STRUGGLING PARADIGMS IN A FRICTION-FREE WORLD: LIABILITY FOR CONTENT IN POST-PRINT CULTURE*

NICOLAS P. TERRY**

I. INTRODUCTION

The Internet's extraordinary and exponential growth is a function of the "friction-free" character of virtual space interactions.[1] In real space there is always the problem of matching buyers and sellers, of hooking up those with information to those who desire it, *i.e.*, friction. The Internet represents the possibility of a perfect market, where information is shared instantly and the laws of supply and demand allocate resources without impediment. Justly hailed as the key to the Web's commercial vitality, this dramatic reduction in transaction costs complicates the adoption of real space legal paradigms to the Internet. The near lack of friction generates two inter-linked paradoxes. First, while navigation of virtual space without the friction inherent in print produces all the freedom for which the Internet is rightly celebrated, it exponentially increases the potential for harm and the inevitable calls for contraction and control. Second, while the law governing cyberspace will naturally be built on traditional legal rules, print culture law was shaped by the very friction whose absence makes cyberspace so promising. Legal architects in this new world are, therefore, destined to find friction-reliant constructs unavailable.

This essay examines real space friction and its suggested virtual space antithetical. In the context of liability for content during the transition from print to post-print culture, I identify some of the salient characteristics of friction-free virtual space. I then explore in detail the impact of anonymous participation[2] and indeterminate dissemination on *ex post facto* liability rules in the growth area of cybertorts.

 Based upon a speech given at the conference *Print Culture in the Electronic Age*, The Center for the Humanities, University of Missouri-St. Louis, March 26-27, 1998. I dedicate this essay to my colleague Professor Eileen Searls; I thank her for her years of wonderful service to our law school and for her unflagging support of my research.

** Professor of Law, Saint Louis University School of Law. My thanks to Christopher Hoffman (SLU Law 2000) for his diligent editorial assistance.

1. *See infra* notes 33-36 and accompanying text.
2. *See generally* ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

II. CONTENT CULTURES, LAW AND FRICTION

Among the attributes of cyberspace most often referred to are its lack of physicality,[3] its functional purposes,[4] and its relation to real space.[5] Still others are its social and cultural roles, statistical growth,[6] and of course there is the obligatory footnote comparing it to the information explosion following the invention of movable type.[7]

The legal rules developed for print culture provide the initial and obvious paradigm for managing Internet content issues. Those traditional rules are found in Intellectual Property law and in the First Amendment protections of speech. Intellectual Property law, called forth from the Constitution,[8] protects the rights of writers and publishers. Political and artistic speech is protected from both government censorship[9] and the chilling prospect of civil liability for defamation.[10] A few regulatory concessions to the FCC notwithstanding,[11] print culture has now passed the favored-child baton to other media. And, as we look back at the demise of the Communications Decency Act courtesy of *Reno v. ACLU*,[12] the early indications are that the Supreme Court is prepared to turn back the most egregious legislative sorties designed to regulate content in virtual space.[13]

---

3. A collection of tools such as the Web and email are "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." Reno v. ACLU, 521 U.S. 844, 851 (1997).

4. *Id.* ("From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.").

5. *Id.* ("The Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.").

6. *Id.*

7. And here it is. *See* Bruno Giussani, *Is It Really Gutenberg All Over Again?*, N.Y TIMES, (Jan. 6, 1998) <http://www.nytimes.com/library/cyber/euro/010698euro.html>.

8. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. 1, § 8.

9. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

10. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

11. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

12. *See generally Reno*, 521 U.S. at 844. The CDA has now been followed by the Child Online Protection Act (COPA), that is itself the subject of suit and ongoing injunctive relief.

13. For other public law content regulation issues see U.S. v. Hilton, 1999 U.S. App. LEXIS 1105 (1st Cir. 1999); Free Speech Coalition v. Reno, 1999 U.S. App. LEXIS 32704 (9th Cir. 1999); People v. Barrows, 1998 N.Y. Misc. LEXIS 332 (NY Cnty Ct. 1998); Urofsky v. Gilmore, 167 F.3d 191(4th Cir. 1999).

