

"Under a Killing Moon software and manual (c) 1994, Access Software Inc. All rights reserved." – A game manual

"Don't tread on me." – Motto of early Pennsylvania or late Internet, depending on your view

"In the few places where the white paper acknowledges the existence of the Net culture, it is overtly hostile to it..."
–Pamela Samuelson, "The Copyright Grab," *Wired*, January 1996

Mr. Protocol Gives a Penny for Your Thoughts

Q: You know, I thought the uniform that Charlie Chaplin created for himself in *The Great Dictator* was the most outrageous thing I'd ever seen, but this takes the cake. Mr. Protocol has designed a uniform that's part storm trooper and part bus conductor. And what's with the letters "TS" in white on the lapels? And why?

A: Last things first. The letters "TS" stand for "Telephone Sanitizer." If you'll remember back to Douglas Adams' series *The Hitchhiker's Guide to the Galaxy*, there was a planet that took all the middlemen, supernumeraries, plant-waterers and telephone sanitizers, declared an imminent supernova, put them on an interstellar ark, the "B" ark, and shot them off to find greener fields. Everyone else was to follow in the "A" ark.

Of course, once the "B" ark took off, somehow the crisis had resolved itself and the "A" ark was never built. Everyone lived long, happy, productive lives, free of the niggers who had plagued them...until, that is, the entire population was wiped out by an infection spread by unsanitary telephones. But that's beside the point.

The point is that Mr. Protocol has detected an invasion of niggers whom he believes are prime candidates for the "B" ark, and so he's designing a uniform (these people love uniforms) to give the rest of us time to relocate when we see one of them coming. Actually, he's been mumbling something about a "C" ark, since the twin threads we see are censorship and copyright.

Censorship is the fun one. There are all kinds of people wanting to control what gets put on the Internet for general consumption, and there are all sorts of ways to characterize them. One way is by the degree of savvy they show. Censorship, as an abstract concept, is anathema to a large percentage of Americans and their elected representatives. People who openly advocate censorship, by that name, generally lack the savvy to push their cause beyond the occasional human-interest spot. More interesting, because they are more effective, are the people who advocate all the same things, and all the same

methods, except they issue loud and hasty disclaimers when accusations of censorship are pointed in their direction.

Censorship, as such, is not legally discussed in regards to the portion of the Internet that exists in the United States. In the United States, legal discussion centers around "protected speech," that is, information whose dissemination is protected by the First Amendment to the U.S. Constitution. The highest form of such protection is that granted to political speech.

Mr. Protocol is willing to bet that when most of his readers saw him use the word "censorship," they probably figured he

was going to talk about <http://www.playboy.com> and its ilk. Later. Right now, he's talking about what's making news, as his amanuensis scribbles this down in hopes of a chocolate chip cookie, or two...today's call by the Simon Wiesenthal Center for Internet Service Providers to unilaterally shut down any Web pages that promote hate.



TOM BARRETT

The Center, interestingly, specifically states that it does not advocate that Usenet newsgroups devoted to hate speech be shut down. This may be because it cuts too close to censorship of open discussion, or because Usenet newsgroups aren't localized. Whatever the case may be, Mr. P. believes that this is a distinction without a difference. He does note that the Simon Wiesenthal Center is probably the only organization that could get away with such a pronouncement without being laughed off the face of the planet, witness as it is to one of the most horrific episodes in history. It seems probable, however, that the Center has fallen victim to something that Mr. Protocol refers to as the "savior syndrome."

The Holocaust was only possible, though, because free speech was first replaced with propaganda. Now, the Center wishes to censor speech that it sees as tending toward the horrors it is sworn to fight, not recognizing that suppression of one type of speech opens the door to suppression of any type of speech, particularly the Center's.

A prime example of this syndrome can be found in the emergency services of almost any large city. If one digs in, one will find that, for example, the radio systems used by these services during dire emergencies and large-scale calamities don't interoperate. The Red Cross and the police can't talk over the radio. Everyone knows this, and most deplore it. But the problem is that each service attempts to be completely self-sufficient and answerable to no one other than its own staff because they have been in the field, they have dealt with emergencies, they know what is required, and no one can or should come in from outside and dictate their actions.

These people are heroes and deserve all the good press they get, but it remains that in order to get them to release the tiniest bit of control, one would need to send a National Guard rifleman into each director's office to enforce inter-service cooperation. This attitude arises not in spite of the heroic service they each perform, but because of it. They regard themselves as saviors, guardians of the light, but saviors aren't notably good at compromise.

