatisfaction with Yahoo's decision. [3] In light of three previously decided cases, *Emerging*, *Van Gorkom*, and *Disney*, this article will attempt to provide a legal analysis on the breach of fiduciary duty suits against Yahoo!.

Emerging Communication

In Emerging Communication, the court addressed, inter alia, class action claims for breach of fiduciary duty. The court held that the defendants in question were jointly and severally liable to the plaintiff class in an amount equal to $27.80 per share. [4]

Emerging Communications, Inc. ("ECM") and Atlantic TeleNetwork ("ATN") were telecommunications companies formed by Jeffrey J. Prosser ("Prosser") and a partner, Cornelius Prior ("Prior"), to acquire the Virgin Islands Telephone Corporation ("Vitelco"). [5] Vitelco operated solely in the U.S. Virgin Islands and was attractive for several reasons. Vitelco's operational market was not saturated with competitors and as such was guaranteed an 11.5% rate of return on the rate base for the local telephone service. [6] In addition, Vitelco had access to below-market interest rate loans. [7] Moreover, The USVI Industrial Development Commission (“IDC”) granted Vitelco numerous tax incentives which made the company in essence free from taxation. [8] Several years later, Prosser and Prior’s business relationship crumbled –this precluded Prosser’s acquisition strategy. [9] The crumbled relationship led to the breakup of Prosser and Prior’s joint companies, leaving Prosser with 52% of ECM's 10,959,131 shares. ECM's public shareholders were relegated to the position of minority stockholders. [10] The breach of fiduciary duty actions herein arose out of a two-step “going private” acquisition of the publicly owned shares of ECM by another company, Innovative Communications Company:

The first step tender offer was commenced on August 18, 1998 by Innovative for 29% of ECM's outstanding shares at a price of $10.25 per share. The balance of ECM's publicly held shares were acquired in a second-step cash-out merger of ECM into an Innovative subsidiary, at the same price, on October 19, 1998. At the time of this two-step transaction (the "Privitization"), 52% of the outstanding shares of ECM, and 100% of the outstanding shares of Innovative, were owned by Innovative Communication Company, LLC ("ICC"). ICC, in turn, was wholly owned by ECM's Chairmand and Chief Executive Officer, Jeffrey J. Prosser ("Prosser"). Thus, Prosser had voting control of both of the parties to the Privitization transaction. [12]

In connection with the two-step transaction, stockholders of ECM filed fiduciary actions suits claiming, inter alia, that Prosser’s acquisition strategy of ECM was unfair. As part of Prosser’s strategy, the remainder 48% shares (Prosser owned 52% shares) were to be purchased at $10.25 per share. [13] The Court of Chancery found that the consideration paid to the shareholders was unfair because the fair market value of ECM’s stock was $38.05, almost four times the amount paid. [14] The Court having concluded that the transaction was unfair, proceeded to assess liability of Prosser and the other ECM's directors. Some, but not all defendants, were found to have breached their duty of loyalty and/or good faith. [15] The "and/or" phraseology was used because the Delaware Supreme Court has yet to articulate the precise distinction between the duties of loyalty and of good faith. [16] To that end, the court stated that if a loyalty breach requires that the fiduciary have a self-dealing conflict of interest in the transaction itself, then only Prosser should be liable. Although the Supreme Court has yet to define the precise conduct that is actionable under a breach of good faith, the Emerging Court held that the directors could be found to have violated their duty of good faith if they consciously and intentionally disregard their responsibilities, adopting a 'we don't care about the risks' attitude concerning a material corporate decision." [17]

Van Gorkom

The next case is *Smith v. Van Gorkom*. Here, the Court of Chancery held defendant directors' decision to approve a merger was not the product of an informed business judgment, that efforts to amend the merger agreement were ineffectual, and that defendant directors had not disclosed all material facts to the stockholders. [18] In *Van Gorkom*, plaintiffs contended that defendant's decision to approve a cash-out merger of their corporation did not warrant business judgment rule protection. The court agreed, stating that the business judgment rule, in part, provides that directors of a corporation must act on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company when making business decisions. [19] Further, it has been an uncontested standard of review that "a director's duty to inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders." [20] In the specific context of a proposed merger of domestic corporations, a director has a duty under 8 Del.C. § 251(b) (Merger or consolidation of domestic corporations), along with his fellow directors, to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. [21] The director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty. The former duty requires a director to take an active and direct role in the context of a sale of a company from beginning to end. [22]

Disney

Lastly, a $140 million executive compensation and severance package of former Walt Disney Company President Michael Ovitz was the basis for the breach of fiduciary duty suit against Disney's officers and directors. [23] Shortly after Ovitz joined Disney, it became apparent that there was a "disconnect" between himself and other Disney officers. [24] A year after Ovitz was hired, he was informed by the then Walt Disney's general counsel Michael Eisner that he would be terminated without cause. [25] Pursuant to the facts, Ovitz had done nothing to warrant termination and the corollary, stated in Ovitz's contract, was for Disney to pay him a substantial severance package in a no-fault termination. [26] Shortly after Ovitz received his severance package, a number of derivative actions followed. Plaintiff's claim, inter alia, was that Disney's board of directors breached their fiduciary duties of care and good faith by paying $140 million to Ovitz. – They felt that the pay-out constituted corporate waste. [27] The court rejected Plaintiffs' contention that Disney's board breached their fiduciary duties. The Court held that defendants' conduct was protected by the business judgment rule. The Court reasoned that under the well-settled Delaware rule, the business judgment rule affords directors of corporations the presumption that their actions were based on information and that they were taken in the best interest of the corporation and its stockholders. [28] The Court further noted that the said presumption is rebutted when the board violates one of its fiduciary duties. [29]. Citing *Emerging*, this court held that liability must still be determined on an individual basis. [30] The concept of duty of good faith is an evolving issue and hence the Courts have yet to draw a meaningful distinction between a fiduciary duty of good faith and what good faith is. [31] However, this court has enumerated three instances when a director has failed to act in good faith: "(1) where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, (2) where the fiduciary acts with the intent to violate applicable positive law, and (3) where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." [32] The Court ultimately concluded that Eisner's actions were taken in good faith. Neither Eisner nor any of the other directors stood to benefit from Ovitz's termination as such the Court found that there was no reason to think that the directors were incapable of exercising business judgment. Thus, the decision to terminate Ovitz warranted judicial protection.

Last month, two class action suits were filed in the Delaware Court of Chancery against the directors of Yahoo! for breach of fiduciary duties in relation to Yahoo's rejection of Microsoft's offer. Microsoft's offer reflected a 62 percent premium above Yahoo! share value. [33] The first and second complaints are *Wayne County Employees' Retirement Sys. v. Yahoo!, Inc.* and *Police and Fire Retirement System of the City of Detroit et al. v. Yahoo!, Inc.*. The second complaint alleges that Yahoo!'s board members "placed personal distaste for Microsoft ahead of shareholder welfare" and have breached their fiduciary duties by rejecting Microsoft's value-maximizing offer. [34] The complaints filed against Yahoo! are best understood in the light of *Emerging, Van Gorkom,* and *Disney*. In order to articulate how effective a suit against Yahoo! may be, it is imperative to understand the rationale behind Yahoo!'s decision to reject Microsoft's offer and the various roles each executive board member played.

In *Emerging*, Prosser was found to have breached his fiduciary duty because he stood on both sides of the transaction – a transaction that would ultimately lead him to reap enormous benefits at the expense of the minority shareholders. The Court used "fairness" as a standard of review. In *Van Gorkom*, the standard of review used was based on the directors' duty to make an informed business making decision. [35] The Disney Court found that neither Eisner nor the other Disney directors were self-interested in the $140 million payout to Ovitz; as such, the business judgment rule was the standard of review. [36]

In a letter in response to Microsoft's offer, Yahoo! wrote:

"After careful evaluation, the Board believes that Microsoft's proposal substantially undervalues Yahoo! including our global brand, large worldwide audience, significant recent investments in advertising platforms and future growth prospects, free cash flow and earnings potential, as well as our substantial unconsolidated investments. The Board of Directors is continually evaluating all of its strategic options in the context of the rapidly evolving industry environment and we remain committed to pursuing initiatives that maximize value for all stockholders." [37]

Following this letter, the suits filed against Yahoo! have alleged, inter alia, a breach of Yahoo!'s fiduciary duty. In summary, the complaints allege that Microsoft's offer was fair, generous, and ultimately a maximization of the shareholder's value. In other words, Yahoo!'s rejection was tantamount to a breach of its fiduciary duty.

In defense to the complaints, Yahoo! could contend that its board members informed themselves prior to rejecting Microsoft's offer and they considered all relevant material information reasonably available to them. Furthermore, Delaware Law provides protection for directors of a corporation if they relied in good faith in reports by officers. In this case, Yahoo utilized independent legal and financial resources in evaluating Microsoft's offer. According to Bloomberg, financial advisors at Goldman Sachs Group Inc., Lehman Brothers Holdings Inc. and lawyers at Skadden, Arps, Slate, Meagher & Flom LLP were among the disinterested parties that led Yahoo! to ultimately reject Microsoft's offer.[38] The Corporate Accountability Report which "shed[s] new light on corporate lawyers' changing roles and responsibilities and myriad high-profile challenges," suggested that liability can be avoided by non self-dealing transactions, employing arms-length negotiations, and selecting disinterested parties in evaluating an offer.

Yahoo! could also contend that Yahoo CEO Jerry Yang and Yahoo!'s board members acted on an informed basis, in good faith, and in honest belief that Microsoft's offer was not in the best interest of the company. These elements may be hard to prove since, over the past year, Yahoo has been in financial difficulties. A recent report indicated that Yahoo needed to lay up to 1,000 workers, [39] to remain profitable.

Although, Yahoo may have had a logical and deductive process in turning down the offer, Yahoo!'s board members need to find a convincing story to tell shareholders. This is extremely important because with Yahoo!'s board members up for re-election this month, Microsoft "reserves the right to pursue all necessary steps to ensure that Yahoo!'s shareholders are provided with the opportunity to realize the value inherent in [Microsoft's] proposal." [40]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at *1.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *43.

[15] *Id.*

[16] *Id*. at *39.

[17] *Id.* at *43.

[18] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[19] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

[20] Van Gorkom, 488 A.2d at 872.

[21] *Id.* at 873.

[22] *In re* Emerging Communications, Inc. Shareholders Litigation, 2004 WL 1305745, at *42.

[23] *In re* Walt Disney Company Derivative Litigation, 907 A.2d 693, 710 (Del. Ch. 2005).

[24] *Id.* at 714-16.

[25] *Id.* at 728-29.

[26] *Id.*

[27] LEWIS H. LAZARUS AND JOSEPH S. NAYLOR, BUREAU OF NAT'L AFFAIRS, INC., CORPORATE ACCOUNTABILITY REPORT, EMERGING TRENDS IN FIDUCIARY DUTY LITIGATION: LESSONS LEARNED FROM EMERGING COMMUNICATIONS AND DISNEY (Mar. 31, 2006).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Delaware Business Litigation Report, *supra* note 3.

[34] Id.

[35] Van Gorkom at 872.

[36] LAZARUS AND NAYLOR, supra note 27.

[37] Erick Schonfeld, *Yahoo Confirms Rejection Letter to Microsoft*, Feb. 11, 2008,http://www.techcrunch.com/2008/02/11/yahoos-rejection-letter-to-microsoft/.

[38] Ari Levy, *supra* note 1.

[39] Michael Liedtke, *Yahoo to Lay Off 1,000 Workers*, Jan. 29, 2008,http://biz.yahoo.com/ap/080129/earns_yahoo.html.

[40] Glenn Chapman, *Microsoft Renews Bid Despite Yahoo Rejection*, Feb. 12. 2008, http://news.yahoo.com/s/afp/20080212/bs_afp/usitcompanytakeovermicrosoftyahooreject.

SEAGATE FILES PATENT INFRINGEMENT LAWSUIT AGAINST COMPETITOR

I. Introduction

In response to increasing market pressure on their core business, Seagate Technologies is asserting a handful of its patents against manufacturers of flash memory-based solid state drives (SSDs) products. Seagate Technology is currently the world's largest manufacturer of hard-disk drives (HDDs), but lags behind several competitors in the SSD market. [1] On Monday, April 14th, Seagate Technology filed a patent infringement lawsuit against STEC. The lawsuit, filed in the US District Court for the Northern District of California, alleges infringement of four Seagate patents. [2] Industry commentators believe that Seagate's lawsuit is a result of increasing market pressure on their core business, which competes directly with that of STEC. By filing an infringement lawsuit now, Seagate opens several options for itself in the face of a potential collapse in sales for its major products.

In recent years, SSDs have made significant inroads into the digital storage market that is presently dominated by HDDs. As demand for storage is exploding, technology watchers are waiting to see if SSDs develop into a suitable replacement for HDDs. [3] As of early 2008, several notebook computers have hit the market featuring SSD, instead of traditional HDD. Only SSDs relatively high cost has kept the otherwise superior technology from rapidly sweeping HDD out of the storage market altogether. However, prices for SSDs have been "dropping so fast that it's surprising even the pros." [4] In the face of plummeting prices, HDD manufacturers like Seagate are bracing for a SSD price war that may make them more attractive than HDDs.

II. Background

Under the current state of technology and economies of scale, HDDs cost significantly less than a comparable SSD. However, SSDs possess several important advantages over their HDD counterparts. Traditional storage devices are based on HDD technology, which store information on rapidly spinning disks. Stationary arms access these disks to read and write information, in a configuration similar to a record player. Like a record player, there are many moving mechanical parts in a HDD, making them prone to damage on sharp impacts. Simply dropping an HDD may catastrophically damage it.

HDDs are currently a limiting factor in the speed of consumer electronics, including personal computers and laptops. [5] Because HDDs store information on a spinning disk, the speed at which data may be stored and accessed directly correlates to how fast the disk is spun. Unfortunately for HDD technology, there are limits as to how fast these metal disks may be spun before the device tears itself apart. The operation of HDDs also results in other problems, such as heat and power consumption, two issues accentuated in laptops. [6] Many of these shortfalls are easily addressed by SSD technologies.

SSD stores data using transistor technology similar to that found in microprocessors. SSDs simply trap electrons between two transistors in order to store data. Because there are no mechanical or moving parts, SSD speeds are not limited in the same way that HDD speeds are. The lack of mechanical parts also reduces the potential for device failure, either through wear and tear or as a result of something catastrophic, such as dropping the device. All of these factors present clear advantages over HDD devices. However, the costs differential between SSD and HDD has, thus far, forestalled a stampede to SSDs. But the recent introduction of notebook computers equipped exclusively with SSDs suggests that HDD’s market dominance may end within a few years.

III. Analysis – The Storage Market and Consumers

Industry watchers voice concerns that a Seagate victory in the infringement suit may stifle innovation and increase costs for consumers. [7] Because Seagate is already the leader in HDDs, they are already in position to squeeze out smaller competitors. Given a patent infringement victory involving fundamental technologies would dramatically increase its leverage against competitors, especially smaller companies with fewer resources.

Seagate faces criticism from a variety of sources, many of whom charge that the company is simply trying to stifle competition in the storage industry. [8] One analyst sees the lawsuit as affirmation that SSD technology is a viable successor to HDD. [9] But most agree that Seagate simply seeks to hamstring their smaller competitors, and potentially even their larger foes. [10] Both Intel and STEC are developing SSD systems that would compete directly with Seagate's bread and butter.

Some commentators may simply be upset over what is perceived to be bad faith by Seagate. In late 2007, Seagate announced its intention to seek licensing agreements, or to pursue infringement lawsuits should negotiations fail. Even at that time, many saw these threats as an attempt to slow or control the development of rival technologies that threaten Seagate's dominant market position. However, most industry watchers agree that, regardless of Seagate's success in these lawsuits and negotiations, it will not be able to halt the erosion of HDD's market-share in the face of SSD gains. [11]

IV. Analysis – Legal Strategies

Seagate claims that it tried to sell licenses for its SSD patents to many of its competitors. [12] However, STEC counters that it was never approached with such a licensing offer. [13] By filing the lawsuit, Seagate may hope to force STEC to pay royalties on all of its SSD products. Conversely, Seagate may simply seek to slow STEC's development of more cost-competitive SSDs while Seagate ramps up its own research and production. However, STEC is a relatively small manufacturer, suggesting that the current lawsuit may simply be a test case for Seagate. If successful, Seagate will be more likely to file suit against major players like Intel and Samsung Electronics, whose legal defenses will be better funded and more ferocious.

In similar patent infringement lawsuits between large technology companies, the two parties "usually settle after squaring off over which has more patents." [14] Each party typically infringes several of their opponent's patents to varying degrees. Both parties try to predict the likelihood of enforcing each of their patents against the other, along with size of a possible judgment or licensing agreement. The party whose patents were worth less, in total, simply writes a check to the other party, thereby avoiding a costly and lengthy litigation battle. Such negotiation settlements also preserve the patent portfolios of each company, since a judge may potentially invalidate a patent at trial. In these cases, unless one party faces a substantial settlement sum, neither party will want to risk their trove of patents before a judge, since judicial invalidation would deprive them of valuable weapons for their next infringement battle.

STEC's initial defensive position is that the allegedly infringed technology actually predates the patents that Seagate set forth in the lawsuit. [15] STEC claims to have developed, manufactured and marketed the technology in question as early as 1994, potentially precluding infringement. [16] If STEC can show that it developed, manufactured or sold such technology prior to Seagate's priority date, then they will escape infringement liability. In the media, STEC claims that the lawsuit is in response to STEC's attempt to develop SSDs for the enterprise storage market. [17]

Among the patents that Seagate asserted is US Patent 6,404,647, which involves the simple idea of shaping and structuring SSD in such a way as to replace HDDs in computers and laptops. [18] The '647 patent appears to be among the patent portfolio that Seagate purchased from Hewlett-Packard Corp. a few years ago. [19] Although the patent is being panned as ridiculous, Seagate may still prevail on the merits in a lawsuit. Seagate likely acquired the patent after losing a nearly-identical case in 1992, when a Scottish hard drive manufacturer alleged infringement against Seagate. That 1992 case involved a patent referring to the physical size of a 3.5-inch hard drive. [20]

Many critics questioned why Seagate choose to target a relatively small manufacturer in STEC, as opposed to market leaders Intel and Samsung Electronics, speculating several plausible explanations. [21] First, STEC also supplies SSD devices to storage giant EMC, who is Seagate's second largest customer. STEC is also the first company to develop a "viable, reliable solid-state solution adopted by a major storage OEM." [22] And relative to Samsung and Intel, STEC is a relatively small player, with little leverage, a smaller war chest, and a smaller patent portfolio. The smaller patent portfolio will favor Seagate should the dispute enter a typical infringement settlement negotiation. However, any Seagate win over STEC does not necessarily imply a similar victory against Intel and Samsung.

V. Conclusion

Much of the criticism focused on Seagate suggests that their patent infringement lawsuit is simply a bad faith impediment to innovation. This may be based largely on Seagate's vulnerability in the market, as SSD emerges as a viable rival technology. Seen through this prism, Seagate's lawsuit indeed appears to be an attempt to block an emerging threat to its dominance of the storage market. Seagate's alleged failure to offer STEC a licensing agreement could be interpreted in two different ways. Seagate may indeed have foregone a license offer, instead seeking to assert overwhelming pressure on its smaller rival. However, this strategy has little utility, since a thorough examination of Seagate's patents will expose any frivolous claims. Ultimately, both parties are unlikely to pursue a trial, where a judge may invalidate Seagate's patents, and where a technologically unsophisticated jury might not fully comprehend the issue.

[1] Dan Nystedt, Seagate Suit Against STEC Could Raise SSD Prices, April 16, 2008, http://www.arnnet.com.au/index.php/id;1753501293

[2] Nystedt, supra 1.

[3] Nystedt, supra 1.

[4] Jon Fortt, Flash vs. Hard Drive battle Heats Up, Mar. 17, 2008, http://bigtech.blogs.fortune.cnn.com/2008/03/17/flash-vs-hard-drive-battle-heats-up/

[5] Brian White, Seagate Patent Claim Could Spell Trouble For PC Industry, April 17, 2008, http://www.bloggingstocks.com/2008/04/17/seagate-patent-claim-could-spell-trouble-for-pc-industry/

[6] White, supra 5.

[7] Martin Czernowalow, Seagate Sues Rival, April 16, 2008, http://www.itweb.co.za/sections/computing/2008/0804161031.asp?A=COM&S=Computing&T=News&O=SBR [8] Beth Pariseau, Is Seagate Trying to Stifle Solid State Disk Adoption?, April 17, 2008, http://searchstorage.techtarget.com.au/articles/24250-Is-Seagate-trying-to-stifle-solid-state-disk-adoption-

[9] Pariseau, supra 8.

[10] Joel Hruska, A Fistful of Patents: Seagate's Saber Rattling Aimed at SSDs, Mar. 25, 2008, http://arstechnica.com/news.ars/post/20080325-afistful-of-patents-seagates-saber-rattling-aimed-at-ssds.html

[11] Hruska, supra 10. [12] Don Clark, Seagate Files Patent Suit Over Chip-

Based Drives, April 15, 2008, http://online.wsj.com/article/SB120821108792914215.html?mod=googlenews_wsj

[13] Don Clark, Seagate Files Patent Suit Over Chip-Based Drives, April 15, 2008, http://online.wsj.com/article/SB120821108792914215.html?mod=googlenews_wsj

[14] Nystedt, supra 1.

[15] Audley Jarvis, Seagate Sues STEC Over "Patent Infringements", April 17, 2008, http://www.techradar.com/news/computing-components/seagate-sues-stec-over-patent-infringements-321578 [16] Dawn Kawamoto, STEC Responds to Seagate Patent Lawsuit, April 15, 2008, http://www.news.com/8301-10784_3-9919122-7.html

[17] Kawamoto, supra 16.

[18] Paul Roberts, Seagate's Ridiculous Patent Weapon, April 17, 2008, http://blocksandfiles.com/article/4843

[19] White, supra 5.

[20] Roberts, supra 18.

[21] Jarvis, supra 15.

[22] Pariseau, supra 8.

FIDEL CASTRO HAS FINALLY STEPPED DOWN: NOW WHAT SHOULD BE DONE ABOUT THAT PESKY TRADE EMBARGO?

I. Introduction

Fidel Castro recently stepped down as president of Cuba. Castro's health, not the 46 year trade embargo, was the primary reason for Castro's statement that he "would not seek to retain his post." [1] Anyone seeking a radical change in the policies of Cuba may have to wait indefinitely, as Fidel Castro's younger brother Raul quickly supplanted him. In a ceremony, on February 24th, Fidel's younger brother was formally designated as Fidel's successor as the head of Cuba's Council of state. [2] Furthermore, Raul stressed that although Fidel will step down as president, Fidel will continue to be "consulted on important decisions, especially on those relating to defense, foreign policy and the economy." [3] However, American politicians and the public have yet another opportunity to consider the continuing effects of the trade embargo placed upon Cuba nearly 50 years ago. Clearly, Fidel was able to defy the wishes of the United States for several decades without giving in to pressure to relinquish Cuba's adherence to Communist ideology. Unfortunately, the embargo devastated Cuban citizens. In a country where the average wage per month is $20, more U.S. aid needs to be given. [4] Considering the current economy of Cuba, is the embargo still a "humane method of coercion" against Cuba, or is it detrimental to yet another generation of Cubans? [5]

II. Background History

Fidel Castro successfully led a guerrilla campaign that helped topple the regime of United States supported leader Fulgencio Batista. [6] While Fidel was able to capture power in January of 1959, he quickly gained the disdain of many in the United States. [7] With the success of the revolution, Castro was able to shift Cuba's government from a capitalist system, as it existed under the regime of Batista prior to 1959, to a communist system. [8] Arguably, the shift to communism was a fatal blow to trade relations between the United States and Cuba.

The United States was understandably suspicious of Cuba's suspected alignment with the Soviet Union during the peak of the Cold War, and a blockade of Cuba's exportation of sugar to the United States was deemed a viable response to the perceived threat. [9] For example, in 1960, Cuba received a large shipment of crude oil from the Soviet Union in exchange for Cuban sugar. [10] As a result of the exchange, the United States "ordered the United States oil companies located in Cuba to refuse to refine the Soviet crude oil." [11] President Dwight D. Eisenhower's issuance of the Determination of Cuban Sugar Quota Proclamation, on July 6, 1960, virtually eliminated Cuba's sugar quota with the U.S. [12] In a series of brazen moves the Cuban government retaliated by changing its national laws in ways that allowed for Cuba to engage in the "nationalization of American properties located in Cuba." [13] For example, Cuba seized all the U.S. refineries located in Cuba that refused to process the crude oil imported from the Soviet Union. [14] In 1960, the U.S. Congress amended the Sugar Act of 1948 to permit a drastic reduction of the sugar quota from Cuba. [15] The reduction of the Sugar quota was another blow to the fragile trade relations between the United States and Cuba. President Eisenhower's announcement of a trade embargo on all instances of trade between the United States and Cuba was an extension of the amended Sugar Act of 1948. Unfortunately, the harsh sanctions imposed in the early 1960s led to Cuba's increased dependence on the Soviet Union. Instead of forcing Cuba to relinquish its ties with the Soviet Union, the U.S. embargo initially forced Cuba into the waiting arms of the then powerful Soviet Union.

Cuba is an island nation and it has an immense reliance on imports for food and medicine and on exports for its economic viability. [16] The embargo against Cuba resulted in a reduction of imports from the U.S. from "543 million in 1959 to $244 million a year later." [17] The Soviet Union was able to assist Cuba after the initial implementation of the United States embargo. However, the collapse of the Soviet Union in 1989 was yet another dramatic blow to the economy of Cuba. [18] Even with the fall of several Soviet bloc States the Castro regime remained in power. The embargo did not bring about the intended demise of Fidel Castro. Given these results, an analysis of the continuing embargo is merited.

III. Analysis

Currently, settlement of the many claims for property seized during the beginning of Castro's rise to power is not yet settled. [19] The issue of restitution has been of interest in the United States for several decades. The United States Congress, in 1964, created the Cuban Claims Program (CCP) which was charged with determining "the amounts of claims on expropriated property by U.S. nationals against the Cuban government." [20] A plethora of U.S. statutes and regulations have been "implemented with the ultimate goal of restricting trade with Cuba as completely as possible" since the trade embargo against Cuba was first imposed in the early 1960s. [21] The Trading with The Enemy Act (TWEA) was the statutory foundation of the embargo against Cuba. [22] Interestingly, the TWEA was also the statutory basis for the embargo previously placed upon Vietnam. However, on "February 4, 1994, President Clinton lifted the embargo against

Vietnam." [23] Since Vietnam was removed from the veil of the TWEA, it seems plausible that Cuba can also be removed from the statutorily-based embargo under the TWEA.