Content in cyberspace is dynamic and the product of convergent technologies.[14] But its dominant characteristic is the way it captures the relationships between publishers, content, and readers. Specifically, the fundamental shift from print culture to web culture involves the transformation of the way recipients of information interact with its content. Back in 1993, *Wired Magazine* noted "[i]n the world of immersion, authorship is no longer the transmission of experience, but rather the construction of utterly personal experiences."[15]

In addition to immersion and discrete reader interaction with content (promoted by the new medium's added dimensionality, multiple paths, etc.), the character of the content itself changes as it is absorbed and re-written in real time by its on-line consumers. In cyberspace we already have experience with social,[16] local, and regional[17] communities. Others revolve around gaming,[18] the professions,[19] and retail commerce. According to Esther Dyson, "[u]sed right, the Internet can be a powerful enabling technology fostering the development of communities because it supports the very thing that creates a community—human interaction."[20] In contrast to real space (and so at odds with some real space legal tenets) virtual space participatory readership and content-based communities frequently prosper because of the *anonymity* of their participants.[21] Even if anonymity is not sought explicitly, the indeterminate nature of virtual communities and the *indeterminate dissemination* of content contrast markedly with the more predictable memberships and distributions in real space.

Markets that have embraced virtual space most quickly have done so because of the user type (such as the technologically enthused),[22] the product

---

14. *See* David Kushner, *The Communications Decency Act and the Indecent Indecency Spectacle*, 19 HASTINGS COMM. & ENT. L.J. 87, 118-23 (1996).

15. WIRED Wonders, WIRED (Dec. 1993) (statement credited to Brenda Laurel), <http://www.wired.com/wired/archive/1.06/wired.wonders_pr.html>.

16. *See generally* <http://www.ivillage.com/>; <http://www.oxygen.com>.

17. *See generally* <http://www.citysearch.com/>.

18. *See generally* <http://www.nytimes.com/library/tech/yr/mo/circuits/game-theory/26game-theory.html>.

19. *See generally* <http://medem.com/>; <http://www.law.com/>.

20. ESTHER DYSON, RELEASE 2.0 32 (1997).

21. *See e.g.*, Taylor & Jerome, *Blind Date*, PC COMPUTING, July 1998, at 75.

> On the Internet, no one knows you're a dog. That nubile ballerina you've been e-mailing could really be a 45-year-old bricklayer with a goatee. Not a few on-line lawyers run their practices from the pokey. People who describe themselves in chat rooms as good-looking, athletic, or rich rarely are. Even more troubling than the whacked disguises people don in cyberspace is their ability to remain entirely anonymous. This is especially annoying when you're trying to squeeze them for cash.

Id. See also Two Faces of Online Anonymity, N.Y. TIMES, July 21, 1998.

22. *See, e.g.*, Dell Computers, at <http://www.dell.com/>.

type/existing distribution infrastructure,[23] or the electronic medium's superior ability to parse information and thereby reduce information costs associated with certain services[24] and sales.[25] Equally, the web's intrinsic technology markets have driven commercial volume. Just as the invention of type required the search engine we call a library,[26] virtual space has brought us *Yahoo*[27] and *Google*.[28] New forms of commerce, such as on-line auctions,[29] business-to-business,[30] group buying,[31] and shopping agents[32] abound. Soon, we will see the sale of digital goods, such as information, music or video, by "micro-slice" delivered from massive data warehouses and paid for with low transaction cost micro-payment systems, *i.e.*, the ability to charge someone a fraction of a penny (for, let's say a single newspaper article) without incurring crippling transaction costs.[33]

Of particular interest in the realm of content liability, virtual space has very low entry barriers for aspiring authors, publishers, and aggregators of information. Indeed, the Supreme Court, comparing cyberspace to other media and types of speech, noted:

> It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, *any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.* Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.[34]

Not only are entry costs low, but cyberspace-enabled commerce has very low information and transaction costs. Bill Gates has championed virtual space for its "friction-free capitalism,"[35] the idea that ubiquitous and equal access to information will create the closest thing yet to a perfect market.

---

23. *See, e.g.*, books, <www.amazon.com>, or CDs, <www.cdnow.com>.

24. *See, e.g.*, airline tickets or travel, <http://www.expedia.com>.

25. *See, e.g.* automobiles, <http://carpoint.msn.com/home/New.asp>.

