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## Unlawful Linking: First Amendment Doctrinal Difficulties in Cyberspace

Mark Deffner\*

Recent cases, legislative bills, and enacted laws have made determining what First Amendment protection exists for hyperlinking an important issue.<sup>1</sup> In *Universal City Studios v. Reimerdes*, the website 2600.com was enjoined from providing hyperlinks to websites that post computer code capable of cracking Content Scramble System (CSS), the encryption system which prevents DVD disks from being copied.<sup>2</sup> The “Methamphetamine Anti-Proliferation Act of 1999” would have banned hyperlinks to websites which contain instructions on how to produce methamphetamine.<sup>3</sup> Also, 18 USC § 842,

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1. Hyperlinks are elements of Web documents that allow users to move from one document to other referenced documents. As opposed to typing in a URL (Universal Resource Locator) address to cause the Web browser to download another document, hyperlinks allow easy access to other documents through a single mouse click. The hyperlinks may point to another place on the same Web page, another Web page on the same Web site, or most frequently to a different Web site entirely. Richard Raysman & Peter Brown, *Recent Linking Issues*, N.Y.L.J., Feb. 8, 2000, at 3. The idea for hyperlinks was developed at the European Laboratory for Particle Physics (CERN) in Geneva. KLAUS W. GREWLICH, GOVERNANCE IN ‘CYBERSPACE’ ACCESS AND PUBLIC INTEREST IN GLOBAL COMMUNICATIONS 39 (1999).

2. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d. 346, 347 (S.D.N.Y. 2000).

3. Criminal Prohibition on Distribution of Certain Information Relating to the Manufacture of Controlled Substances, H.R. 2987, 106th Cong. (1999), §

5. Section 5 would make it unlawful to

teach or demonstrate to any person the manufacture of a controlled substance, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of a controlled substance, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime.

*Id.* at §5 (a). The potential First Amendment implication of this proposed legislation was not lost on House Judiciary Committee members. Representative Bob Barr, R-Ga., said that the bill would “codify[] in the

written in substantially the same language as the Methamphetamine Anti-Proliferation Act of 1999,<sup>4</sup> bans *inter alia* hyperlinks to websites that contain information on making explosives.<sup>5</sup> Finally, the “Digital Millenium Copyright Act” provides liability when an online service provider (“OSP”) provides links to an online location containing infringing material if certain safe harbor provisions are not met.<sup>6</sup>

The ability to create a hyperlink from one website to another “can be seen as one of the Internet’s most distinguishing and valuable features.”<sup>7</sup> Thus, hyperlinks are a key component to what has been termed “a perfect means for freely expressing one’s opinion.”<sup>8</sup> As with the regulation of any type of expression, the regulation of hyperlinking is subject to

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criminal code for the first time a restriction on free speech in this country.” David Hess, *Committee Markups and Votes, July 25, 2000*, NATIONAL JOURNAL GROUP, INC., July 25, 2000. Representative Tammy Baldwin, D-Wis., said that the bill would “cast the net too widely and intrud[e] on First Amendment rights.” *Id.* Subsequently, a bipartisan amendment was adopted by a 15-12 vote to delete that provision of the bill. *See id.* As of September, 21 2000, that bill was dropped entirely. *See* 146 CONG. REC. H7990.

4. *See infra* note 92 and accompanying text.

5. *See* 18 USC § 842 (p). Hyperlinks to sites that contain instructions on how to make explosives would be banned to the extent that they constitute teaching or demonstrating to a person with knowledge that such person intends to use the information for, or in furtherance of, a Federal crime. *See id.*

6. *See* 17 USC § 512(d). There is no liability if the service provider:

- (1) (A) does not have actual knowledge that the material or activity is infringing;
- (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

*Id.*

7. Raysman, *supra* note 1, at 3.

8. GREWLICH, *supra* note 1, at 267.

First Amendment limitations.<sup>9</sup> However, the extent to which the First Amendment protects hyperlinking, and thus what standard of judicial scrutiny should be applied, is not yet clear.

This Note critically discusses how the courts have thus far applied the First Amendment in determining the constitutionality of restrictions on hyperlinks. Part I discusses the Internet as a new communications medium and describes current First Amendment doctrine. Part II analyzes the appropriateness of classifying hyperlinks as expressive conduct for the purposes of First Amendment analysis.

This Note proposes that the non-speech elements of hyperlinks are not significant enough to qualify as expressive conduct and therefore that the courts have erred in holding to the contrary. Further, it is a serious error not to distinguish between software source code and hyperlinks. Ultimately, the courts must be careful when deciding “just what the First Amendment should mean in cyberspace” so that they don’t “get it fundamentally wrong.”<sup>10</sup>

## I. BACKGROUND

### A. THE INTERNET

#### 1. Development of a New Medium

The Internet began life in 1969 as ARPANET, a project of the Advanced Research Project Agency (ARPA).<sup>11</sup> This project was initiated as a solution to the perceived vulnerability of telecommunications networks in the event of armed conflict.<sup>12</sup> ARPANET was designed to enable computers operated by the military, defense contractors, and universities conducting

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9. See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 326 (S.D.N.Y. 2000) (holding that computer code, specifically HTML code which makes up most web pages and hyperlinks, is expression and therefore regulation of it is subject to First Amendment doctrine and analysis).

10. JEREMY HARRIS LIPSCHULTZ, *FREE EXPRESSION IN THE AGE OF THE INTERNET 2* (2000) (quoting Supreme Justice David Souter who in 1997 said, “In my ignorance, I have to accept the possibility that if we had to decide today just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong.”).

11. See Guy Basque, *Introduction to the Internet*, *THE ELECTRONIC SUPERHIGHWAY THE SHAPE OF TECHNOLOGY AND LAW TO COME* 7, 8 (Ejan Mackaay et al. eds., 1995).