The TWEA was the statute of choice when President John Fitzgerald Kennedy proclaimed "a formal economic embargo against all trade with Cuba" on February 3, 1962. [24] Another major restraint was placed upon trade with Cuba on October 23, 1992 when President Bush signed the Cuban Democracy Act into law. [25] The Cuban Democracy Act allows the United States President to impose sanctions against "any country that proffers or provides any favorable assistance to Cuba." [26] Even the Cuban Democracy Act was not enough to topple Fidel Castro's grip on power in Cuba. Arguably, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995 is more controversial than the Cuban Democracy Act. [27] The Libertad Act, commonly known as the Helms-Burton Act, "further tightens the embargo against Cuba by punishing foreign companies that do business in Cuba." [28] The goal of bringing down the Castro regime needs to be weighed against the expansive legislation passed to achieve the desired end. Attempts to extend U.S. law outside American jurisdiction, through the use of statutes, can pose conflicts with existing international law. International law currently allows a State to impose laws "governing all events within its own sovereign borders, but it may not reach outside the confines of its territory and impose its will on those subjects not validly under its jurisdiction." [29] The U.S. exerting itself beyond its own borders in international trade law and policy could cause trade retaliations from other nations. In addition, the U.S. could suffer reputational harm if countries decide to condemn the Libertad Act as an unlawful extension of American jurisdictional reach.

IV. Possible Resolution

Nearly fifty years after the trade embargo against Cuba was imposed, several things are quite clear. For example, the trade embargo increased Cuba's dependency on the Soviet Union. Prior to the Soviet's collapse, the Soviet Union sent billions of dollars worth of aid to Cuba. The aid previously given by the Soviet Union is now comparable to assistance given by another powerful leader. Venezuelan President Hugo Chavez has done much to help the ailing Cuban economy. Recent estimates state Mr. Chavez has provided the island of Cuba with "92,000 barrels per day of oil, and with other aid worth some $800 million in 2006 and $1.5 billion in 2007." [30] Sadly, all the economic support given by President Chavez has not trickled down to improve living conditions for many Cuban citizens. With salaries ranging from "400 Cuban pesos a month for a factory worker to some 700 for a doctor [$17-30]" Cuban citizens are still struggling. [31] Perhaps even more clear is that the embargo has not caused the fall of the Castro regime.

The restitution for property expropriated in the early 1960s is an issue that needs to be resolved. If Cuba wished to resolve the issue, it might decide to work out a payment plan for the property seized. However, fixing the tangled statues and regulations that govern the embargo against Cuba will require much more work. In addition, important to lifting the trade embargo is U.S. diplomatic engagement with Cuba. During the past eight years President Bush has been both steadfast in his support of the Cuban embargo, and in his determination not to engage diplomatically with Cuba. However, changes in trade policy between the U.S. Congress, the next president, and Cuba could lead to a removal of the trade embargo. Whether or not the embargo is actually lifted is currently a matter of speculation.

From an economic standpoint the U.S. should remove the embargo and open up to the billion dollar trade market available with Cuba. [32] Cuba would not be the only possible beneficiary if the embargo is lifted. For example, it is believed that "Cuba could eventually become a market for American farmers" because it "desperately needs food products, farming tools and machinery." [33] The economic benefits of lifting the embargo are numerous, and warrant consideration.

V. Conclusion

The direction that Raul will take Cuba is unknown. However, it is clear that the U.S. trade embargo has helped the Cuban economy to fall into shambles. Furthermore, Raul and his older brother Fidel are still in power of the island of Cuba. The goal of bringing the end of the Castro regime has not been realized in over 46 years, and the failed policy needs to be removed. Of course one reason to lift the embargo is to allow the U.S. to reap the economic benefits of free trade with Cuba. Yet, the most compelling reason to lift the embargo remains that it would help the citizens of Cuba. Dislike for the political system of Cuba is not a valid reason to allow the suffering of innocent Cuban citizens to go on. If the economic benefits do not persuade U.S. lawmakers and the President to lift the embargo, at least common sense should.

[1] *The Comandante's Last Move*, ECONOMIST, Feb. 23, 2008, at 49.

[2] *Young Blood*, ECONOMIST, Mar. 1, 2008, at 41.

[3] *Id.*

[4] *Id.*

[5] Cassandra LaRae-Perez, Note, *Economic Sanctions As A Use Of Force: Re-Evaluating The Legality Of Sanctions From An Effects-Based Perspective*, 20 B.U. INT'L L.J. 161-168, 162 (2002).

[6] James M. Cooper, Essay, *Creative Problem Solving and the Castro Conundrum*, CAL. W. INT'L L.J. 391-423, 395 (1998).

[7] *Id.*

[8] Alexander Williams III, Note, *More Assistance Please: Lifting The Cuban Embargo May Help Revive American Farms*, DRAKE J. AGRIC. L. 455 (2002).

[9] Larae-Perez, *supra* note 5, at 168.

[10] Williams, *supra* note 8.

[11] *Id.*

[12] Cooper, *supra* note 6, at 396.

[13] *Id.*

[14] Williams, *supra* note 8.

[15] David Mowry, Note, *Lifting The Embargo Against Cuba Using Vietnam As A Model: A Policy Paper For Modernity*, BROOK. J. INT'L L. 229-262, 235 (1999).

[16] Larae-Perez, *supra* note 5, at 169.

[17] Cooper, *supra* note 6, at 396.

[18] Larae-Perez, supra note 5, at 168.

[19] Mowry, s*upra* note 15, at 259.

[20] *Id.* at 236.

[21] *Id.* at 237.

[22] Trading With the Enemy Act, 50 U.S.C. § 5(b) (2000).

[23] Mowry, *supra* note 15, at 254.

[24] Williams, *supra* note 8.

[25] *See* Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. Sections 6001-10 (1994)).

[26] Williams, *supra* note 8.

[27] *See* Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. Sections 6001-10 (1994)).

[28] Cooper, *supra* note 6, at 392.

[29] *Id.*

[30] *The Comandante's Last Move*, *supra* note 1.

[31] *Id.*

[32] Williams, *supra* note 8.

[33] *Id.*

THE ROBERTS COURT AND THE NEUTRALIZATION OF MCCAIN-FEINGOLD'S CORPORATE

I. Introduction

For over a century legislatures have struggled with the issue of how to curtail the efforts of corporations seeking to substantially influence political campaigns. [1] Although campaign finance regulation has taken numerous forms throughout the years, loopholes and exceptions inevitably surface despite the intentions of Congress. [2] Corporations have also wrestled with the conflict of advancing their own political interests at the expense of alienating potential consumers. [3] Congress and the courts have sent ambiguous and, at times, contradictory messages regarding the proper role of industry in the political arena–at times conspicuously leaving a route open for corporations to fund candidates and sometimes expressly speaking out against those very same methods. [4] The enactment of the Federal Election Campaign Act ("FECA") in 1971 [5] (and subsequent amendments in 1974, 1976, and 1979) [6] along with the Supreme Court's landmark 1976 decision in Buckley v. Valeo [7] drastically changed the permissibility of corporate involvement in political campaigns. [8] The controversial decision by the Buckley court to allow certain soft money "issue advocacy" while disallowing "express advocacy" [9] along with the Internal Revenue Service's ("IRS") lack of campaign contribution disclosure requirements for certain tax exempt organizations [10] created a safe haven for corporations to anonymously donate to political campaigns. [11] In 2002, Congress attempted to close the corporate campaign finance loophole left open by issue advocacy with the Bipartisan Campaign Reform Act ("BCRA" or "McCain-Feingold"). [12] The BCRA withstood initial judicial review, [13] but the appointments of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court in 2005 and 2006 [14] created a shift in the Court, which has re-opened the loopholes created by the Internal Revenue Code ("IRC"). [15] The Roberts Court should defer to Congress and disallow issue advocacy by tax exempt trade organizations, creating greater campaign transparency and closing this loophole which facilitates corporate political financing.

II. Historical Perspective

Controversy surrounding corporate political donations is certainly not a recent phenomenon. In the late 1800s and continuing in the early 1900s, there were no regulations limiting the amount of funding a candidate could receive from corporate sources. [16] During the 1888 presidential election, Benjamin Harrison caused an uproar when he accepted $50,000 in corporate money during his narrowly successful run for the White House. [17] Eight years later, William McKinley financed his 1896 presidential campaign with an unprecedented $3 million in corporate donations and repeated the fundraising feat in winning his second term in 1900. [18] President McKinley's outraged opponents accused the administration of corrupt practices, claiming that corporations were receiving political favors in exchange for their heft campaign contributions. [19] The response to the criticism was underwhelming, with Congress resisting progressives' urges to act and only four state legislatures banning corporate donations. [20] It was not until Theodore Roosevelt's second term in office that a sitting president spoke out against the developing campaign finance trend. [21] Roosevelt used his State of the Union Address in 1905 and again in 1906 to call for a ban on corporate financing in political campaigns: [22]

I again recommend a law prohibiting all corporations from contributing to the campaign expenses of any party. Such a bill has already past one House of Congress. Let individuals contribute as they desire; but let us prohibit in effective *fashion all corporations from making contributions for any political purpose, directly or indirectly. [23]*

The president's bold call for sweeping campaign finance reform was controversial and began a movement toward the first federal legislation regulating campaign finance. [24] Ironically, his speech calling for an overhaul of the federal election regulations came just two years after Roosevelt won reelection with 73% of the campaign's funds coming from corporate donors. [25]

Outrage following Roosevelt's corporate donations and claims of political scandals led to Congress passing the Tillman Act in 1907. [26] The Tillman Act banned corporate donations to political campaigns on the federal level, but it left such enormous loopholes that the statute was virtually meaningless. [27] In the twenty years that followed the Act, Congress made repeated efforts to tweak election regulations in an attempt to quell cries of corruption from the electorate. [28] Multiple versions of the Federal Corrupt Practices Act were signed into law in 1910 and again in 1925. [29] While these acts may have forced corporations to become slightly more clever in their strategies, they did very little to increase disclosure or put a halt to companies bankrolling elections. [30] It would be quite some time before Congress would get serious about campaign finance regulation.

III. The Federal Election Campaign Act and Buckley v. Valeo

In 1971, Congress drastically changed the face of American campaign finance when it passed the Federal Election Campaign Act ("FECA"). [31] The FECA addressed many of the weaknesses of the Federal Corrupt Practices Act by limiting the amount that candidates could personally donate to their campaigns and requiring disclosure of the source of most donations over $100. [32] The 1972 election and the Watergate scandal quickly made it clear that the legislation did not go far enough. [33] This prompted amendments to the FECA in 1974, requiring increased disclosures and limiting media expenditures as well as the total amount a campaign was permitted to spend on an election. [34] The amendment also created the Federal Election Commission ("FEC") which was charged with enforcement of federal election laws and regulations. [35] Before the FECA amendments were fully implemented, the constitutionality of the provisions were challenged in Buckley v. Valeo; a case which has had a dramatic impact on modern campaign finance.

The constitutional challenge to the FECA was primarily premised on the assertion that it violated the first amendment by restricting the political "speech" of contributors. [36] The Court held that Congress has the authority to restrict speech rights when there is a compelling governmental interest in (1) providing information to voters to help them compare candidates, or (2) discouraging corruption or the appearance of corruption, or (3) using disclosure to ensure records were properly maintained. [37] The Buckley court also distinguished "express advocacy" from "issue advocacy." [38] Under the Court's ruling, a trade organization running a political advertisement may advocate for a candidate's positions (or conversely, against their opponent's position) but may not expressly advocate that a voter support or oppose a particular candidate. [39] The Court also struck down many of the caps on spending and limitations on personal candidate campaign financing as unconstitutional. [40]

In 1979, Congress amended the FECA once again to reform disclosure requirements and better define the types of donations subject to FEC regulation. [41] Following the enactment of this amendment, the FEC created regulations which opened a loophole for funds not subject to federal limitation, also known as "soft money." [42] While the FECA retained tight regulations on corporate campaign donation disclosures, it also led to the soft money loophole which allows covert political financing by corporations acting through trade organizations using issue advocacy. [43]

IV. Soft Money and Issue Advocacy

The Buckley court's allowance of so-called issue advocacy has led to a bizarre and seemingly inutile distinction in political advertising. A single word or phrase can change an advertisement from permissible issue advocacy into disallowed expressed advocacy. [44] A tax exempt organization funding issue ads is free to ridicule, encourage calling or writing, or even simply tease a candidate, but they may not say "don't vote for this candidate." [45] Issue advocacy using soft money is alive and well in politics today. The following advertisement, funded by the organization Americans for Job Security ("AJS") during the 2004 presidential campaign between incumbent George W. Bush and challenger John Kerry, falls squarely within "issue advocacy," and thus avoids full disclosure regulation by the FEC:

John Kerry voted against comprehensive prescription drug benefits making prescription drugs more affordable and accessible to seniors. But it gets worse. Kerry wants to repeal the prescription drug benefits seniors now receive. Kerry's prescription for failure: fewer choices, more government, more paperwork, higher costs. Call Senator Kerry and let him know that American seniors deserve better. [46]

The advertisement, asking voters to call the senator, is permissible as it was run, but replacing the last line with the phrase, "do not vote for Senator Kerry," or "vote for President Bush," would have rendered this same advertisement a violation of federal election law. [47]

Issue advocacy can take many different forms. AJS, which is a tax exempt trade organization, funded a several issue advocacy advertisements supporting Republican challenger Norm Coleman and opposing the Democratic incumbent Paul Wellstone in the 2002 Minnesota senate election. [48] Perhaps the most unique ad was an airplane banner reading simply, "Wellstone . . . quit taxing the dead." [49] Clearly, "issue advocacy" can have the identical impact of "express advocacy." It is rarely necessary to explicitly state opposition to a candidate after hurling attacks at their policies. This election law absurdity would be little more than a puzzling distinction if it were not for the important regulation of who may fund such advertisements. It is clear that certain tax exempt organizations may fund issue advocacy, [50] but who is funding those tax exempt organizations?

V. IRC § 501(c)(6): Tax Exempt Trade Organizations

The Internal Revenue Code ("IRC") allows three categories of tax exempt organizations to engage in "political activities." [51] Social welfare organizations (IRC 501(c)(4)) such as MoveOn.org [52] and the National Rifle Association ("NRA") [53] and labor, agricultural, or horticultural organizations (IRC 501(c)(5)), for example the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") [54] are all tax exempt organizations that may participate in political activities. [55] The category of greatest consequence as it relates to corporate financing of campaigns is tax exempt trade organizations (IRC 501(c)(6)) such as AJS, [56] discussed supra. [57] Tax exempt organizations may only participate in political activities that are on par with the main function of the organization and the political nature of the organization must be a minority (less than 50%) of the organization's main purpose. [58] Although these exempt organizations must report their net contributions and expenses, neither the FEC nor the IRS require itemization of the donors that fund these organizations to be made public. [59]

Organizations that fall under IRC 501(c)(6) include business leagues, chambers of commerce, real-estate boards, boards of trade, and even professional football leagues. [60] The exempt organization itself must not be organized for profit and no parts of the net earning of the organization may inure to the benefit of any private shareholder or individual. [61] There is, however, no requirement that the exempt organization's donors meet such a standard. [62] Because corporations are free to donate funds anonymously to tax exempt trade organizations which, in turn, may run political advertisements so long as the ads qualify as issue advocacy and such activity does not constitute a majority of the exempt organization's activities, corporations have the ability, and frequently do, fund political campaign advertisements. [63] The Supreme Court's decision in Buckley, combined with the FEC's and IRC's failure to regulate the disclosure of such donations, created a gigantic loophole allowing trade associations comprised chiefly of for-profit corporations to fund issue advocacy without disclosing their donors. [64] Such advertisements were quite prevalent in the late 1990s and were used in full force during the 2000 presidential election. [65] This loophole allowed the following ad, which closely mirrored a hard money advertisement being run by then Governor George W. Bush, to be funded by the IRC 501(c)(6) organization AJS [66]:

Are you taxed enough already? Not according to Al Gore. Gore plans to squeeze more money out of middle class families at the gasoline pump. Gore cast the tie-

breaking vote to raise gas taxes 4.3 cents a gallon. He admits he'll add more taxes on gasoline with what he calls a CO2 tax. Gore supported a call to raise taxes so much that gas would cost $3 a gallon. And Gore's ideas are so extreme, if they ever came to pass, Americans would truly be 'Gored' at the pump. [67]

Issue advocacy, such as the above advertisement, was commonplace in the 2000 election on both sides of political campaigns. Two years later, Congress acted in an attempt to close loopholes left open by the FECA. [68]

VI. McCain-Feingold/The Bipartisan Campaign Reform Act of 2002

Beginning in the mid-1980s, campaign finance reform was heavily debated in Congress nearly every year but never culminated in legislation due to fierce political battles. [69] Following the 1996 presidential election, outrage began to grow with the revelation that foreign nationals had made contributions to party committees and allegations that the Clinton administration exchanged White House coffee meetings and overnight stays in the Lincoln bedroom for soft money donations. [70] When rampant issue advocacy and questionable campaign finance tactics again dominated in the highly contested 2000 presidential election, Congress finally began to gain support for campaign finance reform. [71] Senators John McCain and Russell Feingold initially introduced a bill to close financing loopholes in 1996, but made little headway due to political opposition. [72] The Senators reintroduced the bill in 2002, and it passed both houses and was signed into law as the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "McCain-Feingold"). [73]

The BCRA accomplished two primary objectives: first, it created limits on the sources and amounts of political party contributions and, second, the act increased scrutiny and regulation of corporate campaign financing. [74] McCain-Feingold specifically addressed soft money issue advocacy by broadening the definition of electioneering communications to include more media outlets and restricting the use of corporate and labor union funds to finance political campaign advertisements. [75] In an attempt to stop the influence of issue-specific soft money advertisements, the BCRA banned express issue advocacy within sixty days of a general election or thirty days of a primary election, unless funded by hard money. [76] Shortly after its passage, the constitutionality of the BCRA was challenged in an claim reminiscent of the Buckley controversy. [77] In a case reaching the Supreme Court in 2003, the constitutionality of the BCRA was substantially upheld and it appeared as though McCain-Feingold would withstand judicial scrutiny. [78] In the following several years, however, President Bush's Supreme Court nominees changed the face of the Court and the question of permissible campaign finance was reconsidered. [79]

VII. The Roberts Court

Justices Thomas and Scalia opposed legislative deference in their partial concurring opinions in the Court's 2003 McConnell decision. [80] The appointment of Chief Justice Roberts in 2005 and subsequent addition of Justice Alito in 2006 began a trend away from congressional deference and toward Thomas' and Scalia's strict scrutiny standard that they purported should be practiced when interpreting corporate campaign finance restrictions. [81] In the first campaign finance decision under the Roberts Court, it was clear that a philosophical shift had occurred. [82] In 2006, Randall v. Sorrell reached the Supreme Court the plurality held that campaign finance reforms that restrict corporate free speech should be held to a "strict scrutiny" standard of review. [83] The following year, 2007, presented an even stronger rejection of the concept of congressional deference and saw the court substantially weaken McCain-Feingold. [84]

FEC v. Wisconsin Right to Life, Inc. was presented to the Court to determine whether the respondent violated the BCRA and, concurrently, whether the Act's regulations on corporate speech were constitutional. [85] At issue in the case was an advertisement financed by Wisconsin Right to Life ("WRTL") which criticized Senator Russell Feingold, one of the sponsors of the senate bill which ultimately became the BCRA. [86] The ad attacked Senator Feingold and his colleague Senator Herb Kohl for opposing President George W. Bush's judicial nominees to the Supreme Court–the very Justices who ultimately decided this matter. [87] The FEC claimed that these advertisements were funded by soft money for issue advocacy in violation of McCain-Feingold. [88] The court ruled that, regardless of the alleged violations, the portion of McCain-Feingold restricting issue advocacy "impermissibly burdened the First Amendment right to free speech and could not survive strict scrutiny." [89] As a result of the Court's decision in WRTL, nearly all of McCain-Feingold's issue advocacy restrictions have been struck down and corporate and union donations to tax exempt trade organizations are once again an option for businesses that desire to bankroll political advertising anonymously. [90]

VIII. Conclusion

The decision of the Roberts Court to protect corporate freedom of speech over the interests of the electorate to have transparent elections is disconcerting. Although it is crucially important to protect freedom of expression, this freedom is not absolute. [91] The interests of reassuring voters that campaigns are not being clandestinely financed by corporate funds outweighs the merit of protecting the first amendment rights of for-profit corporations. The Court should, at a minimum, reconsider the measures protecting donation disclosure set forth by Senator McCain and Senator Feingold in the BCRA. Ideally, the Court and the legislature should adopt the position of President Roosevelt and prohibit corporate donations to political campaigns. Covertly financing public campaigns is not a first amendment right–it is a dangerous hindrance to public policy and promoting an informed electorate.

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WIKILEAKS: A CUTTING-EDGE JOURNALISTIC TOOL OR AN AFFRONT TO BUSINESS PRIVACY?

I. Introduction

Wikileaks.org, a website dedicated to compiling leaked documents from governments and corporations, has sought to hold large-scale entities more accountable for their actions through greater transparency of information. [1] However, by publishing sensitive information it believes to be in the public interest, coupled with the fact that the site has a completely anonymous user base, the site has aroused the ire of international governments and businesses alike. [2] A recent lawsuit by a Swiss bank in which the bank sought (and briefly received) a permanent injunction to shut down Wikileaks highlights how much controversy the site has generated in its relatively short life span. [3] While some critics try to paint Wikileaks as a site that engenders illegal activity and as a site that is a threat to privacy, neither claim can be properly substantiated. [4] Though Wikileaks is controversial, most forms of speech displayed on the site are protected by the First Amendment. [5]

II. Bank Julius Baer v. Wikileaks: Free Speech and Business Interests Collide

In January 2008, the Swiss bank, Bank Julius Baer (BJB), began sending cease and desist letters to Wikileaks to remove fourteen documents alleged to contain sensitive information about personal transactions of bank customers. [6] After receiving no response to those letters, in early February BJB chose to file suit against Wikileaks and its webhost Dynadot in the United States District Court for the Northern District of California. [7] Most directly, BJB sought injunctive relief from the court to force Wikileaks and Dynadot to remove the documents. [8] Interestingly, there is strong agreement among commentators and Wikileaks contributors that BJB intensely desired to suppress the documents because they exposed "asset hiding, money laundering and tax evasion" by bank clients. [9]

Both the Freedom of Information Act (FOIA) and United States Supreme Court jurisprudence liberate the vast majority of governmental documents or documents deemed to be "in the area of political discourse." [10] But with regard to business documents, the landscape is invariably more complicated. Privacy protections exist in every state for various kinds of sensitive corporate data, including trade secrets and personal bank account information. [11] The remedies under these kinds of statutes are directly limited to the offending data, requiring either the removal of the data from the public sphere or tort liability for the damages caused by that information going public (or most likely, both). [12]

Had the court chosen to grant only the relief explicitly declared by BJB, this case would have been simple and unremarkable: the documents did contain sensitive data about clients (including personal identification and account numbers) that governing California substantive laws and regulations protect as part of the private sphere, and thus removal of the documents from the site would have been a wholly appropriate remedy. [13]

III. The Court's Issuance of a Permanent Injunction

Instead, the court took a fantastically drastic step at the suggestion of a conclusory footnote remark in a BJB memorandum. [14] The footnote declared that because Wikileaks operated anonymously, "it [is] necessary to issue injunctive relief requiring Dynadot to remove the DNS records to prevent the website from displaying the [Bank Julius Baer] Property." [15] In essence, this footnote asserted that shutting the entire domain down was "necessary" to prevent the anonymous site from displaying the small amount of offending data, without offering any supporting arguments for that outlandish claim. Any person with minimal understanding of the internet could easily recognize that forcing a domain to shut down to prevent the viewing of specific, illegal content is by no means necessary; a court order demanding the takedown of those particular files would have completely prevented the harm to BJB without censoring the rest of the site's First Amendment-protected material.

Quite simply, there is no plausible interpretation of current copyright and First Amendment jurisprudence that can substantiate the court's decision to shut down the domain as a whole. [16] Furthermore, it seems extraordinarily strange that the court would grant such a drastic remedy when BJB did not even pray for it directly–an unsupported conclusion hidden in a footnote is generally not sufficient to state a claim for relief.

Both fortunately and surprisingly–and perhaps in large part due to the overwhelming influx of supporting legal arguments from civil liberties groups like the Electronic Frontier Foundation and the American Civil Liberties Union and the extensive press coverage for this high profile case–the federal judge decided to overturn his grant of the permanent injunction less than two weeks after initially granting it. [17] Citing, among other newfound and profound gaps in BJB's legal arguments, the fact that such a drastic remedy was unnecessary to prevent the harm to BJB, the judge completely rescinded the order and allowed for Wikileaks to again utilize its domain name. [18]

Unsurprisingly, BJB suffered significant damage to its reputation in the course of this suit. [19] What is perhaps a bit ironic is that by trying hard to suppress the information about the wrongdoing of its clients, it likely drew significantly more negative attention to itself than it would have had it allowed the files to remain online or had it only requested the court to take the files down without interfering with the whole domain. [20] BJB voluntarily dropped the case on March 5, but not before registering a twenty percent fall in the value of its stock as compared to January–before it initiated any of the proceedings. [21]

IV. Conclusion

Perhaps from the standpoint of pure business interests, Wikileaks is an unfortunate necessity–it does businesses very little direct, tangible good to know that while many documents are protected by various business privacy laws, some sensitive information could legally be displayed to the public at large. Even worse, Bank Julius Baer has proven that while having leaked documents posted online might be damaging to corporate reputation, gaining a reputation for suppressing free speech can be even more injurious. Wikileaks's anonymous posting of documents is, in general, a form of speech protected by the First Amendment, though that freedom is appropriately limited by a variety of privacy laws protecting businesses. Substantive provisions in both intellectual property and corporate law protect the most sensitive kinds of data, and the rest are potentially free for public scrutiny. But even where such laws do apply, a business cannot simply hope to squash the whole site in order to remove a few offending files–or as a lawyer for Wikileaks quipped, "The Supreme Court has warned against 'burning down the house to roast the pig.'" [22]

Wikileaks has the potential to be an extraordinarily powerful, journalistic tool, and its existence could actually be a powerful positive for businesses in a more indirect way: in this recent era where white collar scandals like Enron and WorldCom have stormed the media scene, the existence of a tool like Wikileaks that endeavors for greater transparency could inspire businesses to be more ethical–or at the very least more worried about the likelihood that their wrongdoing could be discovered.

