

1995

A Lawyer's Ramble Down the Information Superhighway

Alan H. Bomser

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Alan H. Bomser, *A Lawyer's Ramble Down the Information Superhighway*, 64 Fordham L. Rev. 697 (1995).
Available at: <https://ir.lawnet.fordham.edu/flr/vol64/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

A Lawyer's Ramble Down the Information Superhighway

Cover Page Footnote

The Report was prepared by the following representatives of ABCNY committees: Alan H. Bomser (Project Chair, Entertainment Law), Henry Beck (Computer Law), John Costa (Patent Law), Gerry Fifer (Technology and Practice of Law), Jessica R. Friedman (Copyright and Literary Property), Alan J. Hartnick (Entertainment Law), Stewart A. Pomerantz (Science and Law), Joseph A. Post (Federal Legislation), Judith Beth Prowda (Entertainment Law), Stephen H. Weiner (Science and Law), and Charles White (Communications and Media Law). The views expressed herein are those of the individual authors. The extensive and particularly insightful work by Jessica R. Friedman, Judith Beth Prowda, and Joseph A. Post, as well as Gerry Fifer's arduous task of coordinating the material, must be singled out for special praise and thanks. A selected bibliography may be obtained through the library of the ABCNY. The authors would like to thank Delia Watson and Patricia Johnson for their contributions to the compilation of the bibliography.

REPORT

A LAWYER'S RAMBLE DOWN THE INFORMATION SUPERHIGHWAY

TABLE OF CONTENTS

INTRODUCTION	700
COPYRIGHT	705
Introduction	705
I. Basic Copyright Principles	708
II. Copyright Meets Digital Technologies	710
A. <i>Rights of Copyright Owners</i>	711
1. The Right to Distribute Copies	712
2. Public Performance Right for Owners of Copyrights in Sound Recordings	716
3. Criminal Infringement	716
4. Alternatives to Distribution to Compensate for Difficulties in Enforcement	717
B. <i>Rights of Users of Copyrighted Materials</i>	718
III. Enforcement on the Information Superhighway	719
A. <i>Copyright Management Information</i>	719
B. <i>Anti-Copying Systems</i>	720
C. <i>Liability of Online Service Providers</i>	721
D. <i>International Implications</i>	723
Conclusion	723
PATENT LAW	725
TRADEMARK	730
I. Trademark Law: General Principles	730
II. Trademark Law and the Information Superhighway	733
PRIVACY AND SECURITY OF DATA	738
Introduction	738
I. Government Collection of Personal Information on Individuals	743
A. <i>The Privacy Act of 1974</i>	744
B. <i>Criticisms of the Privacy Act of 1974 and Proposals for Change</i>	746
1. General Principles for the NII—"Reasonable Expectation of Privacy" and "Information Integrity"	747
2. Principles for Information Collectors	748
3. Principles for Information Users	748
a. <i>Fairness Principles</i>	748
b. <i>Acquisition and Use Principles</i>	749
c. <i>Redress Principles</i>	749

4. Principles for Providing and Using Information ...	750
II. Private Collection of Information on Individuals	750
A. <i>Financial Data</i>	752
B. <i>Solicitations</i>	753
C. <i>Education Data</i>	754
D. <i>Driver's Records</i>	754
E. <i>Health Care Data</i>	755
F. <i>Multimedia Transactions</i>	757
1. Cable Television	757
2. Video	758
3. Electronic Communications	758
G. <i>Possible Legislation</i>	760
1. Privacy in the Workplace	760
2. Privacy of Medical Records	761
3. Consumer Credit Privacy	762
III. The Need for Security	762
Conclusion	769
PRIVACY AND COMMUNICATIONS NETWORKS	770
Introduction	770
I. A Paradigmatic Case: Caller ID	770
II. Some Privacy Issues Raised by Telecommunications Networks	774
A. <i>Who Is Calling?</i>	774
B. <i>User Directories</i>	775
C. <i>Disclosure of Records Related to the Use of the Network</i>	777
1. Cable Act	777
2. Video Privacy Act	778
3. ECPA	778
4. CPNI	779
5. New York Public Service Commission Privacy Principles	780
Conclusion	781
UNIVERSAL SERVICE AND THE INFORMATION SUPERHIGHWAY: PERSPECTIVES FROM THE TELECOMMUNICATIONS EXPERIENCE	782
Introduction	782
I. An Overview of Telecommunications Regulation	783
A. <i>The Traditional Model</i>	784
B. <i>The Rise of Competition and Its Impact on Regulation</i>	786
1. Background	786
2. IntraLATA Calling	788
3. Carrier Access Services	788
4. Local Exchange Services	789
5. Changes in the Traditional Model	789