12. See *id.*

defense-related research to communicate with one another through redundant channels even if some portions of the network were damaged during a war.<sup>13</sup>

In 1984, the National Science Foundation (NSF) took over control of the ARPANET network with the goal of expanding it to include all university institutions and research organizations.<sup>14</sup> In 1988, the NSF began to open network links to foreign countries, starting with Canada.<sup>15</sup> In time, further opening of the network led to the structure in place today, a network of networks that transcends all national boundaries.<sup>16</sup>

Today, access to the Internet is widespread.<sup>17</sup> Individuals can obtain access to the Internet from many different sources.<sup>18</sup> "Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access"; access is also available commercially through a number of major access providers such as America Online, CompuServe, the Microsoft Network, and Prodigy.<sup>19</sup>

## 2. The World Wide Web & Hyperlinking

The World Wide Web ("the Web") refers to an extensive amount of digital-information that is distributed among servers interconnected by the Internet.<sup>20</sup> This stored information is largely in the form of hypertext documents (or "Web pages"),

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13. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

14. See *Basque*, *supra* note 11, at 9.

15. See *id.*

16. See GREWLICH, *supra* note 1, at 38-39.

17. A GAO report issued in March of 1999 estimated that there were 153 million Internet users worldwide. See *Securities Fraud On The Internet: Hearings Before The Permanent Subcommittee On Investigations Of The Committee On Governmental Affairs United States Senate*, 106th Cong. 3 (1999) (statement of Richard J. Hillman, Associate Director, Financial Institutions and Markets Issues General Government Division of GAO). A Department of Commerce report issued in October 2000 found that 41.5% of US households had Internet access. See U.S. DEPARTMENT OF COMMERCE, *FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION XV 1* (2000). The same report found there were 116.5 million Americans online as of August 2000. See *id.* at 51.

18. See *Reno*, 521 U.S. at 850.

19. See *id.*

20. See *United States v. Microsoft Corp.*, 1999 U.S. Dist. LEXIS 21782, at \*9 (D.D.C. 1999).

which are generally a combination of text and graphics but can also include audio and video content, programs, and other types of data.<sup>21</sup>

Most hypertext documents contain annotated references, known as hyperlinks, to other Web pages.<sup>22</sup> Hyperlinks can be thought of as “analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”<sup>23</sup> Clicking on a hyperlink establishes a connection with the server of the linked site encouraging open, easy and seamless access from one Web site to another.<sup>24</sup> Hyperlinks can be more than links between different sites; they can also be used as cross-references within a single document or between documents on the same site.<sup>25</sup>

The Web is comparable, from the users’ viewpoint, to both a vast library and a sprawling mall.<sup>26</sup> Uniquely, any person or organization with a computer connected to the Internet can publish information.<sup>27</sup> “Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal ‘home pages’, the equivalent of individualized newsletters about the person or organization, which are available to everyone else on the Web.”<sup>28</sup> Therefore, because of ease of use

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21. *See id.* at 9-10.

22. *See id.* at 10. The court suggested that the expressive nature of hyperlinks, which are no longer confined to the medium of hypertext web pages. Hyperlinks can now be inserted in word processing documents as well as e-mail messages. *See* Microsoft Corporation, *Turn Text into a Hyperlink in an Outlook 2000 HTML Message*, <<http://office.microsoft.com/assistance/2000/olhtmlhyperlinks.aspx>>. If you find an interesting Web site, news group, file, or other information you want someone to see, you can insert a hyperlink to its location. This saves you from typing a long description about the information or typing instructions to the e-mail recipient on how to get to the site. *Id.*

23. *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 4553, at \*6 (C.D. Cal. 2000).

24. *See* Raysman, *supra* note 1, at 3. Hyperlinks in a web page, most commonly in the form of highlighted words and images, are imbedded with three pieces of information: the address of the “server,” the computer that stores documents, the document’s address on the server, and the protocol, which is the language another computer must use to retrieve the document. *See* John Markoff, *A Free And Simple Computer Link*, N.Y. TIMES, Dec. 8, 1993, at D1.

25. *See* *Microsoft*, 1999 U.S. Dist. LEXIS 21782, at \*10.

26. *See* *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

27. *See id.*

28. *Id.* at 853 n.9.

and breadth of potential readership, the Web may be regarded as a perfect means for freely expressing one's opinion.<sup>29</sup>

### 3. Different Types of Hyperlinks

Since there are actually many different types of electronic links that come under the definition of "hyperlink," it is necessary to specify what type will be referred to in this article. The most basic type of link used in web pages is a simple cross-reference between documents on different sites.<sup>30</sup> This is the type of hyperlink referred to in this article for analysis. This distinction is critical because different sorts of issues may apply to different sorts of hyperlinks, frustrating a First Amendment analysis.<sup>31</sup>

Beyond the most basic type of hyperlink, there is a linking technique known as framing. Framing allows a browser window to be divided so that multiple Web pages can be shown simultaneously. This technique is commonly used to provide an index to a web site along the border of the screen that remains in place while the user browses through the pages of a site. However, this type of link has questionable uses such as displaying the informative content of one website while displaying the advertising content or identifying marks of another.<sup>32</sup>

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29. See GREWLICH, *supra* note 1, at 267.

30. See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 307 (S.D.N.Y. 2000). "[T]he simplest link acts merely as an automated directory—when the hypertext link is clicked with the mouse, the connection to the page with the link is dropped and the user's computer then connects with the linked site, without further connection with the original page." INTERACTIVE SERV. SUBCOMM., ABA, WEB-LINKING AGREEMENTS: CONTRACTING STRATEGIES AND MODEL PROVISIONS 1-2 (1997).

31. See Brian D. Wassom, Note, *Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining*, 49 CASE W. RES. 181, 186 (1998) (evaluating online copyright law as it applies to methods of integrating others' information into Web pages such as framing, deep linking, and inlining). Beyond copyright implications of linking, other potential grounds for liability have been suggested, including trademark infringement, trademark dilution, unfair competition, libel, and misappropriation. See Mark Sableman, *Link Law: The Emerging Law of Internet Hyperlinks*, 4 COMM. L. & POLY 557, 561-66 (1999).