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PATENT REFORM ACT IS CONSIDERED BY U.S. SENATE

I. Introduction

Robust protection for intellectual property is one of the chief engines for economic growth in the United States. Patents, copyright and trademark laws provide vigorous, reliable protection for US intellectual property, which is valued at more than $5 trillion by the Commerce Department. [1] With regards to patents, most commentators and interested parties agree that at least some type of modification or reform is necessary.

Patent reform is expected to reemerge as a major topic of debate in early April 2008, when the Senate debates amendments to S 1145, the Patent Reform Act. The House of Representatives already passed HR 1908, their version of the Patent Reform Act, on September 7, 2007. [2] Both bills include several major changes to various aspects of the patent system, including how patents are awarded and challenged. [3] Legislators and interested parties consider the "big four" issues to be "damages, venue, post-grant review and inequitable conduct." [4] Damages have been the central issue, drawing a diverse group of interested parties into the negotiations.

Currently, the minimum damages that may be awarded is a "reasonable royalty," which is calculated in one of three ways: "the entire market value of an invention, an established royalty based on marketplace licensing, or on the proportional contribution of a patented component." [5] Judges and juries evaluate the infringed patent's "specific contribution over prior art" to determine the actual harm of the infringement. [6] In many cases, the allegedly infringing product is merely one component of a larger, more complicated product. In these cases, courts “generally consider the value of the entire product when a small piece of the product infringes a patent.” [7]

The Senate Judiciary Committee’s current proposal on damages calculations will set damages based on “an invention’s specific contribution over prior art.” [8] Proponents of the reform bill propose basing damages on “the economic value of an infringing product attributable to the infringer’s use of the elements that were novel and non-obvious when the patent application was submitted.” [9] Proponents also want more guidance for juries that are awarding damages, as well as more information for judges on how to gauge reasonable royalties. [10] However, the bill’s opponents believe that the use of phrases such as “novel” and “non-obvious” in damage calculations is toxic, and are completely unacceptable in any compromise. [11]

In general, pharmaceutical and other research-dependent industries favor strict protections for patents, while technology companies favor less stringent protections. Technology companies constantly rush newer versions of products to market in order to generate a profit. Because they naturally try to replace last year’s MP3 player or plasma television with newer versions, they can derive more profits from a first-movers advantage. In contrast, pharmaceutical companies rely heavily on patent protections to shield their products from generic manufacturers. Unlike technology firms, pharmaceutical companies can keep profiting from a successful drug, for the duration of the patents term. But while the initial lobbying was done by a limited number of patent-reliant industries, it has greatly expanded to include a wide range of industries.

II. Domestic supporters and opponents

Patent reform has drawn the attention of a wide range of industries and interest groups, from technology firms and banks to unions and even foreign countries. The patent system of the United States is internationally recognized as the world's strongest form of intellectual property protection. [12] Both domestic and foreign interest groups have voiced concerns that, by making infringement litigation more difficult to win, the reform bill will effectively encourage patent infringement. [13] The bill's proponents counter that many patent holders simply hoard patents while generating revenue from infringement lawsuits and settlements. They further claim that the current system has tipped from encouraging innovation to stifling innovation by enabling rampant patent infringement lawsuits.

The primary supporters of the bill are large technology companies such as Microsoft, Google, Cisco Systems, Adobe Systems, Apple and Amazon.com, who will benefit from more stringent guidelines for infringement damages calculations. [14] Advocates of the patent reform bill also include financial services firms such as Citigroup, who favor the bill's provision that "shields banks from patent suits involving electronic check-clearing services." [15] Despite the size and prominence of these supporters, they are quickly being drowned out by a rising chorus of opposition.

Opponents include "some pharmaceutical companies, biotechnology companies, universities, small inventors, venture capitalists," the Professional Inventors Alliance, and the Bush administration. [16] These groups worry that the bill will weaken patent protection and, as a result, dilute the incentives to innovate. Their primary concern rests with the modified guidelines for calculating damages in an infringement case, which will likely reduce the size of damages even if a plaintiff wins. They also worry that the post-grant review of patents will open the door to perpetual litigation, undercutting the certainty that a patent would typically afford its owner.

Biomedical and pharmaceutical companies are particularly worried that overall patent rights will be weakened by the reforms, making it harder for patent holders to recover damages. [17] These medical companies spend “about $750 million over a decade to generate a single drug,” an investment they believe must be protected with vigorous patent rights. [18] In a more specific example, Joe Kiani cites his experience as the CEO of Masimo. [19] Kiani believes that Masimo would not have successfully raised the $100 million needed to develop and market their breakthrough product if they could not protect the investment from infringers. Indeed, Masimo recovered $134 million in a patent infringement case against their dominant rivals, who had promptly infringed Masimo’s patent after the product’s introduction. [20]

In late July 2007, these groups enlisted the help of labor unions, including the “AFL-CIO, the International Federation of Professional and Technical Engineers, and the United Steelworkers.” The unions voiced concerns that diluted patent protection and lowered damages for infringement would make it easier for large companies to steal patents and outsource the manufacturing process. The union’s opposition to the bill has drawn the attention of Democratic members of Congress, and represents a potential stumbling block for the legislation. Similar opposition has arisen from a variety of foreign observers, all of whom express concern at the potential erosion of patent protections.

III. International opposition and concern

Voices of concern and opposition are also arising from various nations overseas, including China, Germany and Israel, who are wary of the reform’s impact on their own innovation-based industries. In November 2007, Chinese intellectual property judge Cheng Yongshun asserted that the bill will be "friendlier to the infringers than to the patentees in general, as it will make the patent less reliable, easier to be challenged and cheaper to be infringed." Cheng believes that the bill will largely benefit "developing countries with less technological development and relatively fewer patents," to the detriment of others. The Patent Office Professional Association, a union of professionals at the United States Patent and Trademark Office, echoed these concerns, arguing that the bill would aid foreign infringers.

German patent expert Professor Gernot Pehnelt, believes that US patent reform will "undermine German innovation." Bernard Frieder argues that US patent reform will have a "profound effect" in Israel, opening patents to perpetual challenges. This would empower "deep-pocket" patent challengers to sustain litigation and wear down smaller opponents. Because of these widespread concerns among key trade partners and allies, many groups are urging the House to convene hearings on the international impact of the proposed reforms.

Danish Parliament member Morten Messerschmidt expressed concerns that many of the proposed patent reforms would weaken the U.S. patent system and erode the U.S.'s "soft power." Nearly half of all patents issued by the PTO are granted to foreign inventors, many of whom are citizens of key U.S. allies. While all of these countries have their own well-developed patent systems, they seek U.S. patents because of the various protections favoring inventors and patent-holders over infringers. Messerschmidt warns that a weakening of patent protections will make U.S. patents less attractive to foreign inventors, which would economically injure both the U.S. and its allies.

IV. Analysis

Opponents of the bill raise a number of valid and troubling concerns, including the possibility that these changes will lead to more infringement and less innovation. Supporters of the bill are often defendants in patent infringement suits. Thus, they seek to make patent litigation more difficult to initiate while simultaneously lowering potential damages when courts do find infringement. However, the potential savings in litigation costs may be dwarfed by lost revenue resulting from more brazen infringement. This is especially true for the prominent, highly capitalized supporters of the bill, for whom litigation costs seem to be an annoyance. Opponents point out that these proponents are being short-sighted, and will likely suffer financially as a result of weaker patent protections.

Furthermore, in cases where litigation costs and damages were non-trivial, reform supporters fail to recognize the economic harm done by the infringement. A reduction in litigation volume and damages is defensible only when the litigation itself is frivolous. Proponents assert that they are often the target of infringement lawsuits filed by holding companies, whose derive their revenue entirely from such lawsuits. In response, many of the corporations in opposition can cite specific examples of large damage awards resulting from cases of blatant infringement.

The likely increase in patent infringement world-wide is an oft-cited concern of reform opponents. But while opponents focus on changes to how damages are calculated, they should be more concerned with the perpetual challenges to patents. As Youngshun asserted, this change will “make the patent less reliable,” introducing uncertainty into what is currently a well-defined property. Such uncertainty is another reason for investors to shy away from investing in high-risk new technologies, since the value of a technological or commercial breakthrough may be quickly pirated by infringers. Uncertainty within the business and investment communities increases costs, and should be avoided when possible. But while many of these reform criticisms are valid, some are not well-founded. For instance, opponents worry that a shift to the first-to-file system will result in hastily written applications, and lower the quality of applications in general. But even the current patent system allows for applications that are initially incomplete and low quality, only to be amended with subsequent filings.

V. Conclusion

Reforms to the patent system are widely seen as a necessary update, and long overdue. However, as the bills opponents have repeatedly highlighted, the U.S. patent system is currently the envy of the world. While the system may still need adjustments and improvements, any changes should be carefully debated to avoid damaging the positive attributes of the system. Some changes, such as a shift to Europe's first-to-file system, should be highly scrutinized because of their shortcomings abroad. Even though many commentators criticize Europe for back-loading patent litigation costs until after a patent issues, some proposed reforms would shift the U.S. in a similar direction. While patent reforms are necessary and well-intentioned, such concerns suggest that the bill is not yet ready for a final vote.

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[9] *Id.*

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[23] Gross, *supra* note 7.

[24] Kiani, *supra* note 19.

[25] Standeford, *supra* note 4.

[26] New, *supra* note 1.

[27] Standeford, *supra* note 4.

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[29] *Id.*

[30] Morten Messerschmidt, *Patent Reform Could Hurt Key U.S. Allies*, Feb. 29, 2008, http://www.statesmanjournal.com/apps/pbcs.dll/article?AID=/20080229/OPINION/80228053/1049

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AIRLINE LABOR DISPUTES AND THE RLA STATUS QUO PROVISIONS

I. Introduction

On March 7, 2008, the United States Court of Appeals for the Ninth Circuit filed its opinion in the case of *International Brotherhood of Teamsters v. North American Airlines.* [1] It addressed the question of whether a labor union is entitled to enjoin an air carrier to prevent it from unilaterally altering the working conditions of its pilots, while negotiations for an initial collective bargaining agreement are still pending. [2] The court cited the Supreme Court's interpretation of the status quo provisions of the Railway Labor Act of 1926 in *Williams v. Jacksonville Terminal Co*., in ruling that unilateral alteration of working conditions are not prohibited in cases where there is no prior collective bargaining agreement, regardless of any pending negotiations. [3] The *Teamsters* case well illustrates a continuing debate as to whether the Supreme Court's interpretation of the RLA's status quo provisions still adequately serves the RLA's original purpose of promoting peaceable resolution of labor disputes.

II. Background

A. The Railway Labor Act: Purpose & Procedure

In 1926, Congress enacted the RLA, drawing nearly exclusively from the approach to dispute resolution adopted by railway executives and union officials in response to the violent labor conflicts of the late 19th century. [4] Originally applying only to railway companies, Congress amended the RLA in 1936 to include coverage of air carriers. [5] The federal government's interest in the regulation of carrier labor disputes derives from its recognition that interstate commerce relies on the transportation industry and that any disruption of that industry resulting from labor unrest may have devastating effects on both the industry itself and the national economy. [6] The RLA serves to "avoid any interruption to commerce or the operation of any carrier" by providing a procedural framework, within which carriers and their labor unions can peaceably settle labor disputes without disrupting operations. [7] The RLA's status quo provisions, essential to its purpose, "prevent the union from striking and management from doing anything that would justify a strike." [8]

The status quo provisions are scattered throughout the statutory language of the RLA, precluding alterations at specific points during the resolution of major disputes. [9] The general duties of the RLA include the provision that, "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements . . . ." [10] In addition, the parties have a duty to "exert every reasonable effort to make and maintain agreements, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . . " [11] This responsibility commences before any agreement has been formed. [12]

B. Status Quo Application and Scope

In the 1942 *Williams* case, the Supreme Court held that the parts of the RLA prohibiting changes to pay during collective bargaining do not apply to the carrier in cases where there is not a prior collective bargaining agreement. [13] In that case, representatives of red caps employed by a railroad terminal brought action to recover unpaid wages and damages under violations of the Fair Labor Standards Act("FLSA") and RLA. [14] Under the Court's interpretation of the statutory language of the RLA, particularly the phrase "in agreements," the status quo provisions apply only to agreements reached after collective bargaining. [15] In the 1969 case of *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, the Supreme Court clarified the scope of the status quo provisions by holding that they concern the preservation of the actual, objective working conditions in effect prior to the time the pending dispute arose – regardless of whether the written agreement touched upon the disputed issue. [16] In justifying its holding, the Court emphasized that the provisions of the RLA form "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period." [17]

C. *International Brotherhood of Teamsters*

The International Brotherhood of Teamsters ("IBT") alleged that North American Airlines violated its obligations under the status quo provisions of the RLA, by unilaterally altering the pilots' rates of pay, rules, and working conditions, in the midst of negotiations for an initial collective bargaining agreement. [18] The National Mediation Board ("NMB") had certified IBT as the collective bargaining representative for the pilots in January, 2004. [19] In November of that year, North American announced a plan to reduce costs that included pilots' scheduling changes. [20] Negotiations with IBT regarding these changes were not successful, and, pursuant to IBT's application, the NMB instituted mediation proceedings on December 13, 2004. [21] On December 28, 2004, North American announced a reduction in pilots' wages, a reduction of the minimum monthly flight hour guarantee, and other limitations of working conditions. [22] These alterations took effect on January 7, 2005. [23] IBT sought an injunction to prevent North American from unilaterally altering working conditions and to return the conditions to what they were prior to negotiations. [24]

The Court of Appeals applied the rule from *Williams*, precluding the requirement of maintaining the status quo before the collective bargaining agreement has been completed, thereby denying IBT's request for an injunction. [25]

III. Analysis

Due to the 1978 government deregulation of the airline industry and the financial difficulties resulting from the events of September 11, 2001, the airline industry has become increasingly competitive. [26] Maintaining profitability in this environment has required airlines to increase efficiency and decrease operating costs. [27] This state of affairs leaves workers in a rather precarious position, especially considering the absence of protection for members of new unions that have not yet completed an initial collective bargaining agreement.

The *Shore Line* Court broadened the interpretation of "agreements" to include common everyday practices that both the union and company recognize as normal during the ordinary course of business. [28] This interpretation, while casting uncertainty over the decision in *Williams*, stopped short of overruling it. [29] Therefore, where a new union is denied the invocation of the status quo provisions during negotiations for the initial agreement in the face of unilateral changes by the company, the union's only recourse is a strike. [30] Such a situation presents a weak link in the RLA's protection and promotion of peaceable resolution to labor disputes. It has been argued that, because *Williams* works against the stated purpose of the RLA, it ought to be overruled by the Supreme Court. [31]

IBT raised a number of arguments amounting to the claim that *Williams* does not apply to the facts of its case. Their first argument cites the statutory language's lack of an express limitation on the applicability of the status quo requirements. [32] Together with *Shore Line*'s vision of an "integrated, harmonious scheme" for the preservation of the status quo from the beginning of the dispute to the end, the lack of express limitation, claims IBT, implies that unilateral changes in working conditions ought to be prohibited even before the completion of an initial collective bargaining agreement. [33]

IBT also cited an interpretation of *Williams* and *Shore Line* adopted by the 11th Circuit in *International Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos*. [34] The argument turns on *Shore Line*'s interpretation of *Williams*: "In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter." [35] IBT argues with the 11th Circuit that this statement implies its converse: "Where there is any prior history of collective bargaining, the status quo provisions or RLA must apply." [36]

Finally, IBT compares the language of the RLA concerning the general duty to bargain in good faith to the analogous obligation under the National Labor Relations Act ("NLRA"). [37] As interpreted by the Supreme Court, unilateral changes of working conditions violate the duty to bargain in good faith under the NLRA. [38] IBT argues that the same interpretation ought to be extended to the RLA. [39]

IV. Resolution

The 9th Circuit's response to IBT's arguments maintains that the decision from *Williams* is still good law and still applies to the facts of IBT's case. [40] The court distinguishes the RLA from the NLRA by noting that, unlike the RLA, the NLRA provides for an administrative agency, clearly demonstrating a disparity of congressional intent regarding their operations. [41]

The 9th Circuit does not address the purpose of the RLA, how that purpose is served by the decisions in *Williams* and *Shore Line*, or whether that purpose is served by its own decision in the IBT case. The holding in *Williams*, that the status quo requirement does not apply in cases where there has been no initial collective bargaining agreement, implies that the interest to be protected by the RLA is the agreement between the parties. This limits that general purpose of "avoiding interruption to commerce or the operation of any carrier" to "avoiding interruption to commerce or the operation of any carrier" in cases where the carrier has already reached an agreement with its labor union. The holding in *Shore Line* was that the status quo requirement applies to whatever working conditions were in effect prior to the dispute, regardless of their inclusion in any collective bargaining agreement, so long as there is a collective bargaining agreement This holding also implies that the agreement between the parties is the primary interest protected by the RLA – but the focus seems different. It is clear from *Shore Line* that it is not the terms of the agreement that are important, but rather that there is an agreement.

If the importance lies with the fact of the agreement as opposed to its terms, then the interest of the RLA in the agreement concerns less what is agreed upon by the parties, and more that the parties are in agreement. It is irrelevant, from the perspective of government regulation, what the parties have actually agreed upon. It is essential that the parties can operate in an environment where they can agree on whatever is necessary to continue operations of the industry without the threat of interruption by strike. The interest to be protected by the RLA is the continued operation of the transportation industry; necessary to that continued operation is the ability of the parties to agree. Therefore, the government's interest should be in promoting an environment in which negotiations may be conducted without undue interference. Enforcing agreements is necessary to that interest, but only insofar as it promotes unencumbered negotiations.

V. Conclusion

If the purpose of the RLA is more to promote the avoidance of labor dispute disruption of the transportation industry by providing an environment conducive to negotiation and enforcing collective bargaining agreements, rather than merely enforcing agreements, then IBT's arguments begin to appear far more persuasive. If this is the case, then the only way for the RLA to be able to fully serve its purpose would be for the Supreme Court to overrule *Williams.*

[1] Int'l Bhd. of Teamsters v. N. Am. Airlines, No. 05-17436, 2008 WL 614243, *1 (9th Cir. Mar. 7, 2008); MetNews Staff Writer, *Court: No Status Quo Requirement During Contract Negotiations*, METRO.NEWS-ENTERPRISE, Mar. 10, 2008,http://www.metnews.com/articles/2008/team031008.htm.

[2] Int'l Bhd., 2008 WL 614243, at *1

[3] Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402 (1942); Int'l Bhd., 2008 WL 614243 at *6.

[4] Mark A. Schuler, Note, *The Railway Labor Act of 1926 and Modern-Day Airline Labor Strife: Progress Toward Labor Peace Begins with Overruling* Williams v. Jacksonville Terminal Co., 21 SEATTLE U. L. REV. 189, 192 (1997).

[5] 45 U.S.C. § 181 (2000).

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[7] 45 U.S.C. § 152 (2004).

[8] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 150 (1969).

[9] 45 U.S.C. §§ 155, 156, 160 (2000).

[10] 45 U.S.C. § 152 (2000).

[11] *Id.*

[12] Int'l Bhd. of Teamsters v. N. Am. Airlines, No. 05-17436, 2008 WL 614243, *4 (9th Cir. Mar. 7, 2008).

[13] Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402 (1942).

[14] *Id.* at 390.

[15] *Id.* at 440.

[16] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 152-53 (1969).

[17] *Id.* at 152.

[18] Int'l Bhd. of Teamsters v. N. Am. Airlines, No. 05-17436, 2008 WL 614243, *2 (9th Cir. Mar. 7, 2008).

[19] *Id.* at *1.

[20] *Id.*

[21] *Id.*

[22] *Id.* at *2.

[23] *Id.*

[24] *Id.*

[25] *Id.* at *5.

[26] Tulk, *supra* note 5, at 628.

[27] *Id.*

[28] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 153 (1969).

[29] Schuler, *supra* note 3, at 204.

[30] *Id.* at 190.

[31] *Id.* at 210.

[32] Int'l Bhd. of Teamsters v. N. Am. Airlines, No. 05-17436, 2008 WL 614243, *6 (9th Cir. Mar. 7, 2008).

[33] *Id.*

[34] Int'l Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, 924 F.2d 1005, 1008 (11th Cir. 1991).

[35] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 158 (1969).

[36] Int'l Bhd., 2008 WL 614243, at *6.

[37] *Id.* at *7.

[38] NLRB v. Katz, 369 U.S. 736, 743 (1962).

[39] Int'l Bhd., 2008 WL 614243, at *7.

[40] *Id.* at *6.

[41] *Id.* at *7.

ARE YOUR GIFT CARDS SAFE?

I. Introduction

On February 19th, 2008 the specialty retailer Sharper Image filed for bankruptcy under Chapter 11 and announced that it would no longer be accepting its gift cards. This came as a shock to consumers, who suddenly found their holiday gift cards worthless. "'That is typical of businesses that reorganize under Chapter 11 bankruptcy, which treats gift cards as a loan to the company, not as cash.'" [1] Chapter 11 allows for an automatic stay of recovery for any claim against the debtor that arose before the filing of the bankruptcy claim. [2] In response to this announcement, C. Britt Beemer, chairman of America's Research Group, projected that this would greatly affect Sharper Image's future. "'You will see a lot of frustration among customers. You basically stole [money] out of the customers' pocket. They will never forgive you.'" [3]

Just two and a half weeks later, on March 7, 2008, Sharper Image announced it would resume its gift card program, but with certain conditions. Sharper Image's website explains that the program is purely voluntary, applying to all gift cards issued prior to its filing Chapter 11. [4] A person choosing to redeem his gift card must spend the entire balance of the card and the purchase total must be at least twice the amount on the gift card. [5] For example, if a person has a $100 gift card the total purchase must be at least $200, using the full balance of the card. If a person chooses not to redeem according to the new policy, he may have a claim in the bankruptcy action, which would be classified as a priority unsecured claim. [6] This is high up in the unsecured food chain, but would not be paid until all secured claims, those backed by assets, were paid out. Sharper Image Chief

Executive Robert Conway explained, "'while not a complete solution, it does provide satisfaction to customers on a voluntary basis.'" [7] The website goes on to say that Sharper Image hopes it can honor gift cards without condition in the future, but it cannot be guaranteed. [8] Most Sharper Image retail stores are accepting gift cards, but the website can no longer honor them.

II. The Rise of Gift Cards

The trend of giving gift cards as presents has gained popularity in recent years. This past holiday season $26.3 billion dollars were spent on gift cards alone, up from $24.8 billion in 2006 and $24.48 billion in 2005. [9] Some fear that the country's recent economic woes combined with Chapter 11's treatment of gift cards as a loan, instead of cash, put the actual worth of gift cards in limbo. It is estimated that shoppers could lose as much as $75 million from store and restaurant closings in 2008, not including mom-and-pop stores which are more vulnerable to economic downturns. [10]

III. How May Consumers Be Protected?

Recently, more than twenty states passed regulations lowering the restrictions on gift card use. [11] These states responded to consumer-advocacy groups drawing attention to gift card traps such as expiration dates and hidden fees which often catch consumers unaware. [12] One internet company has gone so far as to institute a bankruptcy insurance policy on its gift cards.

On February 25, 2008 Leverage, Inc announced that it would offer consumers who purchased Sharper Image gift cards from its website, LeverageCard.com, and other retailers filing for Chapter 11, protection by transferring the remaining, unredeemable balance to gift cards for other participating LeverageCard.com retailers. [13] For gift cards not purchased through the site, Leverage will allow Sharper Image gift card holders to register their cards and "receive periodic updates as well as applicable assistance during bankruptcy proceedings." [14] Mark Roberts, CEO of Leverage, explained the rationale behind the policy, saying, "'during difficult economic times, consumers may suffer when retailer policy changes leave them with unused gift cards, store credit, and faulty products, among other things. We believe people shouldn't have to pay, both literally and figuratively, when a retailer suffers the misfortune of having to file for bankruptcy and are extending this bankruptcy policy to provide some peace of mind for users of our service.'" [15]

IV. Conclusion

The protection that Leverage offers on its gift cards is rare. The majority of gift cards are purchased directly from retailers, who do not usually offer gift card protection. The effects of Sharper Image's initial rejection of its gift cards and subsequent conditional gift card policy are unclear. It is unlikely that the strong surge in holiday gift card purchases will drop off significantly, but the publicity that Sharper Image's conditional gift card policy has gotten may make consumers more aware of the dangers and pitfalls inherent with gift cards.

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[9] D'Innocenzio, *supra* note 1.

[10] *Id.*

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[12] *Id.*

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[15] *Id.*

THE EXISTING LABOR AND ENVIRONMENTAL AGREEMENTS IN NAFTA

As the Ohio Democratic primary approached, Barack Obama and Hillary Clinton pulled out all the stops to secure the few remaining undecided votes in the Democratic Presidential race. Ohio's economy has been struggling, and the candidates saw a convenient scapegoat to blame for its industrial decline. Both candidates vowed to force Mexico and Canada to include labor and environmental agreements into the North American Free Trade Agreement (NAFTA) or risk the US pulling out of the agreement all together. [1] The sharp anti-trade rhetoric had some obvious omissions. NAFTA more than tripled trade between US, Canada, and Mexico and like all barrier reducing trade agreements, has had a beneficial long-term impact on all three economies. [2] It was supported by politicians and economists of all political leanings, including President Clinton who pushed it through Congress. [3] But perhaps the most glaring omission in Obama's and Clinton's speeches is that NAFTA already includes robust, skillfully crafted labor and environmental agreements. [4] The same type of agreements they supported in other trade pacts.