1995]	<i>INFORMATION SUPERHIGHWAY</i>	699
II.	Accommodating Universal Service Concerns	790
	Conclusion	793
DEFAMATION		794
I.	Basic Principles of Defamation	794
II.	Liability of Online Service Providers	796
III.	Other Defamation Issues on the Information Superhighway	800
CENSORSHIP		804
RECENT ANTITRUST DEVELOPMENTS AND A SELECTIVE ANTITRUST PERSPECTIVE OF THE INFORMATION SUPERHIGHWAY		808
	Introduction	808
I.	The Clinton Administration and Recent Legislative Efforts	809
II.	Statutes and Analytical Framework	813
III.	Essential Facilities	822
IV.	Mergers	824
	A. <i>Horizontal Mergers</i>	824
	B. <i>Vertical Mergers</i>	829
	C. <i>Mergers and Innovation Markets</i>	834
V.	Intellectual Property and Technology Licensing	838
	Conclusion	844
FORUM NON CONVENIENS		845
	Introduction	845
I.	Civil Cases	845
II.	Criminal Cases	848

INTRODUCTION

Alan H. Bomser

In 1993, the Entertainment Law Committee of the Association of the Bar of the City of New York ("ABCNY"), which I then chaired, presented a forum on the legal and business issues generated by multimedia. At that time, I discussed with John D. Feerick, then President of the ABCNY and present Dean of the Fordham University School of Law, the need for a report on selected legal issues raised by the emergence of the information superhighway. He urged me to assemble a committee of knowledgeable attorneys to prepare such a report. Barbara Robinson endorsed the project when she became President of the ABCNY in the Fall of 1994. This report was prepared at the request of the ABCNY as a special project in 1994 and early 1995.¹

The information superhighway uses networks connecting millions of people and sources of information. The "highway" metaphor works well because we are talking about two-way communication, not a one-way "information super-chute." Thus, the information superhighway encompasses electronic information, interactivity, video on demand, and electronic mail ("e-mail"). While the modem has enabled digital communication between individuals all over the world, much of this capability has existed for several years, in technology such as point-to-point voice telephony. What is new is the ability to quickly, easily, and economically send and receive throughout the world, to anyone having access to relatively inexpensive hardware and software, words, still and moving images, and audio material covering a vast array of subjects, and the creative involvement of an ever-increasing number of people worldwide in the formulative process of determining what is to be transmitted. Additionally, and equally important, using the technology is now *fashionable*. Terms such as "the information superhighway," "multimedia," and "electronic publishing" have become buzz words, and magazines such as *Wired* and *Red Herring* have become must-reads for information on these topics.

1. The Report was prepared by the following representatives of ABCNY committees: Alan H. Bomser (Project Chair, Entertainment Law), Henry Beck (Computer Law), John Costa (Patent Law), Gerry Fifer (Technology and Practice of Law), Jessica R. Friedman (Copyright and Literary Property), Alan J. Hartnick (Entertainment Law), Stewart A. Pomerantz (Science and Law), Joseph A. Post (Federal Legislation), Judith Beth Prowda (Entertainment Law), Stephen H. Weiner (Science and Law), and Charles White (Communications and Media Law).

The views expressed herein are those of the individual authors. The extensive and particularly insightful work by Jessica R. Friedman, Judith Beth Prowda, and Joseph A. Post, as well as Gerry Fifer's arduous task of coordinating the material, must be singled out for special praise and thanks. A selected bibliography may be obtained through the library of the ABCNY. The authors would like to thank Delia Watson and Patricia Johnson for their contributions to the compilation of the bibliography.