32. See *Futuredontics, Inc. v. Applied Anagramics*, 1998 U.S. Dist. LEXIS 2265, 3 (C.D. Cal. 1998). In *Futuredontics*, the plaintiff operated a dental referral business and maintained a web site with web pages containing copyrightable subject matter. See *id.* The defendant maintained its own web site and using a frame displayed content from the plaintiff's web site surrounded by the defendant's logo and information. See *Id.*

There is also a type of hyperlink known as deep linking.<sup>33</sup> In deep linking, a link is directed to a specific web page deep within another website.<sup>34</sup> By clicking on a deep link the user is taken past the “front door” or home page of a website and taken directly to specific content bypassing the second site’s navigational structure.<sup>35</sup>

Finally, there is a type of linking known as inlining.<sup>36</sup> Inlining refers to the use of graphic or text images in a website that are actually being taken from another website in a seamless manner.<sup>37</sup> The only way the user would know that these images are “borrowed” would be to examine the code underlying the link.<sup>38</sup>

#### 4. Distinctions Between Posting Information and Linking To Information

It is important to note the distinctions between hyperlinking to content and posting content directly. A hyperlink can be thought of as an “annotated reference”, that describes to the web browser where information of a particular nature can be found.<sup>39</sup> When a hyperlink is clicked on, the user’s web browser requests information from the referenced server, generally elsewhere on the Internet.<sup>40</sup> Thus, the

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33. See *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at \*3.

34. See *id.* at 4. By clicking on a link from the website of Tickets.com, a potential customer was transferred to an interior web page of Ticketmaster, thus bypassing the home page for Ticketmaster. See *id.* at \*3-4.

35. See *id.*

36. See Allison Roarty, Note, *Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right*, 68 FORDHAM L. REV. 1011, 1017 (1999).

37. See *id.* “The image or text that is linked to is then brought into and displayed on the linking Web page as though it is part of that Web page.” *Id.*

38. See *id.*

39. See *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 307 (S.D.N.Y. 2000). Hypertext has been referred to as “an electrified table of contents” and “steroid-addled footnotes.” STEVEN JOHNSON, *INTERFACE CULTURE* 133 (1997). “[T]he hypertext link is in essence an automated version of a scholarly footnote or bibliographic reference: it tells the reader where to find the referenced material.” Dan L. Burk, *Proprietary Rights in Hypertext Linkages*, 2 J. OF INFO., L. AND TECH., ¶ 9 (1998), <[http://elj.warwick.ac.uk/jilt/intprop/98\\_2burk/](http://elj.warwick.ac.uk/jilt/intprop/98_2burk/)>.

40. “Links are generally interconnections to ‘elsewhere,’ and to other pages.” Rob Shields, *Hypertext Links: The Ethic of the Index and Its Space-Time Effects*, in *THE WORLD WIDE WEB AND CONTEMPORARY CULTURAL THEORY* 145, 150 (Andrew Herman & Thomas Swiss eds. 2000).



information downloaded generally does not come from the originating site of the hyperlink but rather comes from another server location on the Internet.<sup>41</sup> This process can be analogized to asking a question and instead of actually getting an answer merely getting a suggestion of where to find the answer.<sup>42</sup> Therefore, one website is actually providing the information and the other is simply pointing out the location of the providing website.<sup>43</sup>

This distinction is important in the context of this article. While it may be a difficult Constitutional matter to decide whether or not certain expression can be posted on the Internet, it is a dramatically more difficult Constitutional undertaking to decide whether or not the location of this information can be described in the form of a hyperlink.

## B. FIRST AMENDMENT RESTRICTIONS ON SPEECH REGULATION

The essential idea of freedom of speech can be described in words attributed to Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it."<sup>44</sup> This concept was considered to be so important by our Founding Fathers that it was incorporated into the Constitution through the First Amendment.<sup>45</sup>

Yet, freedom of speech in our society is not absolute<sup>46</sup> and

41. It is possible to have a hypertext link that connects to its own page but these circular links are not the type of hypertext link being discussed.

42. For example, if someone asked what the word "alacrity" meant it might be appropriate to refer him to the dictionary.

43. When a hypertext link is called or clicked upon, the browser takes the file name of the web page and translates this into machine code and thereby invokes other web page content. *See* Shields, *supra* note 40, at 153.

44. S. G. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907). "The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas." *Young v. Am. Mini Theatres*, 427 U.S. 50, 63. *But see* JACQUES BARZUN, *FROM DAWN TO DECADENCE* 361 (2000) (doubting that Voltaire ever actually wrote these words).

45. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The precise justification for why this sort of right is valuable is the subject of multiple lines of thought including: search for truth, individual autonomy, democracy and self-government, and tolerance. *See generally* WOJCIECH SADURSKI, *FREEDOM OF SPEECH AND ITS LIMITS* 7-35 (1999).

46. The idea that there can be liability based on speech is an old one.

to insist that all types of speech be treated equally would be “both patently absurd and inimical to the freedom of *really* valuable speech.”<sup>47</sup> Accordingly, the First Amendment does not protect some types of speech.<sup>48</sup> Further, there are varying degrees of protection among the types that are protected. The justification for allowing some suppression of speech is always based on harms avoided by such suppression<sup>49</sup> and is never based upon dislike for the particular speech. The Supreme Court has said that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>50</sup>

Consistent with the ideas above, judicial precedent has resulted in defined doctrinal categories of expression and accompanying tests for the application of judicial scrutiny.<sup>51</sup> Through the relevant test, the court seeks to balance the value of free speech with the potential harm of that particular type of speech. Those doctrinal free speech categories most relevant when analyzing the regulation of hyperlinks, and thus reviewed here, include expressive conduct, prior restraint, advocating unlawful conduct, and content based versus non-content based restrictions.

## 1. Expressive Conduct

The seminal case for expressive conduct doctrine is *United States v. O'Brien*.<sup>52</sup> In *O'Brien*, protestors of the Vietnam War were expressing themselves by burning their Selective Service registration certificates on the steps of the South Boston Courthouse.<sup>53</sup> David O'Brien was then tried, convicted, and

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“Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.” 4 WILLIAM BLACKSTONE, COMMENTARIES 151-52 (1769).