After being elected into office, President Clinton renegotiated NAFTA to include agreements on labor and the environment. [5] The two side agreements balance concerns about national sovereignty with effective enforcement of basic labor and environmental standards. [5] They were key to winning over support for NAFTA in the Senate. [6] The North American Agreement on Labor Cooperation (NAALC), the side agreement on labor, marked the first time that reciprocal worker protections were included in a US free trade pact. [7]

“[W]hile the NAALC’s origins lay in the deep insecurities — and perhaps, to some degree, in the underlying racial tensions — of the American workforce, those more unsavory impulses . . . were rewritten in the language and rhetoric of human rights.” [8] NAALC provided a solution to negotiators who wanted to include fundamental labor protections into the agreement without jeopardizing the gains in efficiency, productivity, and mobility made possible with free trade pacts such as NAFTA. [9] With the enactment of NAALC, Mexico, Canada, and the US agreed to hold each other accountable for effectively enforcing labor protections within their own borders. [10] NAALC covers eleven specific areas of labor law, including the right to organize, the right to collectively bargain, and the right to be compensated in case of illness [10] Claims alleging a violation of these labor standards are heard in a dispute settlement process, which includes consultation, evaluation, and arbitration. [11] The arbitration panel may assess monetary damages against a party, be ordered to improve its enforcement of labor laws, or endure trade sanctions. [12] The process mirrors the non-labor NAFTA dispute resolution process. [13]

The NAALC effectively balances concerns about national sovereignty with the desire to have baseline labor standards. While it covers eleven specific areas of labor law, it does not create multi-national super law. Instead, it mandates enforcement of existing domestic laws and standards that fall into the specifically referenced provisions. It creates a multi-national forum where each participating nation may be held responsible for not enforcing the labor laws it has on the books. The construct is quite effective. Mexico has a long history of corporatism and has strong labor rights on paper. [14] The NAALC creates a mechanism where labor rights that previously existed only on paper may now be enforced through a multi-national dispute process. The agreement does not threaten any nation’s ability to self-govern by not imposing a body of multi-national super law. Yet at the same time, it results in improved labor conditions through stronger enforcement.

The NAALC was a significant innovation in trade relations. It was so effective in balancing the priorities of all parties, that its construct became a model for future US free trade agreements. [15] Pacts with Chile, Singapore, several Central American nations (CAFTA), and Jordan have provisions that mirror the NAALC. [16] The recently enacted free trade agreement with Peru, which both Barack Obama and Hillary Clinton supported in the Senate, has a nearly identical agreement on labor. [17] If the agreement is good enough for the trade pact with Peru, than why not Mexico and Canada?

The North American Agreement on Environmental Cooperation (NAAEC) is structured similarly to the NAALC. [18] It requires each nation to enforce its existing environmental standards. [19] But since negotiators were aware that existing environmental standards in Mexico may be too weak or nonexistent, the NAAEC has several key requirements that each nation must meet. The NAAEC requires Canada, Mexico, and the US to “assess, as appropriate, environmental impacts” and provide an impact statement to NAFTA, "promote education in environmental matters", and ensure that laws and regulations provide for high levels of environmental protection and . . . strive to continue to improve those laws and regulations." [20] The NAAEC has been effective in practice. Immediately after NAAEC’s inception, the Clinton administration failed to provide an environmental impact statement to NAFTA and was ordered to do so by a federal court. [21]

Like the NAALC, the NAAEC balances concerns about national sovereignty with environmental protection. Since NAAEC is structured in such a way as to only make it possible to mandate enforcement of existing standards, the NAAEC requires a "high level" of domestic environmental protection along with continued awareness. [22] Like the NAALC, the NAAEC has been incorporated into CAFTA, agreements with Jordan, Singapore, Chile, and the recently enacted free trade pact with Peru, which all three leading Presidential candidates supported in the Senate. [23]

The NAALC and NAAEC were a breakthrough in free trade negotiations. They skillfully addressed concerns about national sovereignty, while mandating enforcement of basic labor and environmental standards. Clinton and Obama vow to force Mexico and Canada to include labor and environmental standards into NAFTA. They omit the fact that skillfully crafted labor and environmental standards are already a part of the agreement. This is not only misleading, but dangerous. It threatens the long-term economic health of all three nations and jeopardizes the economic advancement of millions of people.

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[3] *Id*.

[4] Michael Donovan, *Labor Provisions from Nafta to Cafta: Standards That Work, or a Work in Progress*, BOSTON COLLEGE LAW SCHOOL, 2005, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=bc/ljawps (last

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[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] Michael Donovan, *Labor Provisions from Nafta to Cafta: Standards That Work, or a Work in Progress*, BOSTON COLLEGE LAW SCHOOL, 2005, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=bc/ljawps (last visited March 20, 2008).

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] Michael Donovan, *Labor Provisions from Nafta to Cafta: Standards That Work, or a Work in Progress*, BOSTON COLLEGE LAW SCHOOL, 2005, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=bc/ljawps (last visited March 20, 2008).

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[18] Steve Charnovitz, The *NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, Temp. Int'l & Comp. L.J. 257 (1994).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Supra* note 17.

WORST. JOURNAL ARTICLE. EVER. [NORTHERN IRELAND COURT OF APPEALS OVERTURNS AWARD TO "GOODFELLAS" PIZZERIA IN BELFAST]

I. It's All in Good Taste

Recently,
Northern Island's Court of Appeal overturned a jury's decision to award £25,000 to a pizzeria in Belfast in a defamation suit.[1] In this particular case, Irish News restaurant
critic Caroline Workman wrote a highly critical article of Goodfellas pizzeria, which resulted in the pizzeria filing a defamation suit against Irish News,[2] While a jury found in favor of Goodfellas,
awarding the pizzeria £25,000, Northern Ireland's Court of Appeal ordered a retrial after finding the instructions to the jury were confusing regarding the distinction between fact and comment.[3]

Cases like this have happened in the
United States and continue to happen today. While the differences between law in the United States and law in
Northern Ireland are multifarious, both nations have been faced with the complicated legal issue of how to deal with restaurants bringing defamation suits against their critics. U.S. courts
must delicately balance considerations ranging from the First Amendment to the legitimate harm defamatory reviews can have on innocent restaurants. This article will examine how United States
courts have dealt with this problem. It

will also weigh both sides of this issue while commenting on the importance of free speech for critics.

II. Food Fight!

A quick overview of the restaurant industry reveals that it is one of the largest and most profitable industries in the United States. Current projections estimate that the restaurant industry in the United States will post sales numbers of $558 billion in 2008 alone.[4] On a typical day in 2008, the restaurant industry will have roughly $1.5 billion in sales.[5] With roughly 945,000 locations and an estimated 13.1 million employees,[6] the restaurant industry is one of the linchpins of the economy. While these numbers are impressive and growth is likely to continue in this sector, the success of the restaurant industry is not without its consequences.

Basically, one of the greatest issues facing any restaurant is competition. Considering the large number of restaurants across the United States, consumers have a large number of choices at their disposal. Different occasions also call for different restaurants. While a couple on a date may opt for somewhere with an intimate setting, a large birthday party would likely be ill-suited to that setting. Restaurants vastly differ in terms of location, price, cuisine, atmosphere, and many other qualities. For these reasons, restaurants are constantly in competition with one another for customers. With the continuing growth of the restaurant industry, consumers often resort to gathering information about these restaurants before making a choice. Gathering this information can be costly, difficult, and, at times, vaguely horrifying. Most consumers would prefer to avoid restaurants where the food looks and tastes like vulcanized rubber. Negative information can really hurt a restaurant. On the other hand, positive information casting the restaurant in a good like can result in more customers and increased sales for a restaurant.

Thus, restaurant critics can serve an important function for consumers by providing them with this information. Through publications in newspapers, magazines, books, television shows, and the internet, these critics are able to reach numerous restaurant consumers. Their reviews can be a serious matter for restaurateurs. Costs such as rent, utilities, equipment, wages and benefits for employees, and many other matters make owning and managing restaurants an expensive endeavor.

For example, in late 2006, noted British chef Gordon Ramsay opened his first restaurant in the United States, Gordon

Ramsay at the London, after investing nearly $7.2 million in it.[7] Prior to the restaurant's opening in New York City, there was much consternation over New York Times food critic Frank Bruni's eventual write-up of the restaurant prior to its opening.[8] While Gordon Ramsay at the London in New York City managed to survive Bruni's eventual review of two stars out of four,[9] this example illustrates the pressure critics can place on the restaurant industry. Because these reviews can have a strong negative impact on restaurants, some restaurateurs resort to defamation suits as a solution to this impact.

III. Defamation: The Word Responsible for the Spread of the Bubonic Plague

Generally speaking, defamation is defined as the act of one person harming another by making a false statement to a third person.[10] While this general definition is relevant to this discussion, defamation cases involving restaurants require a history of some barriers that they must overcome in a defamation suit. The most practical starting point for this historical analysis is the celebrated case *New York Times Co. v. Sullivan*. In tangling with issues relating to whether the First Amendment can apply to libel, the Court ruled that public officials may not recover damages for defamation relating to their conduct unless the statement in question was made with "actual malice".[11] The court defined "actual malice" as whether there was knowledge or reckless disregard on the part of the writer regarding whether the statement in question was false.[12]

While *Sullivan* seemed to deal only with government officials in establishing that standard, the definition of "public official" covers more than just those who work in government. While the Supreme Court in *Gertz v. Robert Welch, Inc.* recognized private individuals are more vulnerable to injury than public officials, especially considering public officials have larger channels of communication than private individuals, the Court recognized that many private individuals attract attention and comment.[13] Following the Supreme Court's lead, a number of other courts have recognized restaurants as public figures.[14] Thus, a restaurant bringing a defamation suit against a critic would have to prove actual malice on the critic's part.

The next critical legal hurdle is the distinction between fact and opinion. The Supreme Court in *Gertz* laid out the foundation for this distinction. The Court determined that, under the First Amendment, opinions are protected, whereas false statements of fact are not protected.[15] However, it is worth noting that not all statements couched as opinions are protected. In a case where someone states an opinion that appears to be based on knowledge of facts, such as the statement, "In my opinion, John Jones is a liar," can have just as much of a damaging effect as the statement, "John Jones is a liar."[16] Given that it can be difficult to separate fact from opinion, the D.C. Circuit Court in *Ollman v. Evans* devised a four factor test to clarify this distinction. These four factors are:

determining whether the statement was precise or indefinite, determining whether the statement can be considered true or false, evaluating the general context in which the statement appears, and evaluating the broader social context in which the statement appears.[17] While the first two statements are self-explanatory, the second two statements need further explanation. In talking about the general context, the plurality was discussing an evaluation of the column or article as a whole, such as determining if it was written in a hyperbolic manner.[18] As for the broader social context, the plurality was referring to distinctions that the public is likely to make based on the circumstances surrounding the statement.[19] For example, while someone standing on a soapbox criticizing a politician as corrupt may be perceived as spouting her own opinion, a research monograph which lists the politician as corrupt in discussing the causes and cures of political corruption is more likely to be as fact.[20]

There is one final thing worth noting about defamation actions. Truth is an absolute defense to a defamation action.[21] Even a statement which is substantially true, but has smaller errors in the details, can defeat a defamation claim.[22]

IV. Warning: Handle Litigation with Care

With these factors laid out, it is clear that restaurants will most likely have a difficult time effectively asserting a defamation claim. In getting to the heart of whether something can be construed as fact or opinion, the first barrier facing restaurants is the fact that taste can be enormously subjective. While some people may delight in eating exotic delicacies such as frogs' legs, durian, or reindeer, other people may shudder at the very thought of being in the same room as those foods. In other words, people have differing opinions of food. These opinions are not actionable under a defamation claim.[23]

Moreover, as *Mashburn* illustrated, a fair number of restaurant critics resort to hyperbole in expressing their opinions. Many reviews often use hyperbole in a humorous fashion.[24] Given that authors use hyperbole and overstatement in their reviews, it seems extraordinarily unlikely that their statements can be construed as factual. These statements might be enormously critical of the restaurant, but someone describing the food they were served as looking and tasting like vulcanized rubber is probably not going to be taken literally. Given the context of these reviews, reasonable readers can understand that these statements are opinions and not facts.

Restaurants also face another potential problem in these reviews. If they were to sue a critic for defamation and it turned out that the statements the critic made were in fact true, that would be even more destructive to the restaurant than anything the writer may put in the publication. While truth and substantial truth can be difficult defenses to prove, given the need for investigation and evidence-gathering, a restaurant may want to think twice about filing a defamation suit against a critic who claims he saw a cockroach in their bathroom.

One final issue facing restaurateurs in filing these lawsuits is their likelihood of success is low. As one justice put it, “[restaurant] reviews, although they may be unkind, are not normally a breeding ground for successful lawsuits.”[25] Skepticism towards these claims is understandable, especially given their subjective nature as reviews. While these reviews might be damaging for restaurants, the fact of the matter is these reviewers are entitled to their own opinions.

V. Never Let Facts Get in the Way of a Good Argument

However, in spite of these issues, restaurants can still use defamation suits to their advantage. For example, in *Terillo v. New York Newsday*, a dining column published the recipe of a dish at a Manhattan restaurant, only it listed the incorrect ingredients.<[26] The *Terillo* court found in favor of the plaintiff on the issue of establishing libel and actual malice, as the defendants had an actual menu from their restaurant and printed an inadequate addendum to the article after being informed of their mistakes.[27] Had the defendants printed an adequate retraction, this case may have had a different outcome.[28] Despite establishing a prima facie case, the suit was ultimately dismissed since the plaintiff could not prove monetary damages.[29]

Considering *Terillo* was a case that dealt with an easily verifiable list and a defendant clearly acting recklessly (satisfying the actual malice standard), its facts might not carry over effectively into future defamation suits. Why should restaurants even bother with defamation claims in the first place if they face all of these barriers? Two reasons can provide a satisfying explanation for why restaurants continue this practice today.

The first reason is a pessimistic one. Restaurants can use lawsuits to bully critics and reviewers into withdrawing or amending their reviews. While people such as Frank Bruni have the backing of the New York Times and other major media organizations, critics who post their reviews on blogs and smaller forms of publication do not have that luxury. While a lawsuit against a restaurant critic blogger could be frivolous, the potential cost of legal fees and a protracted legal battle could cause that person to simply remove or amend the review to avoid the hassle.

The second reason is optimistic. Many critics have attracted a public following. Consumers rely on these critics because they trust their opinions and reviews. As previously mentioned, these critics wield a lot of power. If they abuse this power and make defamatory statements, innocent restaurants will be harmed and consumers will receive false information. There needs to be an incentive for reviewers to conform their behavior so that they stick to opinions and true statements of fact.

VI. Always Leave Room for Dessert

While defamation may not be an effective tool for restaurants to attack critics, it provides an effective shield to protect themselves. Critics need to be able to express their opinions and inform the public. They are entitled to strong freedoms and protections under the First Amendment. However, at the same time, critics can occupy powerful positions. A scathing review of a restaurant could spell that restaurant's demise. While many of these reviews may be justified, these critics must show due regard for facts. In that respect, defamation can be an effective tool in shaping their behavior.

However, at the same time, restaurants smarting from negative reviews may wrongfully turn to the court system in order to take down a harsh opinion piece from a critic. That is not an effective use of resources, given the incredibly low likelihood of success. If countless consumers respect a food critic's reviews, there is likely an incredibly good reason for it. Those consumers agree with the critic's tastes. They will most likely agree with the critic's assessment of that restaurant. Rather than lash out at the media, restaurants contemplating the use of the court system as a bully should instead focus their resources and energy on putting forth a better product. The Northern Ireland Court of Appeal sent the right message in ordering a retrial in the Goodfellas pizzeria case. Even critics have the inherent right to express their opinions through free speech.

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[1] *Judge Quashes Libel Ruling against Restaurant Critic*, BreitBart.com, Mar. 11, 2008.

[2] *Id*.

[3] *Id*.

[4] National Restaurant Association 2008 Restaurant Industry Pocket Factbook, http://www.restaurant.org/pdfs/research/2008forecast_factbook.pdf (last visited Mar. 13, 2008).

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[6] *Id*.

[7] Jay Rayner, *Meet Mr. Bruni, the Man Who Can Spoil Gordon's NY Party*, THE OBSERVER, Nov. 12, 2006, at 19, *available at* http://www.guardian.co.uk/uk/2006/nov/12/usa.foodanddrink.

[8] *Id*.

[9] Frank Bruni, *For a Bad Boy Chef, He's Certainly Polite*¸ N.Y. TIMES, Jan. 31, 2007, at F8, *available*

*at*http://events.nytimes.com/2007/01/31/dining/reviews/31rest.html?ref=dining. Frank Bruni did not seem to like the fact that the restaurant was so low-key and mellow, despite the fact that Gordon Ramsay has often been portrayed as a fiery and excitable man. Bruni shared further thoughts on Gordon Ramsay at the London in New York City in his blog. Posting of Frank Bruni to Diner's Journal, *Flushes and Flashes at Ramsay*, http://dinersjournal.blogs.nytimes.com/2007/01/31/flushes-and-flashes-at-ramsay/ (Jan. 31, 2007, 4:23 PM EST).

[10] BLACK'S LAW DICTIONARY (Bryan Garner ed., 2004).

[11] New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

[12] *Id*.

[13] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-345 (1974).

[14] *See* Pegasus v. Reno Newspapers, Inc., 57 P.3d 82 (Nev. 2002). However, *compare* Steak Bit of Westbury v. Newsday, Inc., 334 N.Y.S.2d 325 (N.Y. Sup. Ct. 1972) (finding a restaurant to be a public official because it serves the public and is of public interest) *with* Havalunch v. Mazza, 170 W.Va. 268 (1981) (declining to hold a restaurant to be a public official because it did not hold itself out to the public for reviews and interest, thereby requiring the restaurant to a negligence standard).

[15] *Gertz*, 418 U.S. at 339-440 (footnote
omitted).

[16] Milkovich
v. Lorain Journal Co., 497 U.S. 1, 18-19, (1990).

[17]
Ollman v. Evans, 750 F.2d 970, 979 (1984).

[18] *Id*. at 982.

[19] *Id.* at 983.

[20] *Id*.

[21] Thomas
Daly, 19 AM. JURISPRUDENCE TRIALS 499, § 20(2007).

[22] Haynes
v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

[23]
Mashburn v. Collin, 355 So.2d 879, 888-889 (La. 1977) ("[a]ccording to the author, the sauces could be described as 'hideous'
and 'glop,' the Oysters Bienville were a 'ghastly concoction' of 'strange,' and 'weird' flavors, the
escargots left 'a bad taste in one's mouth,' the duck was served with 'horrible multiflavored rice,' the stuffed eggplant looked and tasted like 'bad overcooked broiled fish,' and most of the food tasted'"as if the conceptions were wrong to begin with,' or as if the sauces came from 'bad cook books.' Although these remarks were sharply critical, they undoubtedly amounted to no more than expression of an opinion that the preparation of the food was ill conceived and unskillful,").

[24] *See Havalunch v. Mazza*, 170 W.Va. 268
(where the author of the restaurant review recommended bringing a can of Raid
to patrons of the restaurant).

[25]
Adam Liptak, *Serving You Tonight Will Be
Our Lawyer*, N.Y. TIMES, Mar. 7, 2007, at F1, *available
at* http://www.nytimes.com/2007/03/07/dining/07lega.html.

[26]
Terillo v. New York Newsday, 519 N.Y.S.2d 914 (N.Y. Civ. Ct. 1971).

[27] *Id*. at 916-917.

[28] *Id*.

[29] *Id*.

SHOULD COMPLEX CORPORATE LITIGATION TRIALS BE LEFT TO THE JURIES?

I. Introduction

Corporate litigation disputes are becoming more complex as new issues arise addressing questions on statistical and/or probabilistic facts, expert testimonies, and other intricacies of the business world. This trend in litigation poses a new issue to the courts, and, more specifically to the juries. With these issues becoming more complicated, one can only wonder if lay jurors are able to understand the disputes, judicial instructions, and are capable of applying the facts to the law.

Juries in their earliest form consisted of committees of qualified persons in the community who provided assistance on facts or issues in dispute. [1] By this time, these "jurors not only knew the litigants, [but] they also knew something about the dispute." [2] Jurors were able to conduct their own investigations among those who they believed had knowledge of the facts. [3] "Today, however, any knowledge of the dispute or familiarity with the litigants is cause for disqualification." [4] The trial by jury in civil cases was introduced into the constitution in 1791 as part of the Seventh Amendment which states, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[5] This Amendment is further supplemented by Rule 38(a) of the Federal Rules of Civil Procedure, which provides "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or given by a statute of the United States shall be preserved to the parties inviolate." [6]

There has been much debate over whether the Seventh Amendment should allow a "complexity exception" in intricate business disputes. This exception would allow the judge to take the reigns from the jury and become not only the finder of law, but the finder of fact. Arguments for this exception assert that juries are "unqualified to participate in lengthy and complex suits both because of the size of the action and the jury's lack of experience in an area requiring great intellectual effort."[7] As illustrated in *In re Japanese Electronic Products Antitrust Litigation*,
the constitution does not necessitate a jury trial in an antitrust action if the issues are too complex for the jury to decide in a proper manner.[8] However, when the dispute deals with complexity in the business realm, the Ninth Circuit has held that "in a securities fraud case that there is no complexity exception to the Seventh Amendment right to jury trial in a civil case." [9] The Second Circuit further supported this rationale and has "remarked that it is doubtful that a jury will comprehend such technical issues as scienter and reliance, but the court has declined to recognize a complexity exception to the jury trial right in a securities fraud case." [10]

The issue of whether the complexity of a matter should turn the role of the jury to a judge has never specifically reached the confines of the Supreme Court floor. Nonetheless, shades of the question can be found in cases questioning the overall right to a jury trial in civil actions. In *Ross v. Bernhard*, the Supreme Court entered judgment on whether the Seventh Amendment guarantees the right to a jury trial in stockholders' derivative actions. [11] The majority reversed the Court of Appeals decision, holding that the right to a jury trial attaches to issues "in derivative action[s] brought by stockholders of corporation, right to jury trial attaches to those issues as to which corporation, if it had been suing in its own right, would have been entitled to a jury." [12] However, in a footnote, the "Supreme Court indicated that ‘the practical abilities and limitations of juries may affect the right to a trial by jury in civil cases." [13]. The Supreme Court failed to determine whether this language implied support for "a Seventh Amendment exception to the right to a jury trial in complex civil cases." [14]

The Supreme Court has seemed to tip-toe around the idea of abolishing jury trial in complex civil cases. However, the question remains whether a judge, who is better versed in the law and the application thereof, is more suited to determine the outcome in complex litigation cases? Many theorists argue that the jury trial is the prime source of unreasonable delay in complex litigation. Franklin Strier argues in his book, Reconstructing Justice: An agenda for Trial Reform, that juries have a difficult time recalling testimony and "making decisions based on statistical or probative information." [15]. Streir further claims that "juries do not understand judicial instruction and have an inability to apply the facts to the law." [16] Under this rationale, it is disputed that lay jurors do not understand the law in these settings and that judges, who are more experienced, are better able to resolve difficult factual issues. [17] Nevertheless, advocates for the other side argue that time is a small price to pay to avoid the bias that the judicial system may infer. [18] Coinciding with this principle, theorists suggest that "[j]urors also work to shield judges from politics because judges cannot be held responsible for jurors' decisions, and the presence of jury trial reduces incentives to "buy" or otherwise pressure judges. [19]

Other theorists have discussed a co-mingling of the judge and jury dichotomy when implementing this exception. If it is the judicial downfall that judges cannot reasonably represent the 'jury of your peers', and that jurors cannot understand the complexities of these complex litigation disputes, then why not propose a hybrid approach in which a professional jury is used. Similar to a medical panel, which is composed of doctors in the particular field, that provides assistance in determining whether a physician was negligent in a malpractice cases; these theories have suggested a professional jury composed of competent members of the business/legal community that would adequately represent a cross hatching of the business community. As a result, the parties would not incur unnecessary costs associated with the time needed to explain the complex factual scenarios and cases could be run more efficiently.

It is important to note that another issue is inextricably intertwined with the "complicity exception." There is a question as to what would be the determining factors as to what would be considered a "complex" dispute. Richard Lempert, a professor at the University of

Michigan Law School, "suggested three important dimensions that might be used to define complexity: trial length, voluminous evidence, and complex legal standards." [20] The Court in *In re Japanese Electronic Products Antitrust Litigation*
stated that "[a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner." [21] However, other considerations to take into account can be the technicality of evidence, quantity of evidence, and density of the law. [22] One suggestion to alleviate this dilemma is to establish a totality of the circumstances test; where a judge would consider the factors mentioned above and determine whether a reasonable juror would find the issues to be complex.

It is questionable whether juries are capable of understanding certain complex corporate legal issues sufficiently. It is evident that corporate litigation disputes are becoming more convoluted with expert testimonies, longer trials, and an overall abundance of facts and issues. It only seems necessary that a change occur. Whether it is allowing a "complexity" exception, where the judge takes control (as seen in intellectual property cases), or resorting to a professional panel (as seen in medical malpractice cases), a restructuring seems proper. In both cases, it appears the appropriate remedy is to allow for a more sophisticated and knowledgeable finder of fact where complex litigation is involved.

[1] Gross Samuel, Lempart, Richard & Liebman James, A Modern Approach to Evidence 495 (West Publishing Company, 2000) (1983).

[2] Hon. Hugh H. Bownes, *Should Trial by Jury Be Eliminated in Complex Cases*?, *available at*: http://www.fplc.edu/risk/vol1/winter/bownes.htm.

[3] Gross, *supra* note 1.

[4] Bownes, *supra* note 2.

[5] U.S. Const. Amend. 7.

[6] Federal Rules of Civil Procedure Rule 38(a).

[7] 54 A.L.R. Fed. 733.

[8] *In Re J*apanese *Electronics Products Antitrust Litigation*, 631 F.2d 1069 (3rd Cir. 1980).

[9] AMJUR SECURITIES § 1054

[10] *Id*.

[11] *Ross v. Bernhard*, 396 U.S. 531 (1970).

[12] *Id*.

[13] Stephan Landsman, *Nobody's Perfect*, Nev. L.J. 468, 479 (Spring 2007), *See Ross v. Bernard*, 396 U.S. 531, 538 n.10 (1970).

[14] Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, Ariz. L. Rev. 849 (Fall 1998).

[15] *Id*.

[16] Landsman, *supra* note 13.

[17] Richard Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, Cornell Int'l L. J. 477 (2007).

[18] *Id*.

[19] *Id*. at 480.