Right now, the Internet is relatively inexpensive to use, because government and universities have subsidized much of it. This may change, however, with the insatiability of people's demands and the limits of financial resources, coupled with reduction of government funding. Now, most of us who use the Internet² pay for access to a funded mechanism. What will happen in the future? Will access be a luxury? What will happen as more people realize that they not only can send e-mail, but also attach files, including multimedia files? Will there be "traffic jams"? Will the cost of transmission rise? Perhaps each of the many new users will be charged a bit more than they pay now. Or maybe private business will make access affordable only to those whom it is inexpensive to serve. Will it remain partly government-sponsored even with the increased costs, and therefore widely available? Only time will tell. But these are matters concerning policy, which are not primarily dealt with in this Report. The growing use of these new media and the evolution of related technology, however, has prompted debate about whether many current laws need revision.

My interest in the legal issues discussed in this Report began in the spring of 1984, when I first learned of the Tom Tcimpidis affair.³ Tcimpidis ran MOG-UR, a free Los Angeles-area bulletin board system ("bbs"). Pacific Bell alleged that a telephone credit card number was posted by an unknown individual onto Tcimpidis' bbs. Police confiscated his terminal, monitor, hard disk, modem, and 150 floppy disks and charged him with telephone fraud. At the time, Tcimpidis was away on vacation and had no knowledge of the posting.

Tcimpidis' lawyer, Charles Lindner, also a computer buff, posted messages on other local Los Angeles bbs's asking for assistance from other lawyers regarding Tcimpidis' liability as operator of a bbs. Lindner asked those bbs's to forward the messages to still other bbs's. The daily developments began to appear on New York bbs's a day or two later. Each night during the affair, I logged on to the Invention Factory, a local bbs, to read about the relatively current developments. I decided to assist in researching the liability issue.

The most relevant case that I found was a 1952 California decision, *Hellar v. Bianco*,⁴ involving a woman who received an objectionable phone call from a customer of a nearby public tavern. The caller told her that he had found on the wall of the pub's men's room her name, telephone number, and a statement that she "was an unchaste woman who indulged in illicit amatory ventures,"⁵ as well as an invitation to

2. The Internet is a series of interconnected network that includes local area, regional, and national backbone networks.

3. See Andrew Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at A1.

4. 244 P.2d 757 (Cal. Dist. Ct. App. 1952).

5. *Id.* at 758.

anyone to call her for a good time.⁶ The woman's husband complained to the pub bartender who was then in charge of the pub.⁷ He failed to remove the information.⁸ The court stated that since the defamatory matter was placed upon the wall by an unknown person, it was necessary for plaintiff to show that defendant "adopted the defamatory matter or republished it. Republication occurs when the proprietor has knowledge of the defamatory matter and allows it to remain after a reasonable opportunity to remove it."⁹ The matter was remanded for determination of these factual issues. I passed my research on to Lindner. Nine months later, however, the case against Tcimpidis was dropped when a new Los Angeles Assistant City Attorney decided that there was not enough evidence to support the claim.¹⁰

Our society has come a long way since *Hellar v. Bianco* technologically, but not legally. Like most of the issues related to the information superhighway, the issue of whether and to what extent an online carrier should be liable still has not been resolved. Novel issues in formerly settled areas of the law continue to arise. For example, the recent *Frank Music v. CompuServe*¹¹ action deals with possible copyright infringement by CompuServe for allowing uploading and downloading of files containing arrangements of standard songs protected by copyright. Because the suit was recently settled, the impact of the case in defining copyright law in the context of the information superhighway remains unclear. Similarly, the *Stratton Oakmont v. Prodigy*¹² suit for libel, based on a statement uploaded to a Prodigy forum by an unknown individual, may help clarify the issue of online defamation. The recent emergence of the information superhighway brings to the forefront many other issues, including patent rights, copyrights, privacy, free speech, antitrust, jurisdiction, and forum non conveniens, and whether the information on the National Information Infrastructure ("NII") will be delivered by television, telephone, satellite, or a combination of these media.