47. SADURSKI, *supra* note 45, at 37.

48. See *Roth v. United States*, 354 U.S. 476, 483 (1957) (providing that “[t]he First Amendment was not intended to protect every utterance”).

49. See SADURSKI, *supra* note 45, at 38.

50. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (Stevens, J., dictum). This idea has been shown by holdings in instances such as when the city of Skokie, Illinois, tried to stop the Nazi party from marching and the 7th Circuit held that the Nazis had a right to march. See *generally* *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

51. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 326 (S.D.N.Y. 2000).

52. *United States v. O'Brien*, 391 U.S. 367 (1968).

53. See *id.* at 369.

sentenced for knowing destruction of a Selective Service registration certificate under the Universal Military Training and Service Act of 1948.<sup>54</sup> The Supreme Court held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>55</sup> In upholding the conviction of *O’Brien*, the Court elaborated a three part test for evaluating regulations limiting expressive conduct: the regulation must further an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.<sup>56</sup>

More recently, this doctrine has been applied to evaluating the constitutionality of laws proscribing the burning of the United States flag.<sup>57</sup> In *United States v. Eichman*, people were arrested for violation of the Flag Protection Act of 1989 after burning a United States flag on the steps of the United States Capitol.<sup>58</sup> After the government conceded that the flag burning constituted expressive conduct,<sup>59</sup> the Court held that the statute failed the three part *O’Brien* test because the restriction on speech was directly related to the message.<sup>60</sup> Accordingly, the statute was subject to “the most exacting scrutiny” and found unconstitutional.<sup>61</sup> The Court concluded by stating that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the

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54. *See id.* at 369-70. As amended in 1965, the act provided that one “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate” commits an offense. *See id.* at 370 (italics omitted).

55. *Id.* at 376.

56. *See id.* at 377.

57. *See United States v. Eichman*, 496 U.S. 310 (1990).

58. *See id.* at 312. The Act provided in relevant part that “(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.” 18 U.S.C.A. § 700 (2000).

59. *See id.* at 315.

60. *See id.* at 313-16. “[T]he Government’s desire to preserve the flag as a symbol for certain national ideals is implicated ‘only when a person’s treatment of the flag communicates [a] message’ to others that is inconsistent with those ideals.” *Id.* at 316 (citations omitted).

61. *Id.* at 318 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>62</sup>

This doctrine has also been applied to evaluating the constitutionality of laws that regulate the distribution of computer source code. In *Junger v. Daley*, the Sixth Circuit held that the *O'Brien* test was applicable for laws regulating the source code of an encryption program because source code has both functional and expressive features.<sup>63</sup> In *Junger*, a professor challenged on Constitutional grounds the provisions of the Export Administration Regulations that regulate the export of encryption software.<sup>64</sup> These regulations prevented him from publishing without a license encryption source code on his web site in support of his teaching activities.<sup>65</sup> In analogizing computer source code to a musical score, the court held that although computer code is unintelligible to many and not traditional speech, it is an expressive means for the exchange of information and ideas about computer programming and therefore protected by the First Amendment.<sup>66</sup> The court further held that “[t]he functional capabilities of source code, and particularly those of encryption source code, should be considered when analyzing the governmental interest in regulating the exchange of this form of speech.”<sup>67</sup>

## 2. Prior Restraint

Concisely, the term prior restraint refers to “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communication are to occur.”<sup>68</sup> The prototypical forms of prior restraint are court injunctions stopping speech and required licensing of certain types of speech.<sup>69</sup>

*Near v. Minnesota* was a classic example of the doctrine of

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62. *Id.* at 319 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

63. *See Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000).

64. *See id.* at 483-84.

65. *See id.*

66. *See id.* at 484-85.

67. *Id.* at 485.

68. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 773 (1997) (quoting *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993)).

69. *See CHEMERINSKY, supra* note 68, at 770.

prior restraint.<sup>70</sup> In *Near*, a Minnesota law provided “for the abatement, as a public nuisance, of a malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>71</sup> Under the statute, a trial court enjoined a publication, known for criticizing public officials, from publishing or circulating “any publication . . . whatsoever containing malicious, scandalous and defamatory matter.”<sup>72</sup> The Supreme Court held that the injunction was unconstitutional and that, “it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication” and that there is a “deep-seated conviction that such restraints would violate constitutional right.”<sup>73</sup>

### 3. Advocating Unlawful Conduct

The seminal case defining First Amendment protection of speech that advocates unlawful conduct is *Brandenburg v. Ohio*.<sup>74</sup> In *Brandenburg*, a KKK leader was prosecuted pursuant to the Ohio Criminal Syndicalism Statute<sup>75</sup> for comments made during a rally that were captured on film by a news cameraman.<sup>76</sup> The Supreme Court held that a restriction could be made on expression that advocates unlawful conduct without facing strict scrutiny provided that: imminent harm was threatened, there was a likelihood of the expression actually producing illegal action, and that there was an intent on the part of the speaker to cause imminent illegality.<sup>77</sup> However, the Court held that the abstract teaching of the moral propriety or moral necessity of force and violence was “not the same as preparing a group for violent action and steeling it to such action.”<sup>78</sup> In this instance, the Ohio Criminal

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70. *Near v. Minnesota*, 283 U.S. 697 (1931).

71. *Id.* at 701-02 (internal quotation marks omitted).

72. *Id.* at 705 (internal quotation marks omitted).

73. *Id.* at 713, 718, 723.

74. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

75. *See id.* at 445 (referencing Ohio Rev. Code Ann. § 2923.13).

76. *See Brandenburg*, 395 U.S. at 445-46. Relevant to inciting illegal conduct, the speaker stated that “[w]e’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.” *Id.* at 446.

77. *See id.* at 447.

78. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

Syndicalism Statute did not distinguish between mere advocacy and incitement to imminent lawless action and was therefore held unconstitutional.<sup>79</sup>

In *Rice v. Paladin Enterprises*, the Fourth Circuit held that the First Amendment does not bar a publisher from being held civilly liable as an aider and abetter to an act of homicide.<sup>80</sup> *Paladin Enterprises* was the publisher of a book that served as an instructional manual for would-be contract killers.<sup>81</sup> A man purchased the book and carefully followed its instructions subsequently murdering three people.<sup>82</sup> Speaking to the First Amendment interests involved, the Fourth Circuit cited *Brandenburg* and acknowledged that paradoxically a right to advocate lawlessness is one of the greatest safeguards of liberty.<sup>83</sup> The court held that,

[e]ven in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.<sup>84</sup>

However, the Fourth Circuit ultimately reversed the district court because regardless of the right to express disagreement with the laws, “it is equally well established that speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.”<sup>85</sup> In this case the court found that the conduct of the publisher was more than just abstract advocacy and reached the level of civil aiding and abetting of a contract murder.<sup>86</sup>

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79. *See id.* at 448-49.

80. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

81. *See id.* at 241. The book was entitled, *Hit Man: A Technical Manual for Independent Contractors*. *Id.* at 239. It contained 130 pages of detailed factual instructions on how to murder and to become a professional killer. *See id.* The book included advice so potentially dangerous that the court felt it necessary to omit portions of illustrative passages from its opinion in order to minimize the danger to the public from their repetition. *See id.* at 239 n.1.

82. *See id.* at 239.

83. *See id.* at 243.

84. *Id.*

85. *Id.*

86. *See id.*

#### 4. Content Related Versus Non-Content Related Restrictions

The distinction between content-based and content-neutral regulation of expression is critically important. In *Police Department of Chicago v. Mosley*, the Supreme Court stated that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>87</sup> Accordingly, “[c]ontent-based regulations are presumptively invalid.”<sup>88</sup> Practically, this has resulted in the general rule that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.<sup>89</sup>

However, an exception to this bright line was created in *Young v. American Mini Theatres* where it was established that regulations that are facially content-based are to be classified as content-neutral for purposes of judicial scrutiny if they are not aimed at the communicative effect of the speech, but rather at its secondary effects.<sup>90</sup> In *Young*, the legitimate concern about the secondary effects on a neighborhood resulting from the presence of an adult theater was sufficient for the content based regulations to be considered content neutral when applying judicial scrutiny.<sup>91</sup>

#### C. RECENT RESTRICTIONS ON HYPERLINKING

Recently, Congress has placed restrictions on hyperlinking. For example, although the Methamphetamine Anti-Proliferation Act ultimately failed, legislation aimed at curbing dissemination of information about making bombs, worded in substantially the same manner<sup>92</sup> as the methamphetamine

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87. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

88. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

89. *See Turner Broad. Sys. v. Fed. Communication Comm'n*, 512 U.S. 622, 642 (1994). “Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Id.* “In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.” *Id.*

90. *See Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 84 (1976) (Powell, J., concurring); *id.* at 70-72 (Stevens, J., holding unclear).

91. *See id.*

92. The wording of the relevant provision of the Methamphetamine Anti-Proliferation Act provided that it is unlawful

to teach or demonstrate to any person the manufacture of a

legislation, was signed into law on September 8th, 1999.<sup>93</sup> Thus hyperlinking to a website is banned to the extent that it constitutes distributing information pertaining to the manufacture or use of an explosive with knowledge that the information receiver will use the information to violate federal law.

The courts have also recently placed restrictions on hyperlinking. In *Intellectual Reserve v. Utah Lighthouse Ministry*,<sup>94</sup> defendant was banned from providing links to web sites that posted copies of a copyrighted church handbook. Defendant was previously enjoined from posting the handbook online but sought to get around the effect of that injunction by stating on their web site that the handbook was still available and providing links to three web sites where the handbook could be viewed.<sup>95</sup> The court found that the links amounted to contributory infringement and briefly dismissed any First Amendment concerns holding that “the First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law.”<sup>96</sup>

Another recent case provided a First Amendment analysis, in more depth though not more satisfying. In *Universal City Studios v. Reimerdes*, the website 2600.com<sup>97</sup> was *inter alia*

controlled substance, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of a controlled substance, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime.

H.R. 2987, 106th Cong., Section 5 §421 (a) (2) (B) (1999). Whereas, the relevant portion of 18 USC §842 provides that

to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

18 USC §842 (p) (2) (B).

93. See 145 CONG. REC. D953.

94. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290, 1295 (D.Utah 1999).

95. See *id.* at 1294-95.

96. *Id.* at 1295.

97. The website 2600.com is run by Eric Corley, who is “viewed as a leader of the computer hacker community.” *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294,308 (S.D.N.Y. 2000). He and his company, 2600 Enterprises, Inc., publish a magazine called *2600: The Hacker Quarterly*.



enjoined from using hyperlinks to websites that posted DeCSS<sup>98</sup>, computer code capable of cracking the encryption system which prevents DVD disks from being copied.<sup>99</sup> Intermingling the hyperlinks “the practical equivalent of making DeCSS available on their own web site”<sup>100</sup> the court held that since hyperlinks have both functional and expressive elements that the appropriate standard for First Amendment concerns was the *O’Brien* test.<sup>101</sup>

Computer code is expressive. To that extent, it is a matter of First Amendment concern. But computer code is not purely expressive any more than the assassination of a political figure is purely a political statement. Code causes computers to perform desired functions. Its expressive element no more immunizes its functional aspects from regulation than the expressive motives of an assassin immunize the assassin’s action.<sup>102</sup>

The court went on to articulate that although “[l]inks bear a relationship to the information superhighway comparable to the relationship that roadway signs bear to roads,” links are different because they are more functional by taking one almost instantaneously to the desired destination upon the user clicking their mouse.<sup>103</sup> Thus, the functionality with links, in the court’s view, is that they take the user to the destination “with the mere click of an electronic mouse.”<sup>104</sup>

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*See id.* *The Hacker Quarterly* has included articles on such topics as how to steal an Internet domain name, access other people’s e-mail, intercept cellular phone calls, break into the computer systems at Costco stores and Federal Express, as well as a guide to the federal criminal justice system for readers charged with computer hacking. *See id.* at 308-309.