[20] Vidmar, *supra* note 14 at 850.

[21] *In Re Japanese*, *supra* note 8.

[22] Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, Ariz. L. Rev. 849, 850 (1998).

CAN A REASONABLE EXPECTATION OF PRIVACY EXIST IN CYBERSPACE?

Privacy has been defined as retirement and seclusion, or as “the state of being free from unsanctioned intrusion.” [1] This evokes thoughts of physical space. [2] One may expect to have privacy behind the closed doors of their own home, though a nosey neighbor may be able to peer through a window and violate that expectation of privacy. Privacy is rarely a guarantee, in this high technology age of advanced surveillance, [3] but most people can feel fairly confident that they can secure a certain physical space where they can be alone and undisturbed. What happens, however, when the walls, doors and windows are removed and cyberspace becomes the means by which private acts take place, or private thoughts are divulged? Do people have an expectation of privacy with regard to using the internet socially, and should they? This article will discuss the difficulty of applying traditional privacy tort analysis to online social networks (“OSNs”) such as MySpace, YouTube and Facebook, [4] and offer some thoughts on a recent proposal to amend the analysis to reflect both physical and cyber privacy.

When a “shameful, embarrassing, or otherwise harmful disclosure of personal information” takes place, there is the potential for a lawsuit alleging tortuous public disclosure. Traditionally, there is a four-part analysis for this tort:

"(1) Was the fact disclosed public or private?
(2) If private, was the information otherwise protected by the first amendment?
(3) If private and not constitutionally protected, was the information disclosed to a large number of people by the defendant’s affirmative action?

(4) Finally, would such a widely disseminated disclosure have highly offended a reasonable person?" [5]

Harm, causation and intent are notably absent from this analysis, but have been read into the tort by various courts interpreting the law. [6] The tort has been further narrowed, perhaps out of fear that the average person could find themselves at risk for prosecution while engaging in routine gossip or that speech that should be protected constitutionally will become suspect. [7] An example of this concern can be found in the case of *Florida Star v. B.J.F.*, where the Supreme Court held that there will be a "public concern test" which must be met in order for a case of tortuous public disclosure to be actionable, meaning that "the information at issue must be a matter of public significance or newsworthiness, and its protection ha[s] to 'further a state interest of the highest order.'" [8] Under the current test, few things are truly actionable under the tort of public disclosure of private facts, especially considering that many things that are a matter of public significance or newsworthiness are also protected by the first amendment. [9] However, for those things that are potentially actionable, the above analysis is inadequate in light of technological advances [10]; since the internet presents new questions regarding what facts are truly public or private, the first prong of the analysis fails to address privacy concerns in cyberspace. A new analysis must therefore be developed.

It may be difficult to apply the traditional public disclosure tort analysis to cyberspace due to the fact that the analysis is heavily linked to the physical realm. [11] The first prong of the traditional test asks whether the disclosed fact was public or private, which begs the question of when a fact is public and when it is private. Is it private simply due to the subject matter of the information – is information of a sexual nature, for example, automatically private? This is not necessarily true. It is difficult to say any information, by its very nature, is private because sensitive information is disclosed all of the time for publicity or other reasons. [12] Physical location also can't define information as public or private, now that the internet is involved. [13] These are just two examples of why the traditional analysis is no longer adequate.

As a result, it has been proposed by Patricia Sanchez Abril that courts analyze these torts in a new way which would be consistent with all possible settings of tortuous public disclosure, both physical and internet invasions of privacy. [14] She suggests that in order to analyze these cases, the court should take a three step approach. [15] First, the court should define what exactly the disclosed information was, whether it was first amendment protected speech and what the overall accessibility was to the information. [16] Next, the courts should analyze the disclosure itself to determine whether the plaintiff was harmed and whether the alleged perpetrator had "malice intent or motive (i.e., did she breach the plaintiff's privacy through wrongful or improper means?)." [17] Lastly, the court should look to what the plaintiff's actions were, including whether the "information [was] originally disclosed in the context of a confidential relationship" and whether the plaintiff took steps to protect the information that was disclosed. [18] Ms. Abril contends that by using this kind of analysis, the court can analyze any public disclosure with a fact-specific approach. [19]

This analysis does seem a more appropriate means of analyzing public disclosure torts, in that it addresses the concerns of intent and harm and translates well to privacy in cyberspace. The first step is adequate to analyze the disclosed information, because it addresses first amendment concerns and assures that protected speech is not chilled by the threat of a private lawsuit. [20] It is also important to analyze the overall accessibility of the information, because if the plaintiff has broadcast the private information on their very own OSN user profile, it was likely accessible to a large audience and therefore the defendant should not be held liable for damages. It has been held that once a person has shared a fact with one or more others, they can no longer hold that information to be private. [21] This is especially true in the digital age, where telling one person could quite literally mean telling the entire world. [22]

The next part of the analysis also seems adequate, in that it addresses the harm that the plaintiff suffered as well as the intent of the discloser, issues that were not addressed in the original restatement analysis. [23] It could be said that anyone who has a private fact disclosed about them was harmed, but this prong of the test would require a severe degree of harm, in order to prevent idle gossip from becoming an actionable offense. This prong allows for a great deal of flexibility and judicial discretion, in that many factors may play into the degree of harm suffered by the plaintiff. While Ms. Abril is attempting to move away from the traditional privacy tort analysis, perhaps the original Restatement language stating that the disclosed information must be "highly offensive to a reasonable person" would be appropriate here in order to give the court some kind of benchmark for what degree of harm must be involved in order for the court to grant relief. [24] In addition, perhaps the size of the audience to which the information was disclosed may be considered. If someone posted harmful information on their OSN profile which only 5 other people have access to (due to privacy settings, etc.), this may be a less serious offense than posting the information on a public OSN profile which has a virtually limitless potential audience. This raises the question of whether any disclosure over the internet should be considered a disclosure to millions of people. One could say that the internet is the largest audience imaginable, yet just because millions of people could have come across the information does not mean that millions of people did. Should any disclosure over the internet be considered a public disclosure to a wide audience? Likely not, and courts will have to do a case-by-case analysis to determine how public the disclosure was in order to determine the true harm to the plaintiff. Intent is also an important factor which Ms. Abril rightly included, because if one person ignorantly spread information about another without meaning to cause harm, their punishment should be far less severe than if it was done maliciously. This may help to assure that only the most serious offenses make it into court – the kind of offenses the U.S. courts presumably intend to deter.

The last prong is very important, in that it analyzes the behavior of the plaintiff his or herself to assure that they took appropriate actions to keep their information private. This shifts a burden to the plaintiff to take steps to protect their information through privacy settings, passwords, etc. [25] The plaintiff can demonstrate a reasonable expectation of privacy by working to protect their information. [26] This prong serves two purposes: (1) it reduces the risk that this lawsuit will end up in court in the first place because increased measures were taken to protect the information, and (2) it also boosts the plaintiff's case in the event of a disclosure.

Ms. Abril's analysis is, therefore, a great way for courts to analyze public disclosures. This multi-factor test may not lead to incredibly consistent results due to the fact-specific nature of the analysis, but it gives courts a list of important concerns that will at the very least assure that the plaintiffs and defendants rights are being considered and fairly weighed, even when privacy over the internet is at issue rather than privacy within physical boundaries.

Today more information is available than ever before, which was made possible by the advent of the internet. People use the internet as a way to promote themselves to a large audience and perhaps even form lasting friendships and romantic relationships. [27] The internet can be a useful tool in furthering social endeavors, but this is a double-edged sword. One poll found that 55% of people ages 12-17 had a MySpace account – a staggering figure. [28] The default mode on MySpace and Facebook accounts is to make all of the information on the page public and available to anyone who wants to see it. Knowing this, people must take extra care to protect information from an unwanted audience. For example, employers are increasingly performing OSN searches of potential employees, and using the information they find to make employment decisions. [29] Users need to take some easy yet effective steps to minimize their risk of public disclosure of private information, since a legal remedy is expensive and difficult to win. One can protect themselves by raising the privacy settings on the MySpace or other account to only allow certain people, such as friends and relatives, to see the profile. [30] One can also minimize the amount of information on the profile, such as eliminating addresses, last names, and other information that is very specific to the user. [31] The moral of the story is to be careful about what information is available to the public on OSNs, because one never knows who is watching. There can and should be laws protecting privacy where there are no walls or ceilings, but until privacy laws are changed to reflect expectations both in the physical and cyber realms, perhaps there can be no reasonable expectation of privacy with respect to information over the internet.

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[6] Abril, supra note 2, at 9-10.

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[9] See James C. Goodale, The First Amendment and Freedom of the Press, 1STAMENDMENT.COM,http://www.1stamendment.com/PentagonPapersFreedomofthePress.htm (last visited Mar. 12, 2008) ("The Supreme Court has held that if the press 'lawfully obtains truthful information about a matter of public significance then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order'" (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)).

[10] *See generally* Abril, *supra* note 2 (discussing the need for a new framework to analyze privacy torts, which can be applied to both physical and cyber invasions of privacy).

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[12] *Id.* at 21.

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[14] *See generally, id.*

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[16] *Id.*

[17] *Id.*

[18] *Id.*

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[27] *E.g.*, EHarmony, www.eharmony.com (last visited Mar. 12, 2008).

[28] Abril, *supra* note 2, at 13.

[29] *See* Abril Myspace, *supra* note 21, at 75 ("A person's digital dossier can betray him in the physical world, resulting in harms like the denial or loss of employment, shame and embarrassment, denigration of reputation, or merely exposure in an unwanted light.")

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LAW FIRMS: IT'S GETTING EASIER TO BE GREEN

I. Introduction

The current surge in environmental awareness is affecting the way our nation does business, across a variety of industries. [1] The United Nations Intergovernmental Panel on Climate Changes has come to the unequivocal conclusion that our planet is getting hotter, and former Vice President Al Gore's popular documentary on global warming has helped to create awareness about environmental issues. [2] Beyond any altruism towards the environment, law firms are discovering that like any other business, they can ultimately profit by taking steps that benefit the environment. [3] This article explores the legal industry's negative impact on the environment, and examines the nature and origin of the sustainability, or "green," movement throughout law firms today.

II. How Lawyers Affect the Environment

A study conducted by the United States Environmental Protection Agency ("EPA") has shown that a lawyer on average uses up to 100,000 sheets of mostly virgin pulp paper per year; the production of this paper alone releases up to 4.5 tons of carbon dioxide and other greenhouse gases. [4] The adoption of simplistic paper management practices recommended by the EPA may reduce such emissions by up to two tons per year. [5] Wendel Rosen Black & Dean of Oakland, California, made a simple switch from using 30% to 100% recycled paper. [6] According to a calculator developed by the EPA, this simple change by the 130-employee firm resulted in the elimination of 40,000 pounds of greenhouse gases, as well as the saving of 260 mature trees, 24,000 gallons of water, and 33,000 kilowatt hours of electricity (enough to power 3.4 homes for a year). [7]

Electricity use and commuting also contribute to carbon dioxide emissions, which then lead to concerns over global warming. [8] Indeed, the energy required to operate personal computers, network servers, and data centers account for .75 percent of the global annual total of emissions, which is comparable to the level of all the greenhouse gases produced by the entire population of the world's airplanes in a year. [9]

III. Initiatives

Previous to the current surge in environmental awareness, some in the legal profession have made efforts to help the industry decrease its environmental footprint. More than a decade prior, a group of firms in the Seattle area founded the Law Firm Waste Reduction Network. [10] This group published a guidebook (available in digital and print format) for legal professionals, educating their audience on strategies such as recycling and source reduction. [11] Other firms across the nation are now belatedly affirming the efficacy of these environmental policies and discovering the financial benefits which accompany their adoption. [12]

A. Internal Initiatives

Homegrown efforts within firms may be basic, but helpful steps to a comprehensive and formal law firm policy regarding environmental sustainability. Many firms are creating internal task forces to examine potential ways to reduce their total carbon footprint, while others have individuals pushing for small changes. Nicole Kilbert, a real estate lawyer in a medium-sized Tampa firm, convinced her fellow attorneys to put aside the Styrofoam cups and begin drinking their daily coffee from reusable mugs or biodegradable mugs. [13] A Denver green law firm that operates "virtually paperlessly" has found that their reduction in paper usage has created valuable cost savings for clients, who bear the cost of copying and mailing incurred by their case files. [14]

Other firms have installed energy-efficient lights, buy bus passes for their employees, and one firm even offers cash incentives for their employees to purchase hybrid cars. [15] Arnold & Porter, a Washington, D.C.-based firm, takes into account the severe damage that airline travel wreaks on the environment by offsetting its millions of airline mileage traveled by the firm's lawyers per year. [16] Knowing that planting one tree offsets the emission of about 50 pounds of carbon dioxide, the firm calculates the amount of miles flown and purchases a corresponding carbon offset from Carbonfund.org, which uses the funds to plant trees and build windmills. [17]

Firms are gathering together to share their experience and ideas concerning such initiatives, with the more environmentally advanced firms taking a leadership role. [18] DLA Piper has joined forces with the Law Society to set up a coalition to help drive environmental sustainability efforts in the legal sector, a so-called "green alliance." [19] Arnold & Porter held a conference in February for other Washington, D.C. firms, entitled "Law Firm Green: The New Black – Achievable Green Initiatives," partnering with Nixon Peabody LLP's Chief Sustainability Officer as an event panelist. [20]

B. External Initiatives

The Energy Policy Act of 2005 incentivizes businesses to create or move to an energy efficient building, providing subsidies and tax deductions for energy improvements to commercial workspace. [21] The United States Environmental Protection Agency has specifically targeted large law firms with their ABA-EPA Law Office Climate Challenge, which encourages law firms to take specified steps to conserve energy and resources, thereby reducing emissions of greenhouse gases. [22] The ABA and EPA have paired to create a comprehensive list of ways that law firms may advance sustainability efforts. [23] Paper management practices include instituting policies of double-sided printing on recycled paper, and energy consumption tips run the gamut from simple strategies of turning off equipment when not in use, to complex upgrades of ambient lighting systems. [24]

Firms may participate in the Office Climate Challenge by choosing one of three EPA programs. [25] WasteWise challenges firms to reduce paper use and increase recycling, while the Green Power Partnership requires firms to obtain a percentage of their electricity from renewable resources. [26] The third option is the EnergyStar program, wherein law firms adopt energy management plans to reduce electricity usage by a minimum of 10 percent. [27] Mere participation in the program gives law firms the title of Law Office Climate Challenge Partners; firms reaching a threshold level of conservation are then identified as Law Office Climate Challenge Leaders. [28]

Alongside the government, private organizations are helping law firms reduce their carbon footprint. Lawyers For Forests provides an "Eco-Kit for Law Firms" that provides not only tips to reduce paper, energy and water consumption, but even provides "audit sheets" and step-by-step checklists for short term, medium term, and long term initiatives. [29] Media coverage of law firms has highlighted green initiatives as a hot topic, but recognizes that beyond a buzzword, sustainability is
becoming a way of doing business. [30] Later this month, American Lawyer
Media's ("ALM") Legal Times publication will issue a special edition exploring topics varying from carbon offsetting to green office space, as well as provide an overview of initiatives currently in place at a sampling of firms. [31]

Private industry is also finding it profitable to assist law firms in their pro-environmental objectives. The Seattle Public Utilities company founded Resource Venture, a service providing free resource conservation assistance to law firms. [32] Other enterprising companies have written computer software that helps monitor the power being consumed at the office, and can estimate the number of kilowatt hours, trees, and gallons of oil being saved by power-saving modes. [33] Printing software written for the paper-intensive legal industry may also be employed, allowing for double sided printing and drivers that eliminate white space and images from the print queue. [34]

IV. Conclusion

The positives for implementation of environmental strategy include not only financial benefits from government programs, but also recognition as a sustainability driven company that brings in clients and recruits talented employees. [35] The compelling social benefits are complemented by business smarts in retaining a new marketing and public relations tool. [36] Indeed, environmental law as a practice is a lucrative and fast growing practice, as many industries and manufacturers also consult counsel on how to take advantage of government pollution "credits." [37] Sustainability policies in the legal industry may be new to the scene, but because of many and varied benefits to both the environment and the firms themselves, it looks as though sustainability is a legal business practice that is here to stay.

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VARYING INTELLECTUAL PROPERTY REGIMES: THE RECEPTION OF GRAY MARKET GOODS IN THE UNITED STATES AND THE EUROPEAN UNION

Introduction:

Most
consumers agree that intellectual property law is essential to ensure that creators of inventions, ideas, designs, services and the like are rewarded for their creativity and to promote the continuation of such creations.[1] In order to grant creators with the incentive to continue creating, such creators must be equipped with the satisfaction of knowing that their creations will not be transformed into cheap imitations which will inevitably compete with their own original creations. Intellectual property is a field in which only the most innovative thrive. While imitation is often considered the most sincere form of flattery, it is doubtful that inventors will continue to introduce the same number of creations at exponentially high rates, knowing that their unique innovations may be reintroduced into the same market to compete with their original goods within a short period of time. The protection of intellectual property is at the forefront of agreements between nation-states because of the relative ease of copying, and the lax attitude of some nation-states to prevent and punish infringement.[2] A prevailing argument is the thesis that "technology drives investment" and to the extent that technology is reluctant to flow where it is not protected, the lack of an adequate

level of protection could stunt technological transfer and foreign investment entirely.[3]

While
there are countless instances of piracy in the fashion design industry, in addition to imitations involving design patents, this study will focus on a topic entirely distinct from imitation. Gray goods, or parallel imports of genuine goods, refer to a fact pattern in which someone other that the designated exclusive United States importer buys genuine trademarked goods outside the United States and imports them for sale into the United States in competition with the exclusive United States importer.[4] While the terms, "gray goods" and "parallel imports," are often used interchangeably, opponents of parallel imports prefer to refer to the imports as gray market goods.[5] Gray goods are not illegal and have not been smuggled or stolen.[6] The term, "gray market goods," refers to foreign manufactured goods, for which a valid United States trademark has been registered, that are legally purchased abroad and imported into the United States without the consent of the American trademark holder.[7] A federal District Court in California defined gray goods in the United States as "goods that are intended to be sold outside the United States but which are imported into this country without the consent of the owner of the United States trademark or copyright associated with the good."[8] In Europe, the term, "gray market" applies to goods sold outside the European Economic Area (hereinafter "EEA") and then re-imported against the wishes of their copyright holder.[9] The gray market has the potential to harm more than just the reputation of the goods being sold, although reputational harm has served as the basis for most innovators' arguments.[10] When a

manufacturer sells goods to distributors abroad, it often does so at prices far cheaper than those in its own country (or in the EEA), based on the differences in the two markets.[11] An overseas distributor can then sell the goods back into the United States at prices that remain much lower than those at authorized retailers, while still making a large profit.[12] Through this parallel importation, gray marketers devastate the businesses of United States trademark owners in a variety of industries.[13] Because gray marketers can rely on the United States trademark owners' large expenditures for brand advertising or warranties, they are able to turn a profit at prices substantially below those charged by the United States trademark owner.[14] Such a practice forces manufacturers into competition with their own products and restricts their ability to control discounts within the United States or EEA.[15]

The gray market appears to benefit consumers by offering brand name goods at reduced prices.[16] Gray market goods, however, are often of lower quality than goods sold by authorized distributors.[17] In many cases, gray market goods are subject to different production standards than goods marketed by authorized distributors, thus giving rise to inferior and even unsafe products.[18] Purchasers of gray market goods are also plagued by the fact that numerous authorized dealers do not honor warranties on such products.[19] Often, only after a product malfunctions do gray market consumers realize that the products they purchased did not include warranties.[20] While facially attractive to the consumer, gray market goods possess many latent drawbacks that render shopping for such goods ultimately more costly than purchasing higher priced goods from authorized distributors.[21]

A gray market good can usually be placed in one of three categories.[22] In the first situation, a domestic firm will purchase the rights to use a trademark from a foreign manufacturer and register that trademark in the United States.[23] If the foreign manufacturer, or a third party, subsequently imports the authentic goods of foreign manufacture into the United States, the domestic trademark holder’s market is being undercut and a gray market is said to exist.[24] In the second case, if a domestic firm that registers a trademark is a subsidiary of, a "parent" of, or the same firm as a foreign trademark holder, the importation of goods by the foreign arm of the organization, or by a third party, also gives rise to a gray market.[25] In the third instance, a gray market exists when a domestic trademark holder authorizes a foreign firm to use its trademark abroad, and the foreign manufactured goods are imported into the United States by the foreign corporation or a third party.[26]

A critical question posed to courts around the United States has asked: can or should the designated "exclusive" United States importer be able to block these "parallel" imports of "genuine" goods?[27] One main factor of consideration is whether or not the foreign manufacturer has assigned United States trademark rights and their registration to the designated exclusive United States importer.[28]

United States and international antitrust and free competition policies intersect with trademark law in that the designated United States importer is usually concerned with gray market goods because they are sold for less, undercutting the designated United States importer’s national price structure for these branded goods.[29]

However, blocking gray market goods of genuine goods may enforce a division of markets and a higher price structure in the United States, raising possible antitrust issues.[30] Gray market goods also raise questions involving trademark law and consumer perception.[31]

The ultimate issue in a trademark infringement suit against the importer of gray market imports is the factual question of whether United States consumers are faced with a likelihood of confusion.[32] Traditionally, resolution of the question depended on whom United States consumers identified as the source of the goods bearing the mark: the foreign manufacturer or the United States importer.[33] The modern approach involves a study of the nature of the goods: if there is a material difference between the gray market imported goods and the goods authorized for sale in the United States, then customer confusion and infringement may be proven.[34]

Under copyright law, the unauthorized importation into the United States of copies purchased outside the United States is an infringement of the United States copyright owner's exclusive right to distribute copies.[35] The copyright issue with respect to gray goods is whether the first sale doctrine exempts importers who acquired ownership of the imported copies that were lawfully made abroad.[36] Some courts take the position that sales abroad of foreign manufactured United States copyrighted material gives copyright holder's exclusive distribution rights in the United States.[37] In at least one circumstance, the United States Supreme Court has held that where goods are manufactured in the United States with copyrighted labels, shipped abroad, and subsequently re-imported, they are protected by the first sale defense and are not barred entry into the United States by the Copyright Act.[38]

Protection of intellectual property rights in the European Union and the European Court of Justice (hereinafter "ECJ") is received quite a bit differently than in the United States. For instance, there is no provision like Article 1, Section 8, clause 8 of the United States Constitution in any of the treaties establishing the TEU that protects intellectual property rights like the United States does.[39] While the ultimate goal is to harmonize all Member States in their approach to intellectual property rights, such a goal has not yet been entirely attained. When a Member State’s law grants a monopoly of exploitation to the owner of such a right, it follows that the owner may forbid any unauthorized third party, or infringer, from any sale, use or other exploitation within that State.[40] If an industrial or commercial property right has considerable economic significance, the owner in one State usually seeks to obtain parallel protection in all of the other States of the Community; however, this is not always possible, either because someone else has prior conflicting rights in another State, or because another State does not protect the right, or imposes differing requirements for recognition of the right.[41] It appears that the European Union’s ultimate goal of harmonizing individual Member States’ laws has been received well by the Community and is evidenced in the fact that citizens and businesses will also benefit from a national law.

Thus far, the European Union has made two concerted efforts toward harmonization: a Directive and a Community-wide system for intellectual property rights.[42] The European Union Trademark Directive 89/104 was the first major legal instrument designed to facilitate the free movement of goods by approximating national trademark laws, and attempting to eliminate the differences between the (Member State) laws to prevent distorted competition within the internal market.[43] The European Union Trademark Directive 89/104 stemmed from the fact that exclusive rights granted a trademark allow the owner to prevent any authorized use of an identical or similar mark if it leads to a "likelihood of confusion" for consumers.[44] Because the distinctiveness of the mark is judged on a country by country basis and not on a European Union level, the Commission makes it practically impossible for Member States to extend the geographical protection of a national trademark.[45] The concept of unionizing trademark law was born in the early 1970’s when the Commission decided trademark law should be harmonized to ensure European Union uniformity.[46] With the Commission adopting the Council Regulation for Community Trademark, which established a single trademark valid throughout the entire European Union and the creation of the European Union Trademark Office, any community trademark owner wishing to challenge trademarks under both Community Trademark Law and national trademark law is freely able.[47]

There have often been debates over the United States’ perception of gray market goods and the reception of the gray market in the European Union. There is not one perception which is correct and another which is incorrect. Instead, it is a country’s promulgation of appropriate laws which balance creativity and innovation, while recognizing consumer rights that truly matters.

At first glance, one would think that both the United States and the European Union have taken measures to ensure that trademarked goods intended for foreign countries and identical to the domestic good do not re-enter the United States only to compete with the original domestic good. After a closer look, it is clear that there still remains the problem with gray market goods having a crippling effect on a trademark holder's sales of original goods intended for domestic sale only.

The policies of each country cannot be criticized without understanding the incentives motivating both the United States and the European Union in taking remedial measures against gray market goods and the extent of measures taken.