26. *See generally*, Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189 (1997), <http://www.law.berkeley.edu/btlj/articles/12-1/berring.html>.

27. <http://www.yahoo.com>.

28. <http://www.google.com>.

29. <http://www.ebay.com>.

30. <http://www.Bizee.com Inc>.

31. <http://www.mercata.com>; <http://www.mobshop.com>.

32. <http://www.MySimon.com>, <http://www.Click the Button.com>.

33. *See generally*, Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997).

34. Reno v. ACLU 521 U.S. 844 (1997) at 869 (emphasis added).

35. *See generally* BILL GATES, THE ROAD AHEAD (1995).

Though it is a little early to hail our current virtual space markets as truly friction-free[36] and the idea that even with the Internet people will "know everything, all the time" is not "*fiction*-free," technology is making great strides in that direction. Web commerce engines and agents sporting price-matching capabilities should allow almost friction-free negotiation.[37] Finally, much of the transaction cost in a negotiation is about identity and financial wherewithal of the parties; presumably digital certificates, escrowed digital IDs and digital money will bring us close to zero transaction costs here as well.

III. LIABILITY RULES, ANONYMITY AND INDETERMINATE DISSEMINATION

Even when dealing solely with "print" defendants, civil content liability is a complex doctrinal area. When it comes to the potential liability of authors and publishers[38] the First Amendment is still applied vigorously because state law liability rules can chill the free discussion of ideas. Therefore, the legal rules are immediately complicated as constitutional law considerations rub shoulders with substantive tort law principles such as "duty." Perhaps more surprisingly, civil content liability (defamation aside) is a somewhat immature area, with little consistency among the cases.[39]

There are myriad examples of courts applying *ex post facto* content liability analysis that spark interesting virtual space examples. These include defamation, privacy issues, and the transmission of SPAM. However, I will concentrate on the narrow sub-set of scenarios where persons are physically harmed as a result of the quality or substance of the information disseminated.

Many of the decided real space cases concentrate only on the delicate constitutional issues. But we can also detect judicial sensitivity to liability scenarios that exhibit low transaction costs. Courts frequently reference what

---

36. While this may have validity at the level of identifying transaction parties, Merges identifies transaction costs, albeit much lower ones, in negotiation, performance, and enforcement. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 116 (1997), <http://www.law.berkeley.edu /btlj/articles/12-1/merges.html>.

37. *See, e.g.*, Kevin Jones, *Comparison Shopping- Unable to Beat 'em, Web Sites Join 'em*, N.Y. TIMES, Mar. 27, 1998, <http://www.nytimes.com/library/tech/98/03/cyber/articles/29buyer.html>; <http://www.necx.com/>. "Price The Market":

> Provides you with pricing from other online retailers so you don't have to leave the NECX web site to research market prices
>
> Includes hot links to the other sites that are listed
>
> Is not a marketing tactic or a "meet or beat" pricing program. It's an evaluation tool we have added to our portfolio of award-winning online capabilities to help you shop smart.

Id.

38. I use this term to include re-publishers.

39. *See generally* Nicolas P. Terry, *Apologetic Tort Think: Autonomy and Information Torts*, 38 ST. LOUIS U. L.J. 189 (1993), Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J. L. & TECH 65, 131-34 (1992).

are known as "floodgates" arguments, the most famous being Justice Cardozo's warning that we should avoid exposing defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[40] Courts have been particularly sensitive to cases involving mass media exposure,[41] speech-based misrepresentation, and emotional distress damages. All of these have the potential to spill over, without limit.

(i) Liability for disseminating inaccurate content

The first type of cases where *ex post facto* liability may be applied concern the quality of the information provided. I start with a travel guide that failed to mention the dangerous ocean surf conditions at a beach resort.[42] The publisher was held to be under no duty to warn a reader:

> It appears from a review of relevant case law that no jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication, unless the publisher authored or guaranteed the information. Whether based on negligent misrepresentation or negligent manufacture of a defective product, the cases uniformly hold, for the same policy reasons, that, *absent guaranteeing or authoring the contents of the publication*, a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications.[43]