98. CSS, or Content Scramble System, is an encryption system used by motion picture studios to control access to and prevent copying of their motion pictures stored on DVD discs. *See id.* at 308. CSS requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back motion pictures on DVDs. *See id.* DeCSS is a software utility, or computer program, that enables users to break the CSS copy protection system and thereby view DVDs on unlicensed players and make digital copies of DVD movies. *See id.* DeCSS was created by a Norwegian national, Jon Johansen, in September 1999, after he discovered the CSS encryption algorithm and keys. *See id.* at 311. Mr. Johansen posted the executable code on his personal Internet web site and spread word of its availability. *See id.*

99. *See id.* at 326.

100. *Id.* at 324.

101. *See id.* at 339.

102. *See id.* at 304.

103. *Id.* at 339.

104. *Id.*

In applying *O'Brien*, the court held that the DMCA served a substantial governmental interest, that the regulation was unrelated to the suppression of free expression, and that regulation “promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>105</sup> In deciding the third prong of the *O'Brien* test the court held that although it would be more direct to simply go after the posting sites themselves, that limiting a remedy to sites posting the material would achieve the government interest less effectively because of foreign sites that not subject to the DMCA and no subject to suit here.<sup>106</sup> However, the Court qualified the scope of the injunction stating that,

there may be no injunction against, nor liability for, linking to a site containing circumvention technology, the offering of which is unlawful under the DMCA, absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.<sup>107</sup>

So far, *Reimerdes* has been the only case in which the federal judiciary has analyzed, in detail, the First Amendment implications of regulating hyperlinks. As such, the analysis in *Reimerdes* will be focused upon. However, this issue is likely to come up again under the DMCA as well as other laws that *inter alia* regulate hyperlinks, depending on interpretation. As such, First Amendment protection of hyperlinking is likely to be important in the future and therefore analysis of the appropriate standard of review is relevant.

## II. ANALYSIS

### A. CONDUCT, FUNCTIONALITY, AND EXPRESSION

To begin, one must understand that no speech is ever truly pure; it is always accompanied by conduct or non-speech elements that make the speech possible.<sup>108</sup> The Ninth Circuit

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105. *Id.*

106. *See id.* at 340.

107. *Id.* at 341.

108. *See International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 296 (1957) (Douglas, J., dissenting).

has recognized that at some level all speech is conduct because “speech in any language consists of the ‘expressive conduct’ of vibrating one’s vocal chords, moving one’s mouth and thereby making sounds, or of putting pen to paper, or hand to keyboard.”<sup>109</sup> Accordingly, when looking for what qualifies something as properly categorized as expressive conduct for First Amendment analysis, we must look further than some simple element of conduct.

Some conduct accompanying speech may be burdensome to others. For example, talk may be noisy, or the distribution of leaflets may cause litter.<sup>110</sup> When these burdensome “non-speech” elements accompanying expression rise past a certain threshold level, the Court labels the activity expressive conduct and gives the expression a lower level of First Amendment protection.<sup>111</sup> In some instances, we accept this because the harm in suppressing the non-speech elements and accompanying expression is less than the harm of letting the non-speech elements happen.<sup>112</sup> Thus, sometimes suppressing the expression is the lesser of two evils.

However, the practical reality is that away from extreme examples it becomes very difficult to draw a distinction between what is properly considered pure speech and what is properly considered expressive conduct. The distinction has been termed both a “hazy line”<sup>113</sup> and “too crude to identify those communicative acts which deserve special protection.”<sup>114</sup>

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109. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934 (9th Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1316 (1996), vacated on other grounds and remanded sub nom *Arizonians for Official English v. Arizona*, 117 S. Ct. 1055 (1997), vacated and remanded, 118 F.3d 667 (9th Cir. 1997).

110. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 827 (2nd ed. 1988).

111. An extreme example given by the court in *Reimerdes* of expression rising to the level of proscribable conduct is the assassination of a political figure. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 304 (S.D.N.Y. 2000). At that level, the non-speech element has unquestionably gone far beyond the threshold necessary to apply a lesser standard of free speech protection, such as under the doctrine of expressive conduct. See *id.* at 328 (by implication).

112. See SADURSKI, *supra* note 45, at 38. The calculus is not quite as simple as saying that any net surplus of benefits justifies restriction. One commentator has stated that the calculus would only be that simple in the case of a lenient scrutiny standard. See *id.* Whereas in the case of strict scrutiny, the social good resulting must be of great importance. See *id.* at 38-39.

113. *Brown v. Hartlage*, 456 U.S. 45, 55 (1982).

114. SADURSKI, *supra* note 45, at 44.

This is particularly true in the realm of the new communication medium known as cyberspace. Commentators have noted that “there are signs of increasing difficulty in distinguishing speech from conduct on the Internet.”<sup>115</sup> The inherent difficulty in drawing this line was evident in the court’s analysis in *Reimerdes*.

## B. EXPRESSIVE CONDUCT: AN INAPPROPRIATE DOCTRINE FOR HYPERLINKING

### 1. The Nature of Hyperlinks

The court in *Reimerdes* fundamentally misunderstood the nature of hyperlinks. In analogizing, the court found that hyperlinks are different than roadway signs because “they *take* one almost instantaneously to the desired destination with the mere click of an electronic mouse.”<sup>116</sup> Strictly speaking, however, the court used the term “take” inappropriately.<sup>117</sup> Hyperlinks themselves do not actually “take” the user anywhere, not like a bus “takes” a rider to another destination.<sup>118</sup> This wording by the court shows a misunderstanding of the nature of hyperlinks. Hyperlinks merely provide an address to the user’s browser program. Then if the user clicks on the hyperlink the user’s browser program requests information from the server at the particular address.<sup>119</sup> While this point may seem to be a minor issue of semantics, it is critical to understanding the flaw in the court’s analysis. To say that a hyperlink “takes” a user to a location, as the court did, is to expand the non-speech element of a hyperlink and thereby make the drawing of the hazy line even

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115. Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U.L. REV. 789, 796 (2000) (discussing how conventional economic regulations may begin to pose First Amendment issues when applied to cyberspace activities such as economically valuable information transmissions termed expressive commodities).

116. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 339 (S.D.N.Y. 2000).

117. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1201 (10th ed. 1995) (“[T]ake”, in this sense means to lead, “carry, or cause to go along to another place,” for example “this bus will [take] you into town.”).

118. See *id.*

119. After clicking on a hypertext link, “the user’s browser or other application can then retrieve the material from its location.” See *supra* note 40 and accompanying text.

more error prone. Whereas, to say that a hyperlink merely provides a server address in a form the browser can understand keeps hyperlinks away from the line at which pure expression turns into expressive conduct.

When properly understood, hyperlinks can be thought of as tantamount to electrified footnotes.<sup>120</sup> The only difference is that hyperlinks make it somewhat easier for the reader to find and view the reference material. It is unlikely that any court would find that the non-expressive, functional elements present in traditional footnotes would qualify them to be considered expressive conduct and thus analyzed under the *O'Brien* test. Therefore, it does not make sense to apply the *O'Brien* test to what are essentially footnotes in a modern medium of communication.

## 2. Hyperlinks Distinguished From Source Code

Next, the court in *Reimerdes* improperly relied on the analysis of *Junger v. Daley* to bolster its position of hyperlinks being evaluated under the *O'Brien* standard.<sup>121</sup> In one sense the court was right. The logic of the Sixth Circuit could be applied to the DeCSS code itself. Like the encryption source code of *Junger*, the DeCSS code communicated information and ideas about computer programming but also had a functional capability; it cracked the CSS encryption system in direct violation of the DMCA.<sup>122</sup> However, where the court went wrong is that computer source code is distinguishable from hyperlinks and thus applying the same *Junger* source code analysis to hyperlinks is entirely inappropriate. Computer source code is typically made up of a high-level computer language that is then compiled into machine-readable object code that the machine can execute to perform specific tasks.<sup>123</sup> The expressive nature of source code lies only in the ability of trained programmers to extract from the code ideas about its

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120. See *supra* note 39 and accompanying text.

121. See *Reimerdes*, 111 F. Supp. 2d 294 at 339. Following the logic of *Junger*, the court found that links, like computer code in general, have both expressive and functional elements and “are within the area of First Amendment concern.” *Id.* Therefore, the court found that the constitutionality of suppression of linking is determined by the same *O'Brien* standard applied to the DeCSS source code. See *id.*

122. See *id.* at 303.

123. See Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 116 (2000).

nature and function.<sup>124</sup> Practically, though, source code is incomprehensible to the majority of people.<sup>125</sup> Accordingly, source code's value as a speech medium is limited.

Conversely, the value of hyperlinks as a component of a new speech medium is great. Hyperlinks are one of the most distinguishing and valuable features of the medium that has been deemed "a perfect means for freely expressing one's opinion."<sup>126</sup> It becomes clear that there is a much greater free speech interest in hyperlinks than there is in source code and thus First Amendment reasoning developed for source code should not be glibly applied to hyperlinks. Rather, a different analysis must be applied to hyperlinks in respect of its greater free speech stature.

Moreover, there are deeply disturbing potential consequences of not recognizing the distinction between source code and hyperlinks. Not distinguishing the two is recognizing the many different ways in which computer code is used in the digital age. Specifically, there is a distinction to be drawn between functionality that is an important part of communication and functionality that merely exists along with communication. Were it not so, the *Junger* logic could be applied to almost all modern communication media, weakening all First Amendment protection. For example, documents created in word processors exist in computer memory as machine-readable coded data files. These electronic documents contain a functional aspect in that they tell the computer what words to display when a word-processing program loads a document file. According to the analysis used by the court in *Reimerdes*, then, because word processing documents exist as computer code and have both functional and expressive features they would only be protected under the medium scrutiny *O'Brien* standard.

Clearly, no rational person would argue that word processing documents are anything less than pure speech despite the fact that they exist as computer code in the memory of a computer and have functional elements. The distinction between functionality that is an important part of communication and functionality that merely exists along with communication becomes clear in this context. Hyperlinks, like

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124. *See id.* at 106.

125. *See id.*

126. GREWLICH, *supra* note 1, at 267.

word processing documents, only have functionality for the sake of enabling communication. So just as word processing document files should not be treated as expressive conduct merely because they have some functionality, hyperlinks should not be treated as expressive conduct merely because they have some functionality. The *Junger* precedent should not be interpreted so that all computer code is treated the same. The *Junger* precedent should be limited to source code and not extended to hyperlinks.

### 3. A Thought Experiment

A thought experiment gives perspective to the difficulty of the court in recognizing hyperlinking as pure speech. Suppose that the written word was unknown in our world and only oral communication was used. Now imagine a new technology being developed which offers great potential for its ability to improve societal communication. Suppose that this new technology is the written word and is rapidly adopted throughout society. Imagine the challenge in applying the doctrine of expressive conduct to the written word for the very first time. The arguments that would be made both for and against mirror those made in the application of the doctrine of expressive conduct to hyperlinking.

First, proponents of applying expressive conduct to writing would point out that unlike oral communication, writing involves the physical conduct of using a pencil and making marks on paper. Second, they would say that a physical embodiment of communication, where none previously existed, is justifiably regulated at a different level than oral communication because it could cause negative effects previously unseen. Specifically, written communication, unlike oral communication which is inherently limited to the earshot of the speaker, can take on a life of its own by being distributed far more widely than the speaker would themselves ever travel. For these reasons, some in our thought experiment would argue that expressive conduct is the appropriate doctrine for regulating the written word.