A. The United States' Perception of the Gray Market

Broadly, one could generalize that the United States appears to take a stronger stance in favor of consumer rights than the European Union in tolerating gray market goods. One rationale for such a tolerant demeanor towards gray market goods is their ability to expose the general public to affordable versions of otherwise upscale and unattainable items. Some commentators have even argued that exposing regular consumers to a normally unaffordable and thus, "unpopular" good will help popularize the good amongst the masses through exposure. These regular consumers may then notice the difference between their gray market good and the "original" domestic product, potentially causing them to switch their tastes toward the domestic version. On a grand scale, such exposure may first increase demand for the gray market good over the domestic good, but would eventually cause gray market sales to drop and sales of the same domestic good to flourish. One common example of such a phenomenon is seen in the sales of soap. Manufacturers have studied that American consumers prefer soap with a large amount of lather and thus, soaps intended for United States are often made with such a preference in mind. The same trademarked soap which is sold in the United States may be created in a slightly different manner for sale in the European Union i.e. without as much lather. If the soap intended for European consumers arrives back into the United States and is sold at a cheaper price in a low-end outlet, sales are likely to rise at first. However, after use, American consumers are likely to recognize the difference in lather and may notice that the ingredients are listed in a foreign language on the cover. Such first-hand experience may cause many American consumers to prefer to pay a higher price and buy the domestic version of lather-inducing soap. The attorney representing Quality King favored the court’s less-than-stringent view against gray market goods and stated: "the court basically held that the copyright laws do not allow companies to charge American consumers more than people in other countries."[48]

Trademark and copyright-holders are naturally quite unhappy with the lax regulation of gray market goods in the United States. Their main un-satisfaction stems from the fact that American manufacturers are forced into competition with their own products.[49] It is, however, this increased competition that many gray market promoters focus upon in order to help the economy thrive. A major downside to a lax view on gray market goods is that the apparent benefit to consumers is in actuality only an ideal. Consumers would benefit greatly if they were able to pay a lower price for gray market goods in addition to receiving customer service and warranties with their purchase.[50] Unfortunately, gray market goods are normally sold without any additionally promised services or warranties, confusing United States consumers who have been exposed to promotions and guarantees regarding quality.[51] In reality, consumers who purchase goods in the gray market are often disappointed with the quality and left without a guarantee in order to assert their rights over poorly manufactured goods.[52]

B. The European Union's Perception of the Gray Market

The EJC's decision in *Silhouette* had the most impact on preserving trademark holders' rights in the EEA. In addition, the European Union Trademark Directive prohibits member states from adopting international exhaustion, allowing trademark holders in the EEA to freely trade outside the EEA without fear that they will be without an infringement remedy if their goods are sold back into the EEA without authorization.[53] However, all manufacturers in the European Union will not benefit from the holding in *Silhouette* until its principles are adopted by all member states and ideally, in a uniform international agreement that applies equally in both the United States and the European Union.[54]

In the meanwhile, it seems that the European Union has taken drawbacks to the gray market more seriously than the United States, while still seeking a "net positive effect" on the respective rights of manufacturers and gray market importers.[55] The *Silhouette* victory has empowered trademark owners in the EEA and it appears that the

European Union need not make any drastic changes to its gray market policy. Overall, the European Union has set a precedent on the possibility of curbing the gray market and now it is up to the United States to follow suit.

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PRIVACY IMPLICATIONS OF RADIO FREQUENCY IDENTIFICATION TECHNOLOGY

Before Mrs. Jones leaves work on a typical Tuesday, she goes to a familiar Web site where she can view the items left in her refrigerator to determine if she needs to stop by the grocery store. She is completely out of milk and some other items, so she plans a trip to the store. Double-checking to make sure her children arrived safely at home, she sees on the Web site that they both got off the bus on time and are in the living room, probably watching television instead of doing their homework.

As she walks toward her car on the way home, a billboard greets her, "Good evening, Mrs. Jones!" and displays a pair of jeans she might be interested in – the same brand of jeans she bought a couple of months ago. In her car, she drives through the parking garage exit without handing anyone money – the arm automatically lets her out. At the store, she is greeted again with her name and the shopping cart she grabs tells her what she bought last time and what aisle each item is in. Upon arriving home, her doors unlock automatically so she do not have to dig out her keys while she carries the grocery bags.

This scenario is made possible through radio frequency identification (RFID). It may seem incredibly futuristic, but the truth is that the technology is closer than one would think. RFID technology offers incredible possibilities for efficiency and convenience for both businesses and consumers, but also raises important privacy concerns.

Uses and Benefits of RFID

RFID technology involves the electronic communication of information from a small chip that emits a radio frequency to a reader that interprets the information.

[1] RFID technology is currently used in items such as clothing, home products, security cards, driver's licenses, and tollway passes. [2] No human interaction with the products or data reader is necessary – the data reader either requests information from the RFID chip if the chip is passive (the more common implementation) or receives information if the RFID chip is active (such as car tags for tollways). [3]

RFID is being implemented extensively by Wal-Mart. [4] Wal-Mart required its top one hundred suppliers to use RFID chips in their products by January 2005. [5] Wal-Mart installed RFID readers on its shelves so when a product with an RFID chip is taken from the shelf, the stock room is notified that a replacement needs to leave the stock room and a new product needs to be ordered. [6] This has incredible benefits of more accurately supplying customers with desired products, as well as not requiring human interaction for scanning the shelves or manually calculating how many products are needed.[7]

Road-toll management is also another current use of RFID. [8] Toll road systems can electronically identify the car and deduct the toll while allowing the cars to keep moving. [9] Identification cards allow electronic access to secured areas through RFID. [10] Holding up the identification card to the reader opens the door, providing great convenience to the user RFID tags are being tested to track students by putting tags in their backpacks. [11] The system being implemented in Charleston, South Carolina will track children as they enter and exit the buses. [12] The global positioning system on the bus will track where the bus is located on its route. [13] Parents are able to check a Web site to see if their children are on the bus and if the bus is on time. [14]

RFID technology offers significant benefits. For retailers, it combines the security of magnetic tags used to prevent theft combined with the detailed product information available with barcodes in one technology. [15] RFID tags also allow writing of information, so businesses can write on the tag who purchased the product and when. [16] Retailers can keep track of their products much closer, knowing exactly when a product has left the shelves and needs to be replaced. [17] This can save companies, both retailers and suppliers, an incredible amount every year. [18] Procter and Gamble reports that almost 16% of its products are out-of-stock, causing empty store shelves. [19] By reducing that number only 10 – 20%, it could save the company $400 million each year. [20]

The convenience of opening doors or driving directly through toll booths is a great benefit of the technology as well. Some parents greatly appreciate being able to determine when their young children have arrived at school and when to expect them home.[21] Other parents, however, have great concerns that the information about their children could become available to unscrupulous individuals.[22] In Charleston, the American Civil Liberties Union has assisted those concerned parents in keeping the information about their children safe by stopping the implementation of RFID tracking technology. [23]

Privacy Implications of RFID Technology

The most serious privacy and legal concerns are raised by publicly available technology that can "skim" – or steal – information from RFID tags. [24] Skimming technology copies the information contained on the RFID tag quickly by reading and cloning the RFID signal. [25] This information can include identifying information and give the 'skimmer' access to secured areas or buildings. [26] California State Senator Joe Simitian sponsored a bill in the California Senate to outlaw skimming technology; the bill was passed in January 2008. [27] Senator Simitian himself was a victim of skimming – a hacker skimmed Senator Simitian's State Capitol access card and was able to walk into restricted areas. [28] Other types of identification, such as drivers' licenses and student IDs often have RFID technology. Frighteningly, the technology to skim the personal information from an RFID tag is "readily available, off-the-shelf, and surprisingly inexpensive." [29]

Retail items with RFID tags, such as clothing, electronics and other goods can provide those who purchase RFID readers or skimming technology with detailed information about a person's spending habits and purchasing history. [30] When the tagged item is identified with a particular individual, the information about that product and the other products they have with them or in their home, depending on where the RFID reader is used, can give the reader a profile of the person. [31] This might be helpful for customers who want targeted coupons or advertisements, but for many people this raises serious concerns about privacy.

In 2005 American Express submitted a patent for a new RFID technology system made up of RFID tags and readers. [32] The patent explained that objects with RFID tags would emit signals that identified the user and that when used in conjunction with RFID readers, people's movements would be recorded and they would be sent video ads targeted directly toward them. [33] RFID readers would be placed in public places such as "a common area of a school, shopping center, [or] bus station," finding out personal information about many different people. [34]

Solving Privacy Problems

For those concerned about privacy, there are forces at work to address the privacy implications of RFID technology. At least two legislative bodies, the California Senate and Washington House of Representatives, have passed bills that make it illegal to skim RFID–enabled cards. [35] On the technological front, software that deactivates RFID tags once the items with the tag is purchased is being developed. [36] This technology will, through the use of lights, indicate when the item's RFID tag has been deactivated. [37]

Also preventing the great outcry against RFID technology is that RFID is not widely used yet. Businesses wanting to use RFID tags would have to make incredible investments in new hardware to read RFID tags on shelves and at checkout counters, software to understand the RFID tags, the RFID tags themselves, training for employees and new security systems. Most companies do not have the capital for such a venture. [38] RFID tag technology itself needs to improve before it can have wide-spread use. [39] RFID readers are not always accurate, and the RFID tags are hard to manufacture very small for the products that require small tags. [40] Additionally, the technology to disable the RFID tags needs to be implemented to address the privacy concerns that consumers have. [41]

As RFID technology gets less and less expensive, more businesses will begin investing in RFID tags. From 1999 to 2003, the cost of RFID tags decreased by fifty percent – from $1.00 to $.50 per tag – with price drops predicted to continue. [42] Once RFID tags become more affordable to smaller businesses, they will become more widely used and consumers need to be aware of what RFID technology is and how it affects them. Even though it would be great to have stores and billboards give customers a personal greeting because they can read the RFID tag on our drivers' licenses, it also means that all sorts of companies are gathering personal movements and creating a profile about the consumers. There is no need to begin a great panic about "big brother" monitoring our every movement, but consumers do need to be aware of RFID technology and what it means for their lives. Although RFID might bring great convenience by allowing parents to see where their children are and permitting drivers to pass through toll booths at a normal speed, at what price does this convenience come? Only the future will reveal how retailers, the government, police, investigators, lawyers and marketers will use our private information.

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WHEN IN DOUBT, SEEK A BUYOUT: INDIANA'S SOLUTION TO THE KELVIN SAMPSON DILEMMA

I. Introduction

Parting ways with a college coach accused of violating National Collegiate Athletic Association (NCAA) rules has become a delicate process. On February 8th, the NCAA notified Indiana University that its men's basketball coach, Kelvin Sampson, had allegedly committed five "major" NCAA rule violations.[1] After more than a week of speculation surrounding Sampson's future at Indiana, the school negotiated a settlement to terminate its relationship with the second-year coach.[2] In exchange for a $750,000 buyout, Sampson resigned and agreed not to pursue any legal action against the university.[3]

On its face, the buyout seems generous for a coach who conceivably could have been fired outright for cause. Sampson, who was already under NCAA sanction for prior infractions, had a clause in his contract that allowed Indiana to terminate him for "significant or repetitive violations."[4] Nevertheless, Indiana was in a difficult position. Firing Sampson prior to NCAA hearings on the alleged violations would have likely spurred a wrongful termination suit in which Sampson could potentially recover the remaining $2.5 million on his contract.[5] Allowing the embattled coach to remain a Hoosier until the NCAA's final determination in July would prolong the program's instability as the NCAA tournament and recruiting season approach.[6] Faced with this dilemma, Indiana decided it was well worth the buyout to get Sampson out the door immediately.

II. The NCAA's Case Against Sampson

Indiana's decision to sever ties with Sampson in a quick manner likely reflects the university's desire to restore its basketball program's once-clean image after a string of embarrassing incidents involving the coach. Two months after he was hired in March 2006, the NCAA imposed sanctions on Sampson for making 577 impermissible phone calls to recruits while he coached at the University of Oklahoma.[7] In October 2007, a university investigation found that Sampson and his staff made over 100 impermissible calls while still under recruiting restrictions.[8] Sampson himself took part in ten three-way calls during the time when he had been expressly prohibited from participating in calls made by his staff.[9]

The NCAA's subsequent investigation found further violations that it deemed substantial.[10] Its report stated that Sampson had impermissible recruiting contact with attendees of a two-day sports camp in Bloomington and that he made twenty-five phone calls that would have exceeded NCAA limits even if no sanctions had been in place.[11] Most damaging, however, was the NCAA's assertion that Sampson repeatedly gave false or misleading information to investigators and that he "failed to deport himself . . . with the high standard of of honesty."[12] When questioned about the report, Sampson denied he ever knowingly acted contrary to his sanctions or provided false information to investigators.[13]

Sampson's history of impropriety justifies Indiana's desire to part ways with the coach in a timely fashion. The decision to offer Sampson a buyout allows the basketball program a chance at a fresh start, even as it awaits further proceedings relating to the investigation. Under the NCAA's version of due process, Indiana will have to file a written response to the allegations by May 8, and hearings are likely to occur in June.[14] The NCAA is expected to make its final decision on further action against Sampson and the university sometime in July.[15] Ultimately, Indiana concluded it could not keep Sampson around that long.

III. The O'Brien Precedent

The decision to negotiate a buyout rather than fire Sampson outright was likely influenced by recent litigation involving Ohio State University and its former men's basketball coach, Jim O'Brien. Ohio State fired O'Brien in 2003 shortly after he admitted to giving a $6,000 loan to a potential recruit.[16] O'Brien's contract specified that he could be terminated for cause if he materially breached the agreement or committed a "major" NCAA violation.[17] The Ohio Court of Appeals ruled in favor of O'Brien because he had substantially performed his contract and was fired before the NCAA held hearings and formally ruled that his conduct constituted a violation.[18] Thus, Ohio State was judged to have breached the contract for firing O'Brien without cause.[19] As a result, the court ordered Ohio State to pay its ex-coach nearly $3 million in damages.[20]

Sampson's contract was similar to O'Brien's. It contained a termination provision for violations of university and NCAA rules, in addition to instances of moral turpitude and conduct prejudicial to the university.[21] Indiana officials, conscious of the O'Brien ruling, knew they could not fire Sampson without incurring liability until the NCAA conducted its hearings over the summer. The latter two termination provisions are broad, however, and could arguably have been invoked in an attempt to fire Sampson outright. Faced with the prospect of years of litigation and an uncertain outcome, Indiana chose to offer Sampson the buyout.

IV. Conclusion

In a business context, Indiana's decision to offer Kelvin Sampson a $750,000 buyout serves as a pragmatic, if expensive, solution to a difficult situation. The university was able to swiftly oust its coach, while avoiding a potentially lengthy and costly legal battle. Additionally, the countervailing interests of due process in NCAA proceedings and a university's ability to act rapidly for its own interests have been sufficiently maintained.

Nevertheless, there remains a visceral unease when assessing the fairness of the situation from Indiana's perspective. It seems counterintuitive that the university cannot immediately fire a man who has repeatedly run afoul of NCAA rules while coaching at two major institutions. Less than two years after being entrusted to lead one of the nation's most storied college basketball programs, Sampson has resigned in a cloud of scandal after incurring university and NCAA sanctions, with more potentially forthcoming.

In the future, universities may seek to better protect themselves from the situations faced by Indiana and Ohio State by negotiating broader termination clauses in contracts. The *O'Brien* court stressed the fact that Ohio State, a sophisticated entity, freely bargained away its "unfettered discretion" to terminate O'Brien by agreeing to equate cause for termination with NCAA rule violations.[22] These attempts may be fruitless, however, as coaches are high-profile figures who often hold a great deal of bargaining power in the increasingly competitive world of college sports. Investigations are not uncommon in college athletics, and most coaches will try to contractually insulate themselves from termination until the NCAA has a made a formal determination that its rules have been violated.

Another alternative to the Indiana dilemma would be for the NCAA to institute expedited proceedings in necessary circumstances. Though the five-month process in Indiana's case is not particularly long, the school may have refrained from offering Sampson the buyout if the NCAA's ultimate decision could have been made sooner.

It remains to be seen how schools, coaches, and the NCAA will adapt to the issues raised by the Sampson situation. Just as the *O'Brien* decision has had the effect of discouraging universities from immediately terminating coaches accused of rule violations, it will be noteworthy to see whether the Sampson buyout changes the dynamics of contract negotiations and termination clauses.

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HEDGE FUNDS ARE GETTING RICH, BUT WHO IS REALLY TAKING THE RISK?

There have been a number of calls lately for increased regulation of the hedge fund industry, however, the Bush Administration has said that no new regulations are necessary. Despite the rapid growth of the industry and the increasingly large risks hedge funds are taking, the recently released report by the President's Working Group on Financial Markets, which was led by the Treasury Department, did not call for any new regulations, but instead called for a set of principles to be implemented, such as accurate disclosures by fund managers and more due diligence by creditors. [1] Nevertheless, the Group of Seven (G7), of which the United States is a member and comprises the seven wealthiest countries in the world, vowed to continue looking into what new measures should be taken in order to impose stricter scrutiny over the risks being taken by hedge funds, and the risks they pose to the global economy. [2]

The total assets under management in the hedge fund industry rose in 2006 to nearly $1.4 trillion, up 29% from the year before, with a record $126.5 billion of new money being invested. [3] Hedge funds, which are investment pools for wealthy individuals and institutional investors such as pension funds and insurance companies, have become increasingly popular because their private nature excludes them from the strict oversight the Securities Exchange Commission (SEC) must give to more public investment instruments, such as mutual funds. [4] The touchstone of these regulations is disclosure, and the logic behind exempting hedge funds from the same reporting requirements is that those investing in hedge funds are more sophisticated market players who know the risks they are taking and don't need the government's intervention or protection. [5]

The problem is that the risks are so large that they are not always limited to those taking them. The most well-known example is the meltdown of the giant hedge fund Long Term Capital Management (LTCM) in 1998, which lost $4 billion dollars overnight, but due to its highly leveraged positions, the loss had a conceptual effect on the economy of closer to $1.25 trillion, which threatened the stability of the global marketplace. [6] This forced the Federal Reserve to orchestrate a bailout plan in order to prevent the implosion of the world economy and led to the last report by the President's Working Group on Financial Markets in 1999. [7] The reforms that were actually implemented were few, however, and just last fall, Amaranth Advisors LLC lost $6.4 billion after making large bets in the natural gas markets, prompting the latest round of calls for new regulations. [8]

The impact on the global markets from the Amaranth disaster was not as drastic as LTCM because, even though Amaranth lost more of its capital than LTCM, it was far less levered. [9] However, while the real danger may lie in a fund's ability to ignore the lessons of LTCM and Amaranth by over-leveraging itself, many of the new regulations that have been proposed are designed to protect the investor by forcing the funds to disclose any changes in its strategy. [10] This would prevent some of the larger funds from employing different, riskier strategies without informing investors exactly how much risk is being taken. [11] Defending the report and the administration's stance that new regulations are unnecessary, Treasury Secretary Hank Paulson cautioned that the principles laid out were not meant to prevent hedge funds from failing, saying that, "As long as we have investors out there, some are going to do better than others and some are going to fail … [w]hat we're emphasizing is market discipline and transparency.” [12]

This was unacceptable to Connecticut Attorney General Richard Blumenthal, whose state is home to many top funds, and who criticized the report by saying that, "These vague recommendations lack substance and specifics, making them unenforceable. In a perfect world, everyone would already follow these guidelines. But in the real world we need real protections.” [13] The G7 issued its own call for reform, requesting a study of the hedge fund industry for its next meeting in May to be conducted by the Financial Stability Forum, and issuing a statement saying, “Given the strong growth of the hedge fund industry and the instruments they trade, we need to be vigilant. The assessment of potential systemic and operational risks associated with these activities has become more complex and challenging." [14] While this is less of a push than had initially been indicated by German Finance Minister Peer Steinbrueck, who put the item on the agenda, it showed that Germany was finding common ground with the United States and Great Britain, two countries which have large hedge fund sectors. [15]

Some of the proposed regulations though are even being met with opposition from those who they are designed to protect, including the SEC’s effort to raise the minimum threshold required for an individual to invest in a hedge fund from $1 million to $2.5 million. [16] The commission explained that the proposal was meant to “define a new category of accredited investor, which is called an 'accredited natural person,' which is designed to help ensure that investors in these types of funds are capable of evaluating and bearing the risks of their investments.”[17] The proposal was roundly criticized, however, as discriminatory towards those who aren’t extremely wealthy by restricting their investment options. [18]

Further, smaller investors called for the SEC to focus more on fraud and other unfair practices in the retail market that are truly a direct cost to smaller investors. [19] That would include the latest potential scandal hovering over Wall Street, in which several of the top banks have been asked to submit information to investigators looking into allegations of "front running," the practice whereby traders improperly benefit from their knowledge of the trades their mutual fund or institutional clients plan on making by trading in front of a future order. [20] Even if they don’t trade in front of their clients, they can also pass on the information to hedge funds that give them a lot of business, which would still drive up the price for the mutual fund, and in the end, the small investor. [21]

As hedge funds continue to increase the amount of risk they are taking, the calls for stricter regulations will continue to become louder. However, until there is real enforcement beyond principles of self-restraint, the real risk will continue to be born by the global economy, and hedge funds will continue to get the reward.

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PAYDAY LENDERS: LURING THE ELDERLY INTO THE DEBT TRAP

I. Introduction

During the past few months, the credit crunch has spread to all areas of the credit market, including: commercial real estate mortgages, student loans, and even auction-rate securities that are considered as safe as cash.[1] In attempt to prevent further loss, many lending industries have tightened lending standards to the extend that some consumers have found obtaining a loan or even a credit card more difficult.[2] At a time where borrowing money has become harder, people with bad credit and low income are flocking to lenders that are willing to fill their wallets with no questions asked. The “payday” loan industry is growing rapidly and is known for its quick and easy lending.[3] Although the quick and easy money may seem attractive, the outrageously high interest rates are leading payday loan users into an inescapable debt trap.[4] Aside from high interest rates, another critical problem surrounding the payday loan industry is its practice of targeting the elderly and other recipients of government benefits.[5] The elderly falling victim to these predatory lenders has only grown over the years, and this exploitation calls the need for regulation and strict enforcement.

II. Payday loans: What They Are and How They Work

Payday loans became popular in the 1990s and the industry has grown rapidly.[6] Currently, payday loans are widely available in thirty-seven states and there are over 22,000 operating establishments.[7] Payday loans are small short-term single-payment loans intended to carry a borrower with a temporary cash deficiency through the borrower’s next paycheck. [8] A typical payday loan is a two-week loan for around $250-$325 with fees ranging from $15 to $20 per

$100.[9] This amounts to a $52 fee for a $325 loan, an interest rate ranging from approximately 300% to 400%.[10] For an average borrower, these terms would equal an $800 repayment for a $325 loan.[11]

Many people that are in need for quick and easy money flock to payday lenders because borrower screening is almost non-existent.[12] Potential borrowers are not required to disclose their debt, credit history, or any other material information that would project the borrower's ability to repay the loan.[13] Currently, payday lenders only require identification, a checking account, proof of income from either a job or government benefits, and a signed personal check to secure the loan.[14] Through their practice, payday lenders are contradicting their original purpose of getting borrowers through a temporary cash deficiency because the triple digit interest rates and expensive fees are trapping borrowers into prolonged debt. Although payday lenders argue that the current interest rates are the only way for the industry to be profitable, the business practices of this industry are questionable.

Borrowers have several options when the loan is due. The borrower can either return to the lender and pay the loan off or allow the lender to cash the borrower's personal check provided at the time of borrowing.[15] However, if the borrower cannot repay the loan, which is often the case, the borrower is forced, by the lack of an alternative, to renew and extend the loan for another two weeks for an additional fee of $52, this practice is referred to as "loan flipping".[16] The biggest problem with the repayment system is that the repayment must be a single payment, paying in installments is not an option in many payday lending establishments.[17] Further, because personal checks are often cashed when a borrower has insufficient funds, overdrawn accounts and bounced checks add additional bank costs to the average borrower.[18] With continuous renewals, renewal fees, bank fees, and accumulated interest, borrowers find it impossible to cut their ties with this small loan industry.

III. Targeting the Elderly

Payday loans have largely marketed to low and moderate income consumers; however, in recent years, payday loans have made government benefit recipients, like the elderly, there newest target market.[19] In many states, there are clusters of these predatory lenders established around subsidize-housing complexes for the elderly and disabled.[20] Although there are no concrete statistics concerning payday lenders and the elderly, these lenders and their workers are encourage by management to recruit this particular social group.[21] Payday lenders recruit the elderly through active solicitation, whether it is actual home visits or friendly conversations the lenders strikes up at nearby areas of a subsidize housing complexes, the lenders are on a mission to get the elder borrower into the door.[22] The predatory lending industry has directly stated that they market to the elderly and other government benefit recipients like the disabled and veterans because “these people always get paid, rain or shine,” and “will always have money, every 30 days.” [23]

Aside from the fact the elderly have guaranteed monthly paychecks, critics focus on other factors that drive these predatory lenders to target this vulnerable group of consumers. First, payday lenders recognize that older homeowners tend to have higher home equity. Targeting the elderly allows the lenders to easily “strip” the equity from a borrower’s home by including excessive fees and lending under unfair terms. [24] For example, lenders will continuously convince the elder borrower to refinance their loans; however, the refinancing does not benefit the borrower because high fees are charged each time, and the accumulated costs eventually wipes out the borrower's equity.[25] Secondly, payday lenders recognize the borrower's need for money.[26] Many elderly borrowers look to payday lenders because they have a greater need for cash to supplement limited income.[27] Finally, predatory lenders target the elderly because of the greater likelihood of physical impairments, diminished cognitive abilities, and social isolation.[28] These characteristics are beneficial to payday lenders because the borrower is at a disadvantage when it comes to comparing credit terms of different companies, accessing financial information, and fully understanding the terms and conditions of a loan.[29]

In addition, payday lenders that target the elderly with often abusive and unfair terms, are also engaging in the practice of tapping Social Security checks of this vulnerable group of borrowers.[30] Because most elderly receive their benefit through direct deposit, it has made it easier for borrowers to pledge their future checks as collateral for small short-term loans.[31] Interestingly enough, the payday loan industry has grown in recent years coinciding with the rise in direct deposit among Social Security recipients.[32]

Just like the illegality of wage garnishment, it is illegal for lenders to directly receive a recipients Social Security benefits.[33] However, many lenders are forging relationships and making arrangements with banks to get their hands on a recipient's benefits.[34] For example, the payday company lends money to an elderly borrower that pledges their future government benefits as collateral to the short-term loan.[35] When the loans is due, the recipient's bank that receives the Social Security benefits through direct deposit, immediately transfers the funds to the payday lender. [36] At that point the lender subtracts the debt repayment, fees, and interest, before the actual recipient receives a single penny. [37] This repayment structure awards almost all control to the payday lender, while the recipient has very little control over their benefits or finances.