That seems to take care of passive, non-intrusive publishers,[44] albeit at the expense of a perverse inventive. But what about authors? It is open to question whether this author/publisher dichotomy can survive in virtual space, where the lines are blurred not just between authors and publishers and aggregators, but between authors and readers.[45]

Will publishers be spared liability with regard to every type of published information? There is a line of cases dealing with aeronautical charts. The classic scenario is a plane crashing into the side of a hill during an instrument-approach landing because the hill was missing from the instrument-approach chart designed and disseminated by the defendant.[46] In these cases plaintiffs

40. Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441, 444 (N.Y. 1931). In *Ultramares* Justice Cardozo specifically distinguished between injuries caused by "physical force" and "the circulation of a thought or a release of the explosive power resident in words." *Id.* at 445. Other examples would be the courts' concerns with other forces that are not limited by types of physical space or drag (*e.g.*, emotional harm damages, economic loss damages).

41. *See generally* Joel Rothstein Wolfson, *Electronic Mass Information Providers and Section 552 of the Restatement (Second) of Torts: The First Amendment Casts a Long Shadow*, 29 RUTGERS L.J. 67 (1997).

42. Birmingham v. Fodor's Travel Publications, Inc., 833 P.2d 70 (Haw. 1992).

43. *Id.* at 75 (footnotes omitted) (emphasis added).

44. *See also* Barden v. HarperCollins Publishers, Inc., 863 F. Supp. 41 (D. Mass. 1994).

45. This is particularly true in collaborative environments. *See e.g.*, <http://www.nytimes.com/library/cyber/nation/011698nation.html>.

46. *See* Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

have had success alleging that the chart was a "product" and thus subject to strict product liability doctrine. The court in one case noted that it was erroneous to believe that "strict liability principles are applicable only to items whose physical properties render them innately dangerous, *e.g.*, mechanical devices, explosives, combustible or flammable materials, etc."[47]

That may be a strong argument, but was given little credence by one Pennsylvania appellate court. There, the publisher of a diet book entitled *The Last Chance Diet* was sued when a reader died of complications arising from the liquid protein diet featured in the book.[48] The plaintiff brought a product liability action, arguing that the diet was a "product" and the book was a patient package insert (PPI).[49] The court concluded: "Instructions by a manufacturer which accompany medication or use of certain marketed goods cannot be equated with publication of books which espouse a writer's theory, opinions or ideology."[50] In holding that strict product liability doctrine was not applicable to a book, the court distinguished the map and chart cases as follows:

> In those cases, extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability. As such they took on the attributes of a product and are not protected by the first amendment.[51]

It is uncertain, as the web becomes an extension of or a substitute for product packaging, which of these two lines of cases applies to a drug company[52] or a tampon manufacturer[53] providing "super PPI" information in virtual space.[54]

(ii) Liability for the decision to disseminate dangerous content

The second broad type of quandary facing the author-publisher involves the decision to disseminate. These are probably the most challenging cases. The question is whether there can ever be liability for disseminating information that is true, non-defamatory, entirely accurate and non-pornographic. Of course, what counts as pornographic is not so easy to

47. *Id.* at 71.

48. Smith v. Linn, 563 A.2d 123, 126 (Pa. Super. Ct. 1989).

49. *Id.* at 125-26. The court was dismissive of plaintiff's arguments relating to exceptions to the First Amendment and a negligent publication argument. *Id.*

50. *Id.* at 126.

51. *Id.* at 127.

52. *See, e.g.*, <http://www.rogaineonline.com>. *See generally* Perez v. Wyeth Laboratories Inc., 734 A.2d 1245 (N.J. 1999) (restricting the reach of the learned intermediary rule after recognizing modern—DTC—techniques in drug marketing). *Id.*

53. *See, e.g.*, <http://www.always.com>.

54. *See generally*, Nicolas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 AM. J. L. & MED. 327 (1999).

determine. The best case to start with, therefore, is a borderline case. In *Herceg v. Hustler*,[55] the plaintiffs' 14-year old son took his own life attempting the practice of autoerotic asphyxia. He had read about the practice in a *Hustler Magazine* article entitled "Orgasm of Death." The article contained both descriptions of the practice and warnings against it, including the phrases "DO NOT ATTEMPT" and "auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe."[56] Citing well-known First Amendment case law, the court found the speech was protected.[57] The Fifth Circuit concluded:

> If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage—or of hang-gliding—might lead to liability just as easily. . . . Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine.[58]

Take another case: you place an advertisement in the magazine *Soldier of Fortune* that reads "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete and very private. Body guard, courier, and other special skills. All jobs considered."[59] Needless to say, the gun is hired, performs his work, and the magazine is sued by the victim's family.