Those against applying the doctrine of expressive conduct to the written word would point out that there is new conduct involved in writing but this conduct is merely in furtherance of communication. Moreover, they would try to point out that from a free speech perspective, there is no difference between

oral and written communications, they both exist for the purpose of transmitting ideas.

Stepping out of the thought experiment, it is important for the courts to realize that the question of whether to apply the doctrine of expressive conduct to hyperlinks is incredibly close to the situation presented in the thought experiment. Today, it is beyond question that written and oral communications should be treated the same for free speech purposes. This is understood by all because of the intimate familiarity that everyone has with the written word. It is important to point out, though, that not everyone has this same degree of familiarity with communications on the Internet. Some members of society, including some on the bench, only see negative aspects of the Internet as reported by the media including virus outbreaks and commercial fraud. Therefore, it is difficult for some to appreciate the Internet's role, and more specifically hyperlinks' role, as the next biggest communication revolution since the written word.

### C. DIRECTIONS FOR THE COURT: WAITING FOR THE IDEAL TEST CASE

The *Reimerdes* case was not an ideal evaluation of the free speech nature of hyperlinking for two reasons. First, it would seem that the defendants suspect status as "hackers" made the determination of the "hazy line" between speech and conduct even hazier. Second, the copyright implications involved in this case made it a less than ideal fact set because the historical relationship between copyright and the First Amendment.

Elements of the *Reimerdes* court's opinion would seem to point towards picking a conclusion first and then finding reasons to support it. Admittedly, the defendant's own conduct is largely the reason for this. In a move termed by the defendant as "electronic civil disobedience", the defendant made an effort to link to as many websites offering the DeCSS code as possible.<sup>127</sup> Understandably this would dispose the court to reaching a decision against them.

Other aspects of the courts decision also suggest a predisposition against the defendant. In an extreme comparison that may reveal its leanings the *Reimerdes* court

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127. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 303-304 (S.D.N.Y. 2000).



held that the expressive element of computer code “no more immunizes its functional aspects from regulation than the expressive motives of an assassin immunize the assassin’s action.”<sup>128</sup> Also, the court pointed out that computer viruses are also computer code and held that “society must be able to regulate the use and dissemination of code in appropriate circumstances.”<sup>129</sup> To this extent, the court held that the Constitution is not “a suicide pact.”<sup>130</sup> Finally, in describing the defendant and his background, the court noted that the defendant publishes what is regarded as “a bible to the hacker community.”<sup>131</sup> In describing the content of the defendant’s magazine the court held that “[n]ot surprisingly, *2600: The Hacker Quarterly* has included articles on such topics as how to steal an Internet domain name, access other people’s e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores and Federal Express.”<sup>132</sup> Further, that “[o]ne issue contains a guide to the federal criminal justice system for readers charged with computer hacking.”<sup>133</sup>

These points brought up by the court reveal its predisposition and contributed to the making of bad law. A finding that hyperlinking is pure speech would simply not be equivalent to a “suicide pact”, as suggested by the court. Moreover, the inflammatory comparison by the court of hyperlinking to political assassination is unfair and displays prejudice. Further, it is true that computer viruses are a menace and society should be able to regulate their use as the court suggests. However, this is more of a reason to view different types of code differently rather than a reason to deny the pure speech nature of hyperlinking. While the negative image that the court apparently had of the defendant is probably well deserved, it is unfortunate that it likely affected the calculus of the court’s decision.

The second aspect of the *Reimerdes* case that makes it less than ideal as a model for determining the free speech nature of hyperlinking is that it involved copyright. Where copyright infringement is concerned, the courts have historically

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128. *Id.* at 304.

129. *Id.*

130. *Id.*

131. *Id.* at 308.

132. *Id.* at 308-309.

133. *Id.* at 309.

dismissed free speech arguments.<sup>134</sup> To the extent that the *Reimerdes* court did not dismiss such arguments so quickly it should be applauded. This has not been true in other cases such as the *Utah Reserve* case.<sup>135</sup> Regardless, the ideal fact set for determining the free speech nature of hyperlinking would not involve copyright. As this type of ideal case is bound to arise soon, a discussion of what options the court would have for analysis is appropriate.

While the doctrine of expressive conduct is not properly applied to hyperlinks, this does not mean that only strict scrutiny will be applied to all regulation of hyperlinks. As applicable to other types of pure speech, the court can use other judicial doctrines to balance the free speech interests of hyperlinking with the potential harm that may be caused. For example, the doctrine of advocacy of illegal conduct might be applied to curtail some particularly egregious hyperlinking comparable to the situation discussed in *Rice v. Paladin Enterprises*.<sup>136</sup> Alternately, some restrictions of hyperlinking may not be viewed as being content-based or might fall under the secondary effects exception. In sum, arguing that hyperlinks should not be treated as expressive conduct is not taking an extremist First Amendment position because there are other doctrines under which judicial scrutiny might be lessened. Rather, arguing that hyperlinks should not be treated as expressive conduct is simply realizing that hyperlinks are a new form of pure speech.

### III. CONCLUSION

The First Amendment doctrine of expressive conduct is not appropriately applied to hyperlinks. The limited amount of functionality in hyperlinks exists for the sake of communication and not in addition to the communication. Further, this

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134. See e.g. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1295 (D.Utah 1999) (“[T]he First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law.”). “Since the U.S. Supreme Court’s decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, few courts have upheld the argument that copyright law might be limited by the First Amendment to the U.S. Constitution.” Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 1 (1998).

135. See *Intellectual Reserve*, *supra* note 134.

136. See *supra* Part I.B.3.

limited functionality is not enough to cross the line into expressive conduct. To hold otherwise, as the court in *Reimerdes* did, jeopardizes First Amendment protection for all communication that is enabled by modern technology. Ultimately, the courts must be careful when deciding “just what the First Amendment should mean in cyberspace” so that they don’t “get it fundamentally wrong.”<sup>137</sup>

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137. LIPSCHULTZ, *supra* note 10, at 2.