Although the elderly are reliable borrowers because they get monthly checks through Social Security, reliable does not mean that the elderly are able to repay their loans.[38] It is rare for the elderly borrower receiving Social Security to pay off their loans quickly.[39] In fact, the elderly are targeted because they are a lucrative consumer group.[40] The elderly are borrowers with a small "fixed income" and they are different from other groups because the elderly have no means of increasing their monthly check. While other low income groups can get a second job or an increased bi-weekly paycheck from working more hours, the elderly have little to no control over of how much money they receive, this makes the elderly a more attractive candidate for payday lender looking to make profit.[41] Having a fixed income and limited finances, the elderly are often forced to either renew their loans adding more costs; and in states where renewal is illegal, borrowers are essentially forced into taking out another payday loan to pay off the old.[42]

IV. Attempts to Regulate Payday Lenders

Currently, garnishment of social security benefits is illegal and all active-duty military families are protected by the Military Lending Act signed into law on October 2006 – capping interest rates at 36% on all small loans, including payday loans, for all military families.[43] Small loans are governed by state law, and many states have implemented restrictions on payday lenders.[44] For example, many state have placed restrictions on renewals of payday loans and some states have banned loan renewal all together.[45] States including Florida, Michigan and Oklahoma have put limits on the number of loans outstanding a borrower may have in order to receive another loan.[46] Some states have adopted payment plans, capped loan amounts, and capped interest rates.[47]

Unfortunately, despite states efforts, payday lenders have found loopholes in order to continue with their lucrative business and borrowers are still trapped. Whether it is the lenders allowing back-to-back lending to substitute for renewal loans; or allowing other family members to take out more loans for an individual with outstanding loans; or misrepresenting payment plans to be unattractive to customers or making eligibility for payment plans difficult, borrowers are drowning in repeat borrowing and growing debt.[48]

In addition, the law is not protecting vulnerable groups like the elderly, disable, and veterans. More importantly, Social Security recipients, like the elderly, have little to no protection from the lenders tapping their benefits. The Treasury Department has stated that privacy rules forbid monitoring a recipient's bank account without cause; and the Social Security Administration officials have stated that the agency is not responsible for a recipient's benefit once the check is paid. [49] As of 2007, thirteen states have saved their citizens approximately $1.5 billion by banning payday loans and/or capping interest rates for small loans at 36%.[50] The thirteen states include Connecticut, District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Vermont, and West Virginia.[51] The Federal Deposit Insurance Corporation has also encouraged banks to craft and market small loan interest at 36% or less to the general public.[52]

V. Conclusion

The payday lending industry is sinking borrowers in debt, charging $4.6 billion in fees alone every year, while making over $28 billion in loans.[53] 90% of payday lending revenue is based on fees stripped from trap borrowers, 99% of payday loans go to repeat borrowers, and a single lender flips an average payday borrower eight times.[54] Currently, only twelve states and the District of Columbia have interest rate caps averaging 36 % or less for small loans.[55]

The state governments along with federal government agencies should place more regulatory restriction on these predatory lenders, and equip the vulnerable groups like the elderly with more protection. Some general suggestion in regulating this industry would include capping not only the interest rates at 36% or less, but also cap loan amounts depending on a borrower's income in all states where payday loans are available. Further, payday lenders should also be required to limit the number of loans outstanding per household, rather than basing the loan limit on individuals. Lenders should also have a system to check the borrower's current debt with other payday loan companies before lending. Also, collateral for the loans should not be personal checks or bank accounts because the bank fees from bounced checks and overdrawn accounts have been just as burdensome to borrowers.

As for the elderly, States should ban banks from forming relationships with payday lenders to ensure that lenders are not tapping Social Security checks of the elderly. What the elder borrower decides to do with their money, including repaying their payday loan, is the decision the elder should make, not a decision a payday lender should make for the elder. States should also ban payday loan companies from soliciting to the elderly through home visits or any other means of direct contact. Direct solicitation makes it easier for lenders to exploit and manipulate the elderly into abusive and unfair loan terms. States should also place restriction on lending to elder borrowers, either through capping loan amounts and interest rates, or by requiring a co-signer for elderly borrowers with physical or mental impairments.

The growth of the payday loan industry has been unstoppable and the industry continues to generate enormous profits at the expense of the public and the less fortunate. The interest in protecting the public alone makes it more than necessary to take steps in limiting and restricting the practices of this predatory lending industry.

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ZONING REGULATIONS NEED TO KEEP PACE

I. Introduction

Many Americans take the plunge and start a small business. The predominant form of small business in the united States is home-based business. [1] Nearly 8,500 new home-based ventures are started each day with one in ten U.S. households conducting some type of home-based business. [2] Although many local zoning regimes started with the same intentions they have led to varying restrictions which may not appropriately balance the concerns of neighbors against the benefits and characteristics of all current home-business.

II. Impact

Government regulations have a very large impact on home-based businesses. [3] In fact, costs to comply with regulation have been shown to be higher for businesses with less than twenty employees than for those with over five hundred. [4] For home-based businesses, local codes and zoning ordinances often have restrictions on the use of residences as places of business. [5] The actual restrictions can vary widely between municipalities. For example, a quick review of two central Illinois city's zoning ordinances show one such difference. The two cities, Decatur and Champaign, are similar in size with between seventy to eighty thousand people [6] but have a different zoning regulation regarding sales of goods. The Decatur ordinance allows home occupations in single family residences but prohibits the sale of any commodity in the home. [7] The Champaign ordinance does not appear to prohibit sales but restricts the number of customers or patrons allowed in the home at one time. [8] Despite the differences in the specific restrictions on the use of the residence as shown in the example above, the regulations most likely arose from similar, if not the same public policy considerations.

III. History & Future

Modern zoning restrictions arose out of the rapid industrialization of the country in an effort to distance commercial activities from residential housing especially for health and safety concerns. [9] After residential areas were created, maintenance of the residential character of the neighborhood is often stated as the purpose of the zoning regulations. [10] Changes in the marketplace and advances in technology allow a wider range of home-businesses without infringing on the rights of neighbors or impacting the character of a neighborhood. Many zoning regulations created before the rise in commercial internet activity are ill-equipped to deal with home based internet businesses. [11] The broad language of many local prohibitions apply to on-line home businesses that pose no threat to neighbors or the neighborhood. [12]

The current restrictions placed on home businesses are not likely to stop people from starting ventures nor should they. Innovation and job growth of the U.S. economy has been shown to come from small businesses. [13] The beginnings of 97.5 percent of the

Fortune 200 companies can be traced to entrepreneurial beginnings. [14] While all these small businesses many not be home-based, 2002 figures showed that 49.4 percent of small businesses surveyed were home-based. [15] With the importance of encouraging new business, the traditional method of separating commercial and residential zoning may need to be reviewed in light of changes to business and technology. [16] Of course the same tension will exist between the desire to preserve the residential character of a neighborhood and the freedom to pursue commercial enterprises; however, the playing field has changed in recent times. With new technology and the ease of communication, many people are experiencing the trend toward mixing the boundaries of work and home. In 2004, fifteen percent of people with employment reported completing some of their primary work at home. [17] Between 1980 to 1990 the number of American workers who worked from home rose over fifty-six percent. [18] The decade prior to 2000, showed an increase of over twenty-two percent. [19] The trend is clearly toward workers spending more time working from home.

IV. Conclusion

Although many local restrictions are flexible enough to provide environments for home business creation, some local zoning regulations should be reviewed to ensure that they are compatible with the changing business climate and do not create unneeded barriers for entrepreneurs. Revised zoning in light of modern trends can promote business creation and respect the rights of neighbors.

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College Football Coaching Carousel

I. Introduction

Both the National Football League ("NFL") and the National Collegiate Athletic Association ("NCAA") have endured their fair share of high profile coaching defections either from one university to another, university to professional franchise, or professional franchise to university.[1] Among the high profile coaches who have abandoned their respective clubs under contract are Nick Saban, formerly of the Miami Dolphins and currently with the University of Alabama, Bobby Petrino, head football coach at Arkansas via the Atlanta Falcons, and Rich Rodriguez, the freshly minted coach at the University of Michigan.[2] The defections by Saban and Petrino received a fair amount of attention. However, the Rich Rodriguez situation may be enough to scare other high profile coaches from jumping ship too soon.

II. Background

Nick Saban led the LSU Tigers to a BCS National Championship in 2004.[3] He then left LSU for the NFL to coach the Miami Dolphins.[4] A mere two years later, he abandoned the NFL for the University of Alabama to become one of the highest paid collegiate coaches.[5] While fans in South Florida felt jilted, Dolphins owner Wayne Huizinga claimed that there were no hard feelings, despite the coach departing three years prior to the end of his contract.[6]

Bobby Petrino, the former coach of the Atlanta Falcons, was desperate to get back to coaching in the collegiate ranks.[7] Despite his desire to leave the NFL, Petrino gave his word to Blank that he would not abandon the Falcons.[8] The next day, Petrino chose to resign so that not even the owner of the team he coached could stop him from returning to NCAA football.[9] Shortly after his resignation, Petrino signed a contract with the University of Arkansas.[10]

Rich Rodriguez grew up in West Virginia, attended West Virginia University ("WVU"), and was a member of the university's football team.[11] Rodriguez achieved great success as a head coach while at his alma mater, achieving a record of 60-26, including a Bowl Championship Series victory in the Sugar Bowl over Georgia.[12] When the University of Alabama was searching for a new coach, Rodriguez's initial decision to take the job set off a statewide panic. However, Rodriguez backtracked and chose to stay in West Virginia at his alma mater.[13] A year after agreeing to an extension at West Virginia, the University of Michigan recruited Rodriguez to replace Lloyd Carr.[14] This time, Rodriguez decided to leave his home state.

Rich Rodriguez's time at WVU helped elevate the football program to national prominence and helped invoke a sense of pride in the residents of the state, which does not maintain a single professional sports franchise. [15] Not only was the decision to leave WVU for Michigan messy because of the state's attachment to Rodriguez, but because he was also under contract.[16]

III. Legal Issue

WVU sued Rodriguez for $4 million dollars on the theory that Rodriguez had breached his contract.[17] Rodriguez maintained that the university violated a promise during his contract to reduce the $4 million buy-out, among several other provisions.[18] The buy-out required Rodriguez to pay WVU $4 million if he did not honor his contract.[19] Rather than stand trial in West Virginia, a state that no longer took kindly to Rodriguez for abandoning it, and risk facing a partial judge, Rodriguez sought to move the case to federal court by invoking diversity jurisdiction.[20] Rodriguez claimed that he was a resident of the state of Michigan at the time of the suit, producing Michigan state driver's licenses held by him and his wife, along with a lease agreement for a townhouse in Michigan.[21] WVU countered by stating that Rodriguez and his family were living in West Virginia at the time of the suit and their children were attending school in the state.[22]

U.S. District Judge John Bailey sent the case back to Circuit Court in Monongalia County to continue proceedings.[23] The decision rested on precedent which states that state agencies are not citizens of a state.[24] WVU was deemed an arm of the state, and therefore, the action could not have been filed originally in federal court and thus could not be removed.[25] The Supreme Court does not have jurisdiction over this case because the Supreme Court has original jurisdiction over controversies between two or more states and over actions by a State against a citizen of another State. However, there is no removal from a state trial court to the Supreme Court.[26] Rodriguez's case will certainly be held in state court, and may produce a result that was exactly why diversity jurisdiction was instituted to prevent – to protect individuals from biased local courts. Although Rodriguez is not an out of state litigant, he has spurned his home state school in favor of a more prestigious school, and might as well be an out-of-state litigant fearing the wrath of a local court.

IV. Conclusion

While coaches will continue to jump from school to school or from school to professional franchises, there are few, if any, obstacles outside of buy-out clauses in coaching contracts to seriously deter their departure. The issue has drawn the attention of NCAA President Myles Brand, who described the situation of coaching departures as "uncomfortable."[27] While the fan bases in Miami and Atlanta felt spurned by their coaching departures, both Petrino and Saban arrived in their new coaching positions relatively unscathed. Rodriguez on the other hand, may have to pay WVU $4 million dollars. This could go a long way to discourage similar contract breaches. Not only is the large sum of money at play an issue, but coaches pondering an in-contract coaching move could be deterred by the mess that has become *West Virginia University v. Rodriguez*. From the statewide fallout to the ever-increasing legal fees, the pending litigation may be the greatest deterrent to coaches seeking similar moves in the future.

[1]

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INTERNATIONAL BUSINESS TRAVELERS BEWARE

I. Introduction

Picture yourself in the shoes of Maria Udy, a marketing executive working for a travel management firm in Maryland. [1] Udy, a British citizen traveling from Washington D.C. to London, was pulled aside by a federal agent because he had "a security concern" with her. [2] She was presented with a frustrating choice: hand over her laptop for the agent to search or miss her flight. [3] In a similar incident a tech engineer, a U.S. citizen who chose to remain anonymous for fear of calling attention to himself, was pulled aside by a federal agent who demanded that he log into his computer so that the agent could search it. [4] The engineer protested, as the computer belonged to his corporation, but he logged in and watched in dismay as the federal agent copied down each of the websites he had visited. [5] Sadly, these incidents are far from isolated. [6]

Technological advances have provided international business travelers with innumerable benefits, but recent border search jurisprudence threatens to nullify the conveniences of this medium by subjecting such travelers to random, invasive searches of their electronics. [7] Indeed, in this age where a business traveler's laptop can be as indispensable as his or her wallet (and capable of carrying so much more), privacy protections have become all the more essential. Furthermore, due to conflicting precedents in two recent, landmark cases, the future of privacy protections in the digital age is entirely uncertain. [8] This article will not only examine the current state of the law of border searches with regard to technology, but it will also analyze the merits of arguments made in salient, recent cases that will shape the future of the law in the field.

II. The Current State of the Law of Border Searches

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." [9] Typically, such searches must be backed by a valid warrant particularly describing the places and items to be searched; [10] however, in the interest of national security, the courts have long recognized an exception to this general protection allowing customs officers to perform warrantless, routine searches of those seeking entry or departure at the country's borders. [11] Airports, in the case of international travel, are considered the legal equivalent of national borders. [12]

Routine searches of people and their luggage at the border do not require any sort of reasonable suspicion or probable cause justification. [13] More invasive, non-routine searches (including body cavity searches), however, do require reasonable suspicion of illegal activity to perform. [14] Furthermore, searches are allowed to be broad in scope, but they are still subject to the reasonableness limitation of the Fourth Amendment. [15] The Supreme Court has determined that searching inside sealed containers within luggage and on one's person are within the scope of the Fourth Amendment. [16]

United States v. Ickes was the first case to tackle the issue of whether border searches of laptops were permissible. [17]

In that case, Ickes was attempting to return to the United States in a van via the Canadian/U.S. border in Detroit. [18] A cursory search of the van revealed illegal materials, including loose marijuana seeds and a tangible album of child pornography. [19] Upon the discovery of those materials, the officer searched his laptop computer and found more files containing child pornography. [20]
The court ruled that the powers of customs officials to perform border searches is necessarily broad, and the search of the laptop in this case did not violate the Fourth Amendment. [21] However, the court did not explicitly mention what level of suspicion would be necessary to perform such a search in general, pointing instead to the several initial, overt indicators of illegal activity that prompted reasonable suspicion. [22] Absent such reasonable suspicion, it is unclear what the court would have ruled, and the question has remained for other circuits to answer.

III. Conflicting Precedents Paint an Uncertain Future for Privacy Concerns in International Travel

A. US v. Romm: One Giant Leap for Government Power Over Privacy

The Ninth Circuit has been the leader in applying conventional border search exception doctrine to new technologies, including laptops. In a string of cases, the Ninth Circuit reaffirmed the traditional border search exception doctrine. [23] The Ninth Circuit entered new legal territory in its landmark case United States v. Romm. However, it took advantage of a technicality to avoid settling an important point of law. [24]

Romm sought entry into Canada from the United States but was denied because of a previous criminal conviction on his record. [25] In searching his belongings, Canadian Border Services required him to turn on his laptop. [26] They investigated his internet search history, finding several web addresses that they suspected contained child pornography. [27] Romm simply responded to their accusations with, "That's it. My life's over." [28] The agents held him in detention before placing him on the next flight to Seattle, alerting US customs agents there that he "possibly had illegal images on his computer." [29] Customs agents brought in a expert computer forensics team to search Romm's computer. [30] In the team's "preliminary analysis," they utilized software powerful enough to recover deleted files and to determine when those files were created, opened, or modified. [31] A more extensive search was performed, but no information regarding the procedure followed was included in the case's facts. [32] No photos were found in regions of Romm's hard drive over which he had control, yet, based on photos found in Romm's internet cache and deleted items, the court upheld his conviction for knowingly possessing child pornography. [33]

The court recognized that deciding whether the search of Romm's computer (and, potentially, the search of laptops in general) was routine or non-routine could set an important precedent for future courts. [34] The court declined to make such an indication, reasoning that they were not required to rule on the issue because Romm had failed to include it in his opening brief. [35] Instead, the court stated simply that even if it were non-routine, there was sufficiently reasonable suspicion to sustain the search. [36]

The most significant aspect of this decision is the court's view that such an incredibly invasive search was warranted given the smallest of reasonable suspicion–namely, the Canadian Border Patrol officer's indication that Romm *possibly* had illegal images on his computer. [37] This suspicion was sufficient to justify a preliminary search that delved into files that Romm had either tried to permanently delete or files to which he did not have access–and it is entirely unclear what means were employed in the "full search." [38] Under this approach, consider someone receiving an unsolicited, spam e-mail containing illicit photos. Even if that person instantaneously deleted the e-mail, a border search (or any search, for that matter) could conceivably reveal the message, and it could be used as evidence against him or her in court. This prospect becomes even more frightening if such searches can legally be performed routinely–i.e. without reasonable suspicion. Furthermore, many laptops, especially those of business travelers, contain sensitive and private data. This court's view could potentially open the floodgates for government searches capable of accessing all kinds of computer data; nothing noted in the opinion limits the scope of the government's search. [39] International travelers should not have to take magnets to their hard drives to ensure their privacy and legal safety.

B. US v. Arnold District Court Decision: Recoiling Against Romm

In United States v. Arnold, the Court of the Central District of California chose to directly grapple with whether border searches of laptops should be classified as routine. [40] Arnold had just returned to Los Angeles after a twenty hour flight from the Philippines, where he had been visiting for three weeks. [41] A customs official at the airport selected him for additional questioning. [42] She asked him to turn on his computer so she could see if it was working; once it turned on, she handed it to another customs official for him to search. [43] On Arnold's desktop, the officer found two folders entitled "Kodak Pictures" and "Kodak Memories." [44] The officer opened files in both folders, finding one picture showing two naked women; however, the State introduced no evidence to demonstrate that the women depicted were minors. [45] The customs officials consequently called in Department of Homeland Security agents and other federal agents to interrogate Arnold and to thoroughly search his computer. [46] In the subsequent search, the agents discovered numerous pictures that they determined to be child pornography. [47]

Citing a string of Ninth Circuit cases that largely referenced invasive, physical searches, the court held that any search that implicates privacy and dignity rights must be predicated on reasonable suspicion. [48] This is a sound, inoffensive position: though this court recognized that there must be some concessions made to privacy to protect national borders, it still recognized that just because someone is at the nation's border does not mean they should be required to sacrifice their dignity without, at the bare minimum, some form of basic justification. [49]

The most contended point of the court's analysis revolves around its further holding that a search of a person's laptop implicates privacy and dignity interests. [50] Springboarding off the Ninth Circuit's decision in United States v. Molina-Tarazon (asserting that "government intrusions into the mind . . . are no less deserving of Fourth Amendment scrutiny than [physical intrusions]"),

[51] the court indicated that because of the vast amount of private thoughts and sensitive data that can be stored on data drives, searching them is analogous to searching the mind, and thus they implicate privacy and dignity interests. [52] Consequently, the court held searches of laptops and other electronic storage devices require reasonable suspicion. [53]

This holding, while not technically inconsistent with Romm, emphasizes a more progressive set of values. Whereas Romm focused on the need for broad discretion to protect the nation's borders, Arnold warns of the dangers of limitless discretion to natural, personal rights. The State, believing that values espoused in Romm were more fundamentally consistent with the Ninth Circuit's prior border search jurisprudence, appealed the decision. [54]

C. US v. Arnold Appeal: The Future of the Law

The State's pending appeal of the Arnold decision will force the Ninth Circuit to make the very decisions that it avoided in Romm.

[55] These decisions will certainly shape how the law regards customs border searches of laptops, but particular arguments, if adopted by the court, could also be very persuasive as to how other branches of the law will treat computers and electronic storage devices. Recognizing the powerful implications of this decision, various privacy rights groups have have brought out a veritable arsenal of arguments to attempt to influence intelligent and responsible policies that protect both privacy interests and national security. The Electronic Frontier Foundation (EFF), a San Francisco non-profit dedicated to preserving civil liberties in the digital age, and the Association of Corporate Travel Executives (ACTE) submitted an amicus brief in support of Arnold's position in an effort to protect their vested privacy concerns

and rebut the State's positions. [56] The arguments in this clash of heavyweights are extremely telling as to the potential future of electronics in the legal world.

The State amassed a series of powerful arguments, but perhaps its first argument could have the most drastic–and dangerous–consequences: it argued that "computer storage devices are constitutionally indistinguishable from other closed containers subject to suspicionless border searches." [57] The State contends that, for example, carrying around a laptop containing assorted files is the equivalent of carrying hard copies of all those files in a briefcase, and because customs can legally search those hard copies, it should likewise be able to search hard drives. [58] This argument is deceptively simple.

The truth is that laptops and electronic storage devices are not simply "digital briefcases;" not only are they capable of containing much more information, but they frequently possess kinds of information that are fundamentally different from things we carry around in a briefcase. For example, on my computer I keep files containing my most private thoughts and musings about politics, religion, and the world. I have e-mails and school papers dating back to the year 2000. I have my entire scanned and digital photo collections, music collection, and computer game collection. I have receipts for nearly everything I have ever purchased online and records of many things purchased in brick-and-mortar stores. My laptop is an organized and thorough catalog of my work–of my mind–of my life. These things do not just implicate my privacy and dignity rights, they implicate those of anyone with whom I have ever communicated. A briefcase or suitcase contains what a person needs for that particular trip. Maybe it also contains a journal or a photo album. But it does not and cannot contain a record of one's life like a laptop can. Laptops are no longer just for business; in the digital age in which we live, laptops can and do store so much more. A sound judicial rule must understand the true breadth of the privacy and dignity interests that are implicated by further technological advances.

Furthermore, laptops carry all kinds of information over which the owner is generally not in control. For example, the only list that is kept of what paper copies one views is in one's own mind. By contrast, very nearly every action taken on a computer leaves some kind of tracks, like internet search histories and caches, photo meta data, system preferences, cookies, and so many other kinds of "behind-the-scenes" forms of digital data ubiquitous yet invisible to the ordinary user. The facts of Romm illustrate this point perfectly. When one wants to remove a hard copy from one's briefcase, one does just that: removes the paper and perhaps shreds it to ensure privacy. Even files that Romm tried to virtually "shred" were able to stick to him in ways that paper simply does not. If a briefcase were capable of spontaneously generating eBay purchase histories, old book reports, or shredded documents, the State's assertion might be more apt. But because this is not a realistic perception of the world in which we live, it is essential to adopt a rule that accurately understands the true scope of technology in the digital age and does not set a dangerous precedent for other courts by irresponsibly blending the legal statuses of two distinct categories of objects.

A second major contention by the State is that it has a vested interest in performing warrantless border searches of laptops without reasonable suspicion. [59] It argues that computers "can serve as repositories for all manner of dutiable goods and digital contraband." [60] The District Court decision also acknowledges that searches of laptops could reveal illegal content such as child pornography or terrorist plans. [61] Yet, ironically, if the court were to adopt a rule giving customs officials full power to conduct suspicionless, warrantless searches of laptops, it would completely undermine the effectiveness of their searches. As the EFF and ACTE astutely argue in their amicus brief, because the information is digital, it can easily be transported over national borders via the internet, and with far less risk to criminals than keeping it on a drive that would be searched. [62] The court would be breeding strains of criminals more careful and cunning in their illegal pursuits and immune to the laws. Quite simply, this rule would punish and inconvenience a tremendous multitude law abiding citizens in order to catch a nominal amount of hapless criminals. To give the State this power would not advance any legitimate state objectives; it would in fact impede them.

To be clear, the court is not stuck between the two poles that the decisions in Romm
and by the District Court create. It could choose to strike a creative balance of the values espoused by both cases. However, the suggested rules by the EFF and the ACTE in the amicus brief seem to best protect the myriad of interests at stake on all sides and happen to closely align with the District Court's decision. They suggest that routine searches of laptops and electronics to ensure that they are not weapons

or bombs is fully sensible, while searching data therein can only be done with reasonable suspicion of wrongdoing. [63] This would protect vital national security interests and would acknowledge privacy rights as being of a high priority. The Ninth Circuit could achieve this by affirming the District Court's decision.

However, the Ninth Circuit judges may have already betrayed their biases in oral testimony during the Arnold appeal. Of the total thirty-three minutes of testimony by both sides, the State spoke relatively uninterrupted for the opening seven minutes. [64] When the court did interject questions, it did so using language to impliedly dissociate themselves from the decision of the District Court. [65] By contrast, Arnold's defense attorney was grilled with nearly a dozen questions and frustrated judicial interjections for the next twenty minutes. [66] Many questions emphasized the broad discretion for the State to perform border searches, and some judicial responses indicated a hesitancy to believe that digital storage devices were really any legally different from closed containers. [67] While the court has not yet issued a decision, the court will hopefully recognize the vital privacy and legal issues at stake and create a sensible rule for governing new technologies in a changing world.

D. The EFF Fights for Transparency of Governmental Policy

Despite the District Court's ruling in Arnold and the case's pending appeal, customs officials have continued the practice of random searching and seizing of laptops. [68] Furthermore, there are allegations that some Transportation Security Administration (TSA) officers have confiscated various electronic devices to not only be searched but also to be copied. [69] Responding to a slew of complaints over these surprise searches and seizures at airport terminals, [70] the Asian Legal Caucus (ALC) and the EFF contacted the TSA and asked for copies of their search and seizure policies pursuant to the Freedom of Information Act (FOIA). [71] The TSA failed to deliver the information within the statutorily allotted amount of time, and the EFF and ALC sued the TSA for injunctive relief–i.e. the delivery of the policy statements. [72]

The TSA's reluctance to deliver this information pursuant to statute is unsettling. Transparency regarding inspection policies would certainly help enforce citizens' privacy rights. Knowing what can be searched and when can help a traveler prepare for travel in such a way that ensures a speedy visit through security while being able to protect information they deem important. It is a situation that would benefit both government and travelers: the TSA can ensure safety faster and with less hassle, and travelers can rest easily knowing that their information and electronics are theirs alone.

IV. Conclusion

Each of the decisions discussed above will have a powerful effect on the way the law regards technology and privacy rights, especially at the nation's borders. The Ninth Circuit's decision in Romm may be the logical extension of the traditional border search exception doctrine to electronic technology. However, just because the decision is consistent with tradition does not mean it sets the appropriate rule for governing new technologies. The Arnold District Court decision made important connections among privacy rights, dignity, the mind, and electronic data.