The first thing to note is that we now enter a murky sub-set of free speech. Generally, advertisements are commercial speech and receive only limited First Amendment protection.[60] The court recognized that in the face of chilling

---

55. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) *cert. denied* 485 U.S. 959 (1988).

56. *Id.* at 1018-19.

57. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). The court noted that under the *Brandenburg* test,

> [I]t would be necessary for the plaintiffs to have proved that:
>
> 1. Autoerotic asphyxiation is a lawless act.
>
> 2. Hustler advocated this act.
>
> 3. Hustler's publication went even beyond "mere advocacy" and amounted to incitement.
>
> 4. The incitement was directed to imminent action.

Herceg, 814 F.2d at 1022.

58. *Herceg*, 814 F.2d at 1024.

59. Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1112 (11th Cir. 1992), *cert. denied* 506 U.S. 1071 (1993) (affirming 757 F. Supp. 1325 (M.D. Ala. 1991)).

60. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 n.4 (1985). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). For a content-*ex post facto* liability type case, see *Herceg v. Hustler*, where the Fifth Circuit apparently viewed a mere "promotional device" as commercial speech in contrast with content disseminated for profit that could still qualify as noncommercial speech. *Hustler*, 814 F.2d at 1024.

rules the publisher is more likely to decline to publish than to persevere with the customer's message.[61] Moreover, chilling advertisement might impact protected non-commercial speech by impeding the publication of a magazine or newspaper.[62] As such, the court viewed a pure negligence standard as constitutionally flawed, presumably because the traditional common law negligence rule of constructive foresight[63] contemplated publisher liability based solely on a failure to investigate. Thus a "modified" negligence standard was required, triggered by some intrinsic quality in the published content. The court summarized its position as follows:

> [W]e conclude that the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public. The absence of a duty requiring publishers to investigate the advertisements they print and the requirement that the substance of the ad itself must warn the publisher of a substantial danger of harm to the public guarantee that the burden placed on publishers will not impermissibly chill protected commercial speech.[64]

Applying this standard, the court concluded that the "modified" negligence standard had been met by the specific exclusion of a duty to investigate and the requirement that "the language of the ad itself contain a clearly identifiable unreasonable risk of harm to the public."[65]

Suitably "chilled," suppose your gunman-for-hire retires his semi-automatic for a word processor, and writes a book describing his craft. The

---

61. *Braun*, 968 F.2d at 1117-18.

62. *Id.* at 1118.

63. *See generally* 57 AM. JUR. 2D *Negligence* §§130-35 (1989):

> The probability of injury by one to the legally protected interest of another is the basis for the law's creation of a duty to avoid such injury, and foresight of harm lies at the foundation of the duty to use care and therefore of negligence. The broad test of negligence is what a reasonably prudent person would foresee and would do in the light of this foresight under the circumstances. Negligence is clearly relative in reference to the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care. In other words, damages for an injury resulting from a negligent act of the defendant may be recovered if a reasonably prudent and careful person should have anticipated, under the same or similar circumstances, that injury to the plaintiff or to those in a like situation would probably result. The most common test of negligence, therefore, is whether the consequences of the alleged wrongful act were reasonably to be foreseen as injurious to others coming within the range of such acts.

See also RESTATEMENT (SECOND) OF TORTS § 283 (1964).

64. *Braun*, 968 F.2d at 1119 (footnote omitted).