So the Simon Wiesenthal Center, confronted with a pluralistic Internet which, for the first time, gives tiny hate groups free and immediate access to the general public, or at least that growing segment of it with access to the Internet, sees a burgeoning of hate speech and reacts immediately, calling for a halt.

The horrors to which the Center stands witness are beyond the imagining of anyone who was not there to experience them. That is why the Center is needed. Anything resembling a recurrence of the conditions that gave rise to the Holocaust must be cause for alarm. The Holocaust was only possible, though, because free speech was first replaced with propaganda. Now, the Center wishes to censor speech

that it sees as tending toward the horrors it is sworn to fight, not recognizing that suppression of one type of speech opens the door to suppression of *any* type of speech, particularly the Center's.

Whose Morals?

Consider the other bugaboo, pornography. Numerically, most pornographic sites on the Web are commercial, demanding registration and payment before coughing up the goodies. This is business. Business can be regulated, as long as it's regulated as business, not as speech, or if it's purely offensive.

Consider one highly popular site, "Babes on the Web." This site simply contained pointers to the home pages of women whom the site's author found "babeworthy." The site created the predictable amount of hoo-hah. But the only reaction that garnered more than minimal notice was a counterpunch site, "Babes of the Web II," which contained pointers to the home pages of men whom the (female) author of the site found babeworthy. Touché.

The problem with regulating any type of speech on moral grounds is that you get into the slippery area of "whose morals?"

Pornography, as represented on any physical medium, is a physical item of trade whose sale can be regulated by geographic communities. So, one can claim "community morals" without getting a horse-laugh. Nationwide broadcasters have thrown up their hands and adopted artificial standards whose sole purpose is to keep politicians at bay.

The Net, however, is a worldwide affair. The current *flap du semaine* is the CompuServe mess. The German High Sheriff told CompuServe to clean up its act or get out of the country, and CompuServe plans to sell a lot of accounts in Germany. Truth be told, it really doesn't want to be involved in a discussion of what it can get away with at all, so CompuServe was enormously relieved to have an opportunity to throw out wholesale a ratbag of groups that someone else had declared offensive, and claim that they lacked the ability to alter what they CompuServed up on the basis of national boundaries.

Of course, the German High Sheriff had picked CompuServe because it was the biggest target. CompuServe may not CompuServe up any naughty bits anywhere anymore (at least not in newsgroups whose names would suggest naughty bits), but anyone with access to an unrestricted Web browser can quickly determine there are all sorts of sites inside Germany's borders that are still serving up mighty spicy meatballs indeed.

This is the main problem with censorship, at least from the censors' point of view. Censorship laws and policies stop at national boundaries, but the Internet does not. Already there are offshore data banks, including at least one gambling casino on a Caribbean island. While gambling requires proactive participation on the part of the gambler, resulting in activity that can be regulated, mere consumption of information across the Internet is essentially unregulatable, at least until someone has the bright idea of passing legislation affecting backbone

providers: "No bits from these IP addresses shall pass through thy routers."

The major on-line services, whose main file stores and corporate structures are based in the United States, are at the mercy of the legislators, but the end-user sites that generate the most dubious stuff are passing their packets through providers big and small around the globe.

The Internet was originally designed to meet a military specification: Blow a hole in the middle of it, so your main routing node is a smoking crater, and you can always route around the hole. Guess what? You can route around the hole no matter whether the bombshell was depleted uranium or Jesse Helms.

This safety net depends on the lack of international agreement regulating censorship. Indeed, given the favorite bits of censorship held by some governments and decried by others (and vice versa), this situation is unlikely to change. Copyright regulation is entirely another matter.

Who's Protected?

Copyright exists to provide financial incentive to authors and publishers, and for no other reason. There's no sense in writing the "Great American Novel" if you're never going to make a dime off the millions of pirated copies. Oh, it's also nice that the author's work is protected against unauthorized change, and some protection would be necessary without the financial angle. But it's money that makes the presses go round and royalties that keep the words flowing—and the pictures, the TV programs, software programs, movies and anything else protected by copyright. Which is wonderful.

Copyright protection, though, has some exceptions. Most people take these for granted, so much so that they usually aren't familiar with the legal terms that give them the right to do what they're used to doing.

One biggie is "fair use." This is what allows Mr. Protocol to reproduce those quotations at the front of each column. Many are from copyrighted works, but neither Mr. P., nor

his amanuensis, are likely to occupy a small room with large vertical window slats any time soon on that account because such quotations are protected by the "fair use" provisions of copyright law.