The novel legal issues that have arisen as a result of the growth of the information superhighway have not gone unnoticed. In July, 1994, the Working Group on Intellectual Property Rights (a subcommittee of the Information Policy Committee of the Infrastructure Task Force established by the Clinton Administration) (the "Working Group") issued the "Green Paper," a report that focused mainly on copyright

6. *Id.*

7. *Id.* at 758-59.

8. *Id.* at 759.

9. *Id.*

10. Peggy Watt, *City Drops Bulletin Board Case: Controversial Tcimpidis Case Dropped For Lack of Evidence Against System Operator*, InfoWorld, Feb. 25, 1985, at 19.

11. No. 93 Civ. 8153 (S.D.N.Y.) (complaint filed Nov. 29, 1993).

12. 1995 WL 323710 (N.Y. Sup. Ct. June 21, 1995).

questions and dealt briefly with the impact of the NII on patent, trademark, and trade secret law. The Green Paper recommended certain modifications to the Copyright Act of 1976.¹³

In September 1995, the Working Group issued the "White Paper." This report was prepared by the Working Group after reviewing the submission of comments (more than 1500 pages) by over 150 individuals and organizations representing approximately 425,000 individuals.¹⁴ It made recommendations for amendments to the Copyright Act which favored and extended protection for content providers, generally disregarding the arguments of the online services and of others who believe that by reason of the ease of digital publication and distribution, less protection should be afforded.

The proposed amendments would (1) make clear that the right of public distribution in the Copyright Act applies to transmission of copies and phonorecords of copyrighted works; (2) expand the current exemption for libraries to permit making a limited number of digital copies; (3) add a new, qualified exemption for non-profit organizations to reproduce and distribute to the visually impaired large-type and audio copies; (4) add a new section prohibiting the importation, manufacture, or distribution of any product or service the primary purpose of which is to deactivate any technological protections which prevent the violation of exclusive rights under the copyright law; (5) prohibit the dissemination of false copyright management information (i.e., name of copyright author, owner, and terms and conditions for uses of the work) and the unauthorized removal or alteration of copyright management information; and (6) provide civil and criminal penalties for tampering with copyright management information and civil penalties for circumvention of copyright protections systems.

Other than the Green Paper and the White Paper, no comprehensive reports exist discussing the multiplicity of legal issues generated by the NII. This Report discusses such issues, including some not previously covered.

The following is a discussion of the impact of the technology on various areas of law. Each section was prepared primarily by the individual authors of the section.¹⁵ For this reason, the writing styles vary throughout the Report. This Report does not purport to be a complete review of all areas of law affected by the flourishing information superhighway or the technology associated with its growth. For exam-

13. 17 U.S.C. §§ 101-1010 (1988 & Supp V. 1993).

14. Working Group on Intellectual Property Rights, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure 4 (1995) [hereinafter White Paper].

15. Primary authorship of each section is as follows: Copyright, Trademark, & Defamation—Jessica R. Friedman; Patents—John Costa; Privacy & Security—Judith Beth Prowda; Privacy & Telecommunications—Joseph A. Post; Universal Service—Joseph A. Post; Censorship—Charles White; Antitrust—Stewart Pomerantz; Forum non Conveniens—Steven H. Weiner.

ple, we decided not to define the terms "information superhighway" and "National Information Infrastructure." With respect to such definitions, the core is clear, but the edges are imprecise. Included within these definitions are the online services, local bbs's, and the Internet (with its increasingly significant World-Wide Web). Yet it is unclear whether the worlds of television and traditional telephone service (sources of information that are not as readily accepted in the definitions of information superhighway and national information infrastructure) are included. Further, the Report does not include criminal activity on the Internet and the online services (e.g., CompuServe, America Online, Prodigy, the Microsoft Network)—although some aspects of these issues are discussed in the sections on privacy and security and *forum non conveniens*. Nor does the Report make policy recommendations. If it did, it would have been difficult to obtain the timely approval of the various relevant committees of the ABCNY, whose members represent many diverse and conflicting interests.