65. *Id.*

case of *Rice v. Paladin Enterprises, Inc.*[66] concerned such a book: *Hit Man: A Technical Manual for Independent Contractors*, produced by the defendant publisher.[67] The criminal responsible for the three murders that was the background to *Rice* "meticulously followed countless of Hit Man's 130 pages of detailed factual instructions on how to murder and to become a professional killer."[68] The book was found in the killer's apartment after the crime.[69] In order to pass constitutional muster the court required that any liability rule should apply not merely to publishers who could foresee such actions but also to "those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment."[70]

From examining these two types of content liability cases from real space it is clear that the courts have circumscribed a relatively narrow window of *ex post facto* liability. Should a similar approach not follow in cyberspace? Here, the friction-free paradoxes again assert themselves. The anonymous participation and indeterminate dissemination in virtual space would seem to allow defenses for content providers based on "floodgates" arguments and the protection of mass media. Yet, the potential for harm from dissemination of inaccurate or dangerous information on the web is immense. In real space, courts seem to be satisfied to impose liability in a small number of cases (*e.g.*, chart cases and some gun for hire advertisements), confident that this will have some deterrent effect on *all* content providers. Even assuming the efficacy of this approach[71] it is difficult to see how courts will the narrow their targets in cyberspace.

---

66. 128 F.3d 233 (4th Cir. 1997).

67. For a listing of the publisher's titles, see <http://www.paladin-press.com/backlist.html>. The online description for *Hit Man* is as follows:

> HIT MAN
> A Technical Manual for Independent Contractors
> *by Rex Feral*
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only.* 5 1/2 x 8 1/2, softcover, photos, illus., 144 pp.
> ISBN 0-87364-276-7. . . . . .$10.00
> <http://www.paladin-press.com/surv-elecA-L.html> (emphasis in original).

68. *Rice*, 128 F.3d at 239.

69. *Id.*

70. *Id.* at 247-48 (cross-reference omitted).

71. Such deterrence arguments themselves involve considerable information costs issues.

CONCLUSION

The *ex post facto* content liability rules pose real problems when we consider transferring them to virtual space. First, courts are more willing to impose liability where the situation is unique, not the least because they prefer not to crowd their dockets with hundreds or thousands of cases. In global virtual space, where any number of persons may access the offending content, courts may find it difficult (or impossible) to identify unique cases. Second, courts have preferred liability rules predicated on face-to-face interaction, a cyberspace antithetical, between plaintiff and defendant, where there was some preexisting relationship or some particular knowledge of a party's identity or circumstances. Third, the few deeply entrenched rules we have rely on a clean distinction between author, publisher and reader: a distinction that is difficult to establish in interactive cyberspace.

In reacting to a post print world of reduced friction we have made something of an inauspicious start in dealing with content regulation. We should be justifiably suspicious of early legislative forays that seem to be placeholders or, worse, trial balloons[72] rather than considered, long-term solutions. The only consistent theme in the area of content liability has been carving out an exception for "common carriers." The 1996 Telecommunications Act attempted to carve out such an area of immunity for ISPs.[73] However, the world of content, particularly the friction-free cyberspace world of content, poses liability questions that are not susceptible to such simple solutions. Rules for virtual space tend to be decided by the secular (non-digital) among us. As a result, we could find ourselves with laws we very well might deserve, but which we decidedly do not want. The temptation is to isolate cyberspace content from regulation, at least for now. Yet the paradox haunts us as we observe the effect that the friction-free environment has on our real space calculus. It is that paradox that compels the presence of content regulation and guarantees that we will be examining the "dark reflection"[74] of cyberspace.

---

72. This is arguably the case with the Communications Decency Act, 47 U.S.C. § 230 (1994 & Supp. II 1996).

73. *Id.* § 230(c)(1). *See generally* Doe v. American Online, Inc., 718 So. 2d 385, (Fla. Ct. App. 1998), Blumenthal, v. Drudge, 992 F. Supp. 44, (D.D.C. 1998). More complex, albeit conceptually related provisions apply to ISPs and other conduits regarding alleged copyright violations. *See* Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (1994).

74. We want not only rules that apply to everyone, but also a system that responds to the particular needs of citizens.

> We expect lawyers to fulfill both desires, and so they are a constant irritating reminder that we are neither a peaceable kingdom of harmony and order, nor a land of undiluted individual autonomy, but somewhere disorientingly in between. Lawyers, in the very exercise of their profession, are the necessary bearers of that bleak winter's tale, and we hate them for it. We hate them, that is, because they are our own dark reflection.

Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass, 75 CALIF. L. REV. 379, 386 (1987).