Another protection is the "right of first sale," which says that when you buy a new book from a bookstore, you can do whatever you like with it, including lending it to a friend and reselling it to a used book store. Public libraries exist because this gives them the right to lend out their books.

Copyright law, however, is predicated on the assumption that copies are difficult and expensive to make, and that it is neither possible nor desirable to establish charging mechanisms for every conceivable type of usage. So where does this leave us in attempting to apply copyright law to the Internet?

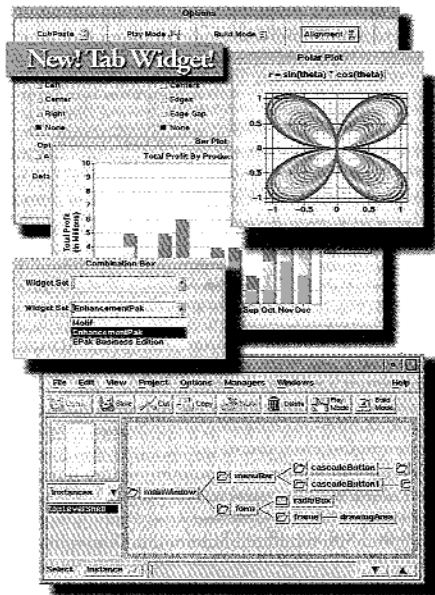
Mr. Protocol is glad you asked. The main problem with the Internet is that it is impossible, at least using present or foreseeable technology, to read or view a copyrighted work on the Internet without making a fresh copy every time the work is viewed. And, practically speaking, once you've downloaded (and hence copied) something to look at it, there's nothing stopping you from keeping that copy. In fact, most Web browsers purposely keep copies of everything they download, so that the relevant Web page can be brought up again quickly without the necessity of downloading it again from the Net. And what can be stored locally can be passed along, not only to one friend at a time, but to everyone on the Net, royalty-free.

Obviously copyright law is going to need some revision here. But how?

One fellow who has had an answer for years is Ted Nelson, whose Xanadu system included not only hypertext links in documents which greatly resemble today's Web pages, but also a charging system so that those users who followed such links would automatically be charged appropriate royalties for reading the linked work. This is similar to what is being proposed today. However, Xanadu was a single integrated system, not a pluralistic

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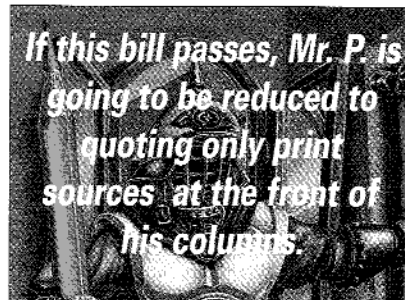
grass-roots movement like the World Wide Web.

For better or worse, most of the people involved in making new copyright law are those who stand to make money from it. No one else is interested. It's not as if we're dealing with starving babies here. As a result, the current administration of the United States has, as a part of its National Information Infrastructure task force, come up with a white paper suggesting revisions in the copyright law that sound not only onerous, but downright ornery.

The white paper may be viewed at <http://iitf.doc.gov/>. It takes the position that there is no conceivable usage, however small, that cannot be metered. Therefore, there is no such thing as "fair use" under the proposed changes, not for yourself, not for a friend, not for quotation, nothing. If this bill passes, Mr. P. is going to be reduced to quoting only print sources at the front of his columns. Further, it reverses the court decisions that allow

a person to make a backup copy of a copyrighted digital work for archival purposes.

The bill also has provisions that foresee that copies of copyrighted digital works may have embedded within them special digital codes which will