The Ninth Circuit has an important decision to make about the future of privacy rights for technology. The variegated arguments by the State and interested parties like the EFF help illustrate what rules are possible and what their consequences may be. It would be a dangerous oversimplification of the issue to treat digital storage devices like any other unopened container because it would ignore the true breadth of what these devices can and do store. Furthermore, granting the government this power does not further legitimate state objectives. The EFF and ACTE's suggestions balance privacy and national security well, ensuring all sides' objectives are met. Regardless of the outcome of the Arnold appeal, at the very least transparency of governmental policies can only help protect citizens' rights.

There are privacy interests at stake in these cases that are not only of importance to business travelers, they are important for shaping how the courts will view electronic devices in other fields. Consequently, the courts must look beyond precedent and craft a rule that can successfully safeguard rights, freedoms, and protections in the ever-changing and developing world in which we live.

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[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Complaint for Injunctive Relief for Violation of the Freedom of Information Act, 5 U.S.C. § 552, at 3-4, available at http://www.eff.org/files/filenode/alc/alc-complaint.pdf.

[7] Id.

[8] United States v. Romm, 455 F.3d 990 (9th Cir. 2006); United States v. Arnold, 454 F.Supp.2d 999 (C.D. Cal. 2006).

[9] U.S. Const. amend. IV.

[10] Id.

[11] Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

[12] Id., at 272-73.

[13] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[14] United States v. Okafor, 285 F.3d 842, 845-46 (9th Cir. 2002).

[15] United States v. Ramsey, 431 U.S. 606, 618 (1972).

[16] Robbins v. California, 453 U.S. 420, 426 (1981).

[17] United States v. Ickes, 393 F.3d 501 (4th Cir. 2005).

[18] Id., at 502.

[19] Id.

[20] Id., at 503

[21] Id.

[22] Id.

[23] Okafor, 285 F.3d at 842; United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995).

[24] Romm, 455 F.3d at 997.

[25] Id., at 994.

[26] Id.

[27] Id.

[28] Id.

[29] Id.

[30] Id.

[31] Id., at 994-95.

[32] Id., at 995.

[33] Id., at 994.

[34] Id., at 997.

[35] Id.

[36] Id.

[37] Id., at 994.

[38] Id., at 995-96.

[39] Id.

[40] Arnold, 454 F.Supp.2d at 1003-04.

[41] Id., at 1001.

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] Id.

[47] Id.

[48] Id., at 1001-03.

[49] Id.

[50] Id., at 1003-04.

[51] United States v. Molina-Tarazon, 279 F.3d 709, 716 (9th Cir. 2002).

[52] Arnold, 454 F. Supp.2d at 1003-04.

[53] Id.

[54] United States v. Arnold, 2007 WL 2434085, Government's Reply Brief, July 16, 2007, at 17-21.

[55] United States v. Arnold, Case No. 06-50581.

[56] United States v. Arnold, CR 05-772-DDP, Brief for Amici Curiae Association of Travel Executives and Electronic Frontier Foundation, June, 19, 2007, available at http://www.eff.org/files/filenode/US_v_arnold/arnold_amicus.pdf.

[57] United States v. Arnold, 2007 WL 2434085, Government's Reply Brief, July 16, 2007, at 2-17.

[58] Id.

[59] Id.

[60] Id.

[61] Arnold, 454 F. Supp.2d at 1007.

[62] United States v. Arnold, CR 05-772-DDP, Brief for Amici Curiae Association of Travel Executives and Electronic Frontier Foundation, June, 19, 2007, at 5-6, available at http://www.eff.org/files/filenode/US_v_arnold/arnold_amicus.pdf.

[63] Id., at 3-6.

[64] United States v. Arnold, Oral Argument, October 18, 2007, available at http://www.ca9.uscourts.gov/ca9/media.nsf/9C28DC14D572E654882573780072E57E/$file/06-50581.wma?openelement.

[65] Id.

[66] Id.

[67] Id.

[68] Complaint for Injunctive Relief for Violation of the Freedom of Information Act, 5 U.S.C. § 552, at 3-4, available at http://www.eff.org/files/filenode/alc/alc-complaint.pdf.

[69] Id.

[70] Id.

[71] Id., at 4-6.

[72] Id., at 6-7.

GOOGLE DEFENDS ITS TRADEMARK FROM GENERICIDE

I. Introduction.

Over the last decade, Google has quickly risen to dominate the internet search arena. The company's rapid ascension is marked by a corresponding rise in the value and recognition of the Google trademark. In that time, Google has attached its name to an increasingly wide-range of products and services, such as Google News, Google Maps and Google Images. On occasion, Google has also manipulated its trademark into easily recognizable derivatives, such as its web mail service Gmail. Google also alters its primary trademark on major holidays, adding playful cartoon flourishes to its recognizable search page.

But manipulations of the Google name, such as Gmail, are an anomaly in Google's stable of trademarked products names. As the company matured, it shied away from playful variations of "Google" in favor of building the strength of its primary brand. Towards that end, in April 2007, the company changed the name of its shopping search service from "Froogle" to "Google Product Search" just over four years after Froogle's original launch. [1] As one Google executive explains, the name Froogle "caused confusion for some because it doesn't clearly describe what the product does." [2] Notably, the company's solution was to re-brand that service using its core "Google" name.

These various instances are only some examples of the strength of Google's trademark. Throughout its explosive growth, Google has steadfastly held on to its motto: "don't be evil." [3] This in turn has endeared the search engine to the public, generating enough goodwill that "a huge group of Web users and bloggers stand ready to adopt any ol' app Google rolls out, whether its best in class or not." [4] For Google, the goodwill and universal recognition vested in its trademarked name makes that trademark one of Google's most valuable assets. As a result, Google actively protects its trademark from a variety of threats, including genericide, the process by which a trademark becomes generic and ineligible for protection.

II. Background of trademark law

Passed by Congress in 1946, the Lanham Act is the source of all Federal trademark law in the United States. The Lanham Act protects marks, designs, product configurations, sounds and other source identifiers. In theory, strong and easily distinguishable trademarks allow consumers to quickly determine the origins of a product or service. Conversely, businesses have an incentive to build public recognition of their trademarks through investments in advertising. By defending trademark rights, the government protects a business's investment in its mark, and increases consumer confidence that marks reliably indicate a product or service's origin. But the government is also wary of overprotecting marks and inadvertently stifling competition among businesses who might use them in bad faith. As a result, trademarks are afforded varying degrees of protection depending on their strength, as measured by the "Abercrombie spectrum." [5]

The Abercrombie spectrum defines four possible categories of strength for trademarks. In order from strongest to weakest, those categories are: arbitrary or fanciful, suggestive, descriptive, and generic. While arbitrary or fanciful marks are afforded all of the advantages and protections of trademark law, generic marks are essentially in the public domain, and are afforded no protections.
Although arbitrary marks and fanciful marks are two distinct categories of trademarks, they both enjoy maximum protection under the Lanham

Act. Fanciful marks are marks that are created expressly for the purpose of being a trademark. Prominent examples include Kodak, Clorox and Exxon. Because these words were created for the purpose of being trademarks, courts are comfortable in granting to their owners the exclusive right to use those marks.

In contrast, generic marks represent the other end of the Abercrombie spectrum, and are afforded no trademark protections. The key question is whether the mark signifies the name of a product or service, its genus, rather than signifying its origin, or species.

Thomas McCarthy's seminal treatise on trademark law states his "who are you, what are you" test. [6] If the mark answers the question "who are you" or "where do you come from," then it is not generic and is still eligible for trademark protections. If the mark merely answers the question "what are you," then it has lost its source identifying properties, and is generic.

III. Genericide

A finding of genericness typically arises from one of two scenarios. The first possibility is that the term is generic "by virtue of its natural relationship to the products with which they are used." [7] For example, the mark "Beer" would be generic with regards to a beer product. [8] The second possibility is that a formerly non-generic mark may become generic over time through evolving public usage, a process known as genericide.

As Google seeks to avoid the genericide of its own trademark, it has an ample history from which to draw lessons and warnings. Genericide has claimed several well-known, widely-recognized victims, including Xerox, Band-Aid, Aspirin, Escalator, Kleenex and Thermos. In their day, the products sold by companies such as Aspirin, Escalators and Kleenex dominated their respective markets to such an extent that over time, public usage of those marks shifted. Instead of identifying a brand of adhesive bandage or facial tissue, Band-Aid and Kleenex eventually came to identify the product itself.

For instance, the genericide of “escalator” is one prominent example of how inaction on by the mark’s owner can make that mark generic. The Otis Elevator Company’s trademark for the term “escalator” was cancelled, in part, because the company failed to actively defend their mark from genericide. Specifically, two employees of the Otis Elevator Company were on the committee that drafted the “Standard Safety Code for Elevators, Dumbwaiters and Escalators.” [9] Neither of these employees objected or protested in any way to the generic use of the term “escalator” in the drafted safety codes. This course of conduct by the Otis Elevator Company caused the mark to “lose its significance as an indication of origin.” [10]

Public use of the mark, for purposes other than source identification, is also heavily weighed by courts when determining whether a mark is generic. Dictionary definitions are one such public use, as they “reflect the general public’s perception of a mark’s meaning and implication. Newspaper and magazine use of a mark was also used as “a strong indication of the general public’s perception” of a mark. [12]

Like these brands, Google’s trademark can be readily classified as a fanciful mark: a word created for the sole purpose of being a trademark. The word “Google” was a play on the word googol, and appears to be a word created for the express purpose of identifying the company, an ideal position for seeking trademark protections. [13] However, Google must take active steps to avoid falling victim to genericide.

IV. Evaluating Google's position

As Google comes to dominate the internet search industry, the term "Google" has increasingly been used for purposes other than source identification. Google appears to be well aware of the potential implications of these expanding, varying uses of the term "Google," and has been taking steps to combat this potential genericide. Since at least February 2003, Google has been actively policing the use of its increasingly valuable trademark. [14]

Most famously, Google sent a cease-and-desist letter to the creator of the Word Spy website in early 2003. Word Spy was a popular online dictionary, and had recently added a definition of "google." The widely-publicized letter from Google's trademark attorneys asked Word Spy to clarify its entry and emphasize that "google" refers to an internet search conducted using Google's search engine, and not to internet searches in general. [15] This particular letter from Google was just the first to draw significant attention from commentators.

In early 2006, a television commercial for Pontiac automobiles urged viewers to "Google 'Pontiac' to find out" more. [16] Curiously, Google did not object to the commercial's usage of "Google" as a verb, even though the infraction seems similar to various other instances that prompted a letter from Google's attorneys. Indeed, Google essentially consented to the commercial's usage of "Google," since Pontiac contacted Google to obtain permission for use in the ad. [17] This particular instance of generic use may be especially damaging to Google, since their consent to the use is similar to that of the Otis Elevator

Company, which weighed heavily in the finding of genericness. However, Google might successfully argue that the video of the commercial included images of the Google search page being used, reinforcing the public's understanding that the phrase "Google 'Pontiac' to find out more" means use of the Google search engine.

In mid-2006, Merriam-Webster's Collegiate Dictionary added the term "Google" as a verb. [18] However, the dictionary's lexicographers were sensitive to Google's attempts to protect its trademark, and crafted the entry accordingly [19]: "to use the Google search engine to obtain information about (as a person) on the World Wide Web". [20] The induction into Webster's dictionary was marked by an article in the Washington Post, which drew a cookie-cutter letter from Google's trademark lawyers. [21] Like its previous letter to Word Spy, this response This in turn sparked cries of outrage and disappointment for Google's apparent lack of humor. [22]

While Google's efforts to preserve its trademark has drawn the ire of many commentators and industry, they remain necessary actions in its quest to preserve trademark rights. Many of these writers do not recognize the imminent danger that Google faces from potential genericide. Furthermore, the actions taken by Google to prevent genericide are innocuous requests made to writers, bloggers and the general public. [23] They do not contain any threats of legal action, but merely ask the relevant party to change the way it uses the word "Google." However, such letters should help combat allegations of consent and indifference on the part of Google.

V. Conclusion

As several commentators have discussed, Google is unlikely to suffer the same trademark fate as Xerox and Aspirin, simply because they own the Google.com domain name. Thus, Google's source identifier is precisely how customers find their product, protecting Google from the dangers of genericide. However, Google should continue to zealously defend its trademark from genericide, for several reasons.

First, Google's current position of dominance in the search engine arena is by no means guaranteed or secured. By vigorously defending their trademark now, Google ensures that their mark will still be non-generic in future years when, like Xerox and Otis Elevator before it, Google may no longer dominate its industry.

Furthermore, Google's ownership of the Google.com domain name may not be adequate protection against genericide in the future. Given the rapid evolution of web-related technologies, how consumers access the internet may be radically different in the near future. If and when this happens, Google will likely need a robust and non-generic trademark to maintain market dominance.

Finally, Google's powerful trademark is useful for non-web-based products and applications, where its domain name is a non-factor. Branching away from internet-related services, Google has attached its name to cell phones and even lip balm. [24] As it expands its portfolio of products and services, Google will likely attach its trademark to other products. Towards that end, Google will need its mark to serve as a non-generic source identifier.

Given Google's current dominance of internet search engines, commentators are understandably puzzled over the company's concern for its trademark. However, the history of dominant companies and ubiquitous trademarks has shown that a mark owner should always remain vigilant against genericide.

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THE MAIL-ORDER BRIDE PHENOMENON

IN A WORLD OF RISING GLOBALIZATION HOW DO THE LAW AND INDUSTRY GENERATE SAFE OPPORTUNITIES FOR PEOPLE TO MEET ONLINE IN DIFFERENT NATIONS?

Contrary to popular depiction in the media and amongst the populace of western countries, the idea of a 'mail-order bride' no longer exists in the classical sense; in the 18th and 19th Centuries, women such as the 'casket girls' of New Orleans were often ordered through catalogs or sent to colonies by their Governments to marry settlers and maintain the harmony and prosperity of the colony. [1] Nowadays, the term generally refers to women from developing countries that use introduction services such as Anastasia International (HYPERLINK "http://anastasia-international.com" http://anastasia-international.com) to meet and possibly marry men in first world countries. [2] The common misconception, at least with regard to women in the Commonwealth of Independent States (the former Soviet Union), is that they are coming to this country to escape political or economic turmoil in their own. [3] The following article will dispel the myth of the 'mail-order bride' and explain the legal concerns regarding safety and security for both men and women looking to meet someone internationally.

WHY WOMEN IN RUSSIA ARE LOOKING FOR HUSBANDS ELSEWHERE

In America, we have "a huge population of working singles who have limited opportunities to go through some elaborate courtship"; this, in turn, has lead to the rise of Internet dating sites in the United States. [4] In Russia and throughout the CIS, many women have no opportunities due to the demographic reality of their countries. In Russia, there are eighty-eight women of marriageable age for every one hundred men; in Ukraine the rate is 87-to-100 and in Estonia and Latvia it is 85-to-100. [5] Culture plays another strong part in why women in Russia seek husbands elsewhere. Since the 10th Century, heavy drinking has been a fact of Russian life noted by many historians; nearly 20% of the male population would be considered alcohol 'abusers' by American standards with 5-10% consuming the equivalent of 100 grams of alcohol per day. [6] Needless to say, this kind of consumption equates to extremely high rates of domestic violence; a woman dies from domestic violence every 40 minutes in Russia and every day over 36,000 husbands and partners physically abuse the women in their lives. [7] These facts result in 14,000 women losing their lives to domestic violence per year in Russa compared to 1,200 in the United States which also has twice the population (144M versus 300M); Russian women are 2.5 times more likely to be killed by their partner than American women and 5 times more likely than women in Western European nations. [8]

Male chauvinism and infidelity are also problems. There is an old, Russian saying 'chicken is not a bird; woman is not a human being'; this is the type of culturally ingrained sexism that Russian women deal with on a daily basis. [9] Moreover, according to the research of Professor David M. Buss of the University of Texas at Austin, with an excess of women to men, Russian men are confronted with less competition for the affection of their female counterparts and pursue short-term sexual strategies rather than seeking commitment. [10] This, in turn, stated Carel de Rooy of UNICEF, leads to a staggering Russian divorce rate of nearly 80%. [11] From all these statistics, the conclusion follows that while economic and political conditions in Russia and former soviet countries are bad, what women who seek husbands abroad are looking for is not a better financial situation but a chance at a stable life and a loving marriage – something that is easier to find in the United States, Western Europe, Canada, or Australia.

WHAT TYPE OF MAN OR WOMAN SEEKS MARRIAGE ABROAD

Despite the dilemmas facing Russian women, only .5% of the total number of single women in Russia signs up for marriage agencies (meaning signs up not actively searches – many still meet their partner domestically). [12] In addition to this, it is estimated that only 3-5% of women seeking foreign husbands complete their search and worldwide figures suggest only 4-6K marriages occur in this way per year in the United States. [13] Of the women who start their search and actively pursue it, most are over 25, have advanced degrees, and make a decent living compared to the average Russian woman; similarly, the majority of western men looking for foreign brides are also highly educated and have higher salaries with the average age being between 40 and 50. [14] Given this small and peculiar market and the immigration and abuse concerns of groups such as the Tahirih Justice Center (HYPERLINK "http://www.tahirih.org" www.tahirih.org), what is the government of the United States doing to protect individuals using International Dating Services?

LEGAL CONCERNS WITH THE INTERNATIONAL DATING INDUSTRY

There are two basic concerns with this industry – one for the men and one for the women. The men’s concern is being scammed by a woman (or fake woman) into sending money to another country or marrying someone only looking for a green card. [15] While U.S. Authorities vigorously prosecute green card scammers domestically, they can do little to stop fraud in foreign nations where the fact that only 1 in 20 men ever visits the foreign service’s nation pushes them to hire women to answer men’s letters and then pawn off the few men who do visit; in this regard, reputable agencies are left to their own devices and provide advice to their members and list known scammers (who show themselves by requesting money) at sites such as the Black List (HYPERLINK "http://www.anti-scam.org" www.anti-scam.org). [16]

The other concern is the health, safety, and welfare of women who choose to marry Americans and legally immigrate to the United States. [17] Responding to three well-publicized murders over the last ten years, Representative James Sensenbrenner [R-WI] introduced the Violence Against Women and Department of Justice Reauthorization Act of 2005 that was nearly unanimously passed by Congress and then signed into law by President Bush on January 5, 2006. [18]

The Act requires an introduction service to collect and disclose the following information before it may provide contact or general information on foreign women to American men:

Every state of residence of the man since the age of 18

His current or previous marriages as well as how and when they terminated

Information on children of his under 18

Any arrests or convictions related to controlled substances, alcohol or prostitution, making no distinction on arrests not leading to conviction

Any court orders, including temporary restraining orders

Any arrest or conviction for crimes ranging from “homicide” to “child neglect”

Any arrest or conviction for “similar activity in violation of Federal, State or local criminal law” [19]

In addition to these legal protections, the United States Citizenship and Immigration Services (which replaced the INS when the Department of Homeland Security was established) has a lengthy and involved process to procure a K-1 (fiancé) visa for entrance into the United States; this process includes a medical exam, personal interview, and a requirement that the American spouse make approximately $25K per year or more. [20]

CONCLUSION

Certainly, cross-border dating can be dangerous for women as shown by our Congress' concern over foreigners' safety and with human trafficking in women and girls becoming a serious problem currently being addressed by both national governments and private groups such as Vital Voices (HYPERLINK "http://www.vitalvoices.org" http://www.vitalvoices.org). However, international dating can also be dangerous for western romance seekers. Recently, an ABC News story detailed the plight of an Australian man who went to visit a woman he met on the Internet in the African Nation of Mali and was kidnapped and held for ransom. [21] While international dating can be dangerous, traditional dating and domestic Internet dating sites have their dangers as well. On the one hand, domestic Internet sites have the same problems with fraud or identity theft as international matchmakers but also hold the added risks of stalking and physical security/privacy violations due to site members being in close proximity to each other. [22] On the other hand, statistics compiled by the research of Clinical Psychologist and University of Arizona Professor Mary P. Koss now show that 1-in-4 women are the victims of sexual assault (date rape or attempted date rape) while attending college. [23] Considering these statistics, it now seems that foreign women have better protection from domestic violence than American women and that the law treats American men as abusers until proven innocent; at least one feminist, Wendy McElroy agrees, stating "contacting a woman for romantic purposes — internationally or domestically — is not a crime. Those who do so are not a priori criminals who must prove themselves innocent before being allowed an email exchange". [24]

Despite the legal requirements to run an International Dating Agency, the industry continues to persist. As problems are solved and the forces of globalization shrink the world, reason dictates that this industry will continue to grow. While there are horror stories in this industry, there are also people finding real happiness; as with any new market, there are those who seek to exploit the situation – hurting lives and reputations in the process. However, for any well-meaning and honest entrepreneur, there is legitimate opportunity to make a profit and change lives for the better by providing a safe, reliable service, in line with government regulations, allowing people from different cultures who speak different languages to meet each other and maybe fall in love. In the end, we are all human – citizens of one world and one species. As this view takes hold and artificial boundaries between people disappear, the ability to expand one's dating sphere from a single city or state to the entire world will become a valuable commodity and international dating, like domestic online dating, will become a more mainstream way to meet a romantic partner.

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Overtime Pay and White-Collar Exemptions: Seeking Clarification in Light of Recent Revisions

I. Introduction

The New York Times recently asked, "In today's perpetual workplace, where downtime has merged with work time, where you can carry your office in your pocket, where collars are no longer distinctly blue or white, how does one measure overtime?" [1] Such questions lead to others, concerning the purpose of overtime pay, the reasons for distinguishing between types of employees, and the role the federal government ought to play in resolving the growing inconsistencies and confusion of the complex structure of overtime law. This article examines recent changes to the overtime laws concerning exemption of white-collar workers and any effects, beneficial or burdensome, that they may have on individual workers and the economy as a whole.

II. Background

The Fair Labor Standards Act ("FLSA") was enacted in 1938, as a substantial piece of the New Deal response to the economic and social damage done by the Great Depression. [2] The FLSA rules on overtime served as incentives for employers to shorten the work week, raise employee compensation, and hire more employees. [3] At the time of enactment, the rules concerning who was exempt and who was non-exempt from receiving overtime pay adequately corresponded to the clear division between white-collar and blue-collar workers. [4] However, in the sixty years since the Act's debut, the national economy's shift from industry to service has created a situation in which the line between white-collar and blue-collar has been obscured; the exemption rules no longer correspond closely to that categorical distinction. [5] In 2003, the Department of Labor proposed, and in 2004, Congress approved, new exemption rules to clarify the growing confusion. [6]

The old FLSA rules on overtime exemption involved a three part analysis: a salary basis test, a salary level test, and a duties test. [7] The salary basis test required that the employee was paid at a predetermined basis during a pay period regardless of the quality or quantity of his work; if so, the employee qualified for overtime pay. [8] The salary level test automatically qualified an employee for overtime pay if the employee earned less than a specified base indicative of a managerial or professional status. [9] The duties test looked into whether the employee's position could be more properly characterized as managerial, professional, or administrative work, taking into account the extent of "independent judgment and discretion" involved in the position and the level of education required for the position. [10]

III. New Overtime Exemption Rules

Under the new rules, the salary basis test remains unchanged in its essentials, and the compensation amount required for the salary level test has been raised. [11] The duties test has simplified and standardized the test for each exemption, looking into the primary duty of the employee's position. [12] As under the old rules, an employee with primary duties involving management of an enterprise, as well as direction and supervision of two or more other full time employees, falls squarely under the executive exemption. [13] The new rules add that an executive must have the authority to hire, fire, and promote employees. [14] Employees falling under the administrative exemption retain the same essential requirements. [15] Their primary duties involve the performance of office or non-manual work and the exercise of discretion and independent judgment. [16] The professional exemption still involves primary duties that require either knowledge of an advanced type or, for creative professionals, invention, originality or talent. [17] The new rules no longer distinguish advanced knowledge from "knowledge obtained from a general academic education, an apprenticeship or from training in the performance of routine, manual, or physical process." [18]

IV. Impact and Perception

The overtime exemption rules have been a highly politicized issue. [19] Accordingly, the responses to the new regulations have ranged from laudatory to dismissive. One argument contends that the clarity of the new rules will save employers from the costs of litigation arising from uncertainty as to exemptions under the old rules. [20] As a result, "savings will be passed onto workers in the form of higher salaries or increased hiring which will contribute to the fulfillment of Congress's original goals in passing the FLSA." [21] However, according to some estimates, "[l]awsuits brought under the Fair Labor Standards Act, by employees claiming they had been illegally declared ineligible and demanding back overtime pay, have increased by 50 percent since the changes were made, mostly in the form of large class-action suits." [22]

Before considering any hasty post hoc ergo propter hoc analysis, it should be noted that the new regulations are not retroactive and therefore most recent decisions still apply the old rules. [23] Moreover, "where courts have applied or referenced the new regulations, the courts have found the regulations to confirm or be generally consistent with the rules of the prior legislation." [24] At this pace of judicial interpretation, the practical effects of the change in exemption regulation, if any, may not present themselves for some time. The increase in litigation may merely be a result of the necessity of establishing case law precedent to interpret the new regulations, or it may be that the complex structure of overtime exemption law particularly lends itself to uncertainty and confusion. "The scope of FLSA regulations is defined by complex body of federal regulations, Department of Labor guidance materials, and case law precedents", as well as "[a]nalogous state and municipal laws and regulations." [25]

V. Conclusion

It is likely too soon to determine what practical effects, if any, the minimal changes in overtime exemption rules will have on workers or the economy. However, there still appears to be an open question as to how the increasing complexities and vagaries of the contemporary workplace can be resolved within the still dominant paradigm of overtime exemption. Perhaps what is required is a radical reassessment of the purposes and practices of overtime pay. Is it a organism of economic stimulus from a bygone day that has ossified into a sense of entitlement lacking any economic benefit or is it an acknowledgement of the individual worker's sense of ownership of his time and the value of his production, coupled with a social commitment to and responsibility for the welfare of the economy on an individual basis? Is the purpose served by distinguishing between white-collar and blue-collar employees still relevant? If not, what would be an effective alternative distinction? These questions will not soon be easily answered; indeed, answers to these questions would then breed others to replace them. That much, at least, is certain.

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