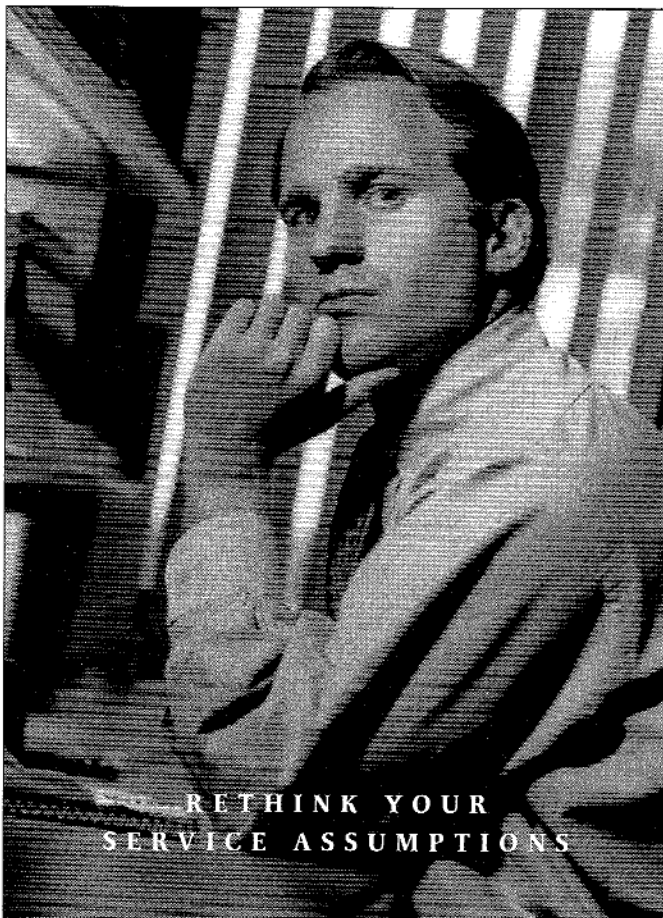


uniquely identify the copy, to track illegal forwarding (and all forwarding would be illegal under the provisions of the proposed bill). Tampering with these codes would be a felony. Trying to decrypt a copyrighted work that is protected by encryption would also be a felony.

The real kicker is that on-line service providers would, under this bill, have not only the right but the duty to periodically go through your files, looking for illegal copies of copyrighted works, and blow the whistle on you if they found any. Yep, you read it right, that's what they want. So much for the notion of on-line services as neutral common carriers.

There are other provisions of this bill that don't stand up under any sort of examination, but these are the high points. Mr. Protocol thinks it would sound silly except that there aren't many people who are even aware that this is being made a part of the NII, so it has a pretty good chance of passage.

Hasty law is bad law, generally. What's particularly bad about this noisome piece of legalese is that, unlike law involving censorship, copyright law is covered by the Berne Convention, an international treaty to which just about every country in the world subscribes; at least, if they have any



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hope of international trade, they do. National laws are superseded by the terms of the Convention, at least in theory. If this white paper and the associated legislation become law, it could result in a renegotiation of the terms of the treaty, since the United States is recognized as the leader in all this Internet stuff. And once it becomes part of the Berne Convention, if it turns out to be unenforceable or just a very bad idea, it could take decades to fix.

It reads, in fact, like the 55 MPH speed limit of the information super-highway. Good intentions permanently legislated in reaction to a temporary crisis, universally ignored. And it is a very, very bad thing when a treaty that is one of the cornerstones of international trade suddenly becomes unenforceable.

Glory Days

Mr. P. emphasizes once again that these are the good old days that we'll look back on, here, at the beginning of the Internet. It couldn't be less regulated

than it is now, because as it is it's completely unregulated.

For better or worse, we are in an uncensored, unregulated, near-anarchic on-line society. This is the most extreme it will ever be; once regulated, it will never again be completely unregulated. The pendulum may swing back and forth before it finally settles in the middle, but the broad strokes that are painted in the early days will characterize the way the network operates, potentially for centuries.

We owe it to everyone to think before we act...and enact. We owe it to the Founding Fathers, who wrote the enabling law for copyright regulation into the Constitution. We owe it to our descendants, who will have to live with what we build for a long, long time. And we owe it to ourselves. We will have to live with it too. →

Mike O'Brien has been noodling around the UNIX world for far too long a time. He knows he started

out with UNIX Research Version 5 (not System V, he hastens to point out), but forgets the year. He thinks it was around 1975 or so.

He founded and ran the first nationwide UNIX Users Group Software Distribution Center. He worked at Rand during the glory days of the Rand editor and the MH mail system, helped build CSNET (first at Rand and later at BBN Labs Inc.) and is now working at an aerospace research corporation.

Mr. Protocol refuses to divulge his qualifications and may, in fact, have none whatsoever. His email address is amp@cpq.com.

Further Reading

There's an excellent argument on the issue of copyright legislation in "The Copyright Grab," Pamela Samuelson, *Wired*, January 1996.

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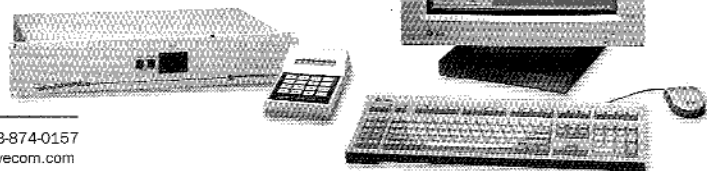
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