The Internet: Place, Property, or Thing—All or None of the Above?

October 30, 2003

Morning Session

PROFESSOR MILANI: Welcome to the Mercer Law Review symposium on "The Internet: Place, Property, or Thing—All or None of the Above?" My name is Adam Milani. I am a professor here, and I have the pleasure of serving as the moderator of our first panel. Before I do that, though, I want to thank a few people who were instrumental in putting this together. First and foremost, we have to thank the person who brought the whole idea together, and that is the Lead Articles Editor for the Mercer Law Review, Ms. Elizabeth Wilson. Last spring Liz spoke to Professor Dick Creswell and me about some ideas for the symposium for this year. We talked for a few minutes about some possible topics.

Professor Creswell is the one who deserves the credit for coming up with the idea about the Internet. He had been reading recently about the problems created by spam and by people invading other people's websites, and he said that would seem to be an interesting topic for a Law Review symposium. And I agreed.

We were fortunate enough to talk to Professor David Hricik, who has some expertise in the area from his prior practice. I had some knowledge from my work in disability law that the question of access to Internet sites was becoming a big issue under the Americans with Disabilities Act (ADA)[1] as well as under Title II of the Civil Rights

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

Act.[2] What we quickly determined was that both issues—the problem of spamming and invading of websites and the problem of accessibility to the websites—involved the same basic issue. What is the Internet? Is it a place?

So Liz took it and ran with it, and she ran a long way with the help of several people who I would also like to thank. First of all, David Hricik, who did quite a bit of work on this; Professor Hal Lewis, who is the faculty advisor for the Law Review; and of course, Yonna Shaw, who is the rock of the Law Review and takes care of everything Law Review related.

Now for a brief introduction on what our symposium is about. As somebody who teaches writing in addition to some other things, what I tell my students is what I am sure all law professors tell their students: Law is about language. The language we use is vitally important. So let's talk about some of the language we use when we talk about the Internet.

We visit a web*site*.

We meet people in a chat *room*.

We ask people for their E-mail *address*.

To keep unwanted visitors from damaging our systems or sending us unsolicited E-mail, we build fire *walls*.

All of those things sound like places: site, room, walls, and addresses.

My colleague, Michael Smith, has written a new book, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*,[3] which I highly recommend to you. In it, he writes that "metaphor is regarded by many classical rhetoricians as 'the most beautiful rhetorical figure,' the 'supreme ornament' of prose."[4] And if law were based solely on metaphor, there would be little doubt that the Internet is a place. It is real and tangible property.

But metaphors aren't the law, and courts are now beginning to address the key and very unsettled questions about the fundamental nature of the Internet. The most basic issues are: Is a website real or personal property? Is a website a place of public accommodation under the ADA or Title II of the Civil Rights Act of 1964? Courts are just now deciding these issues for the first time.

How we characterize the various aspects of the Internet in terms of property matters greatly. If a hacker or a spammer has trespassed onto

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2. Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (2000).

3. *See generally* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING (2002).

4. *Id.* at 179 (quoting 3 Marius Fabius Quintilianus, *Institutio Oratoria* 199 (H.E. Butler trans. 1954)).

real property, the network owner does not have to show actual damage to get an injunction. "You came on my land. That is all I need to prove." On the other hand, if the trespass is viewed as being on personal property, then the owner can obtain an injunction only if the spammer or hacker has somehow caused damage or is threatening to cause irreparable injuries.

Similarly, if a website is a "place of public accommodation" for purposes of the ADA, then the site owners must accommodate people with disabilities. For example, they must make sure that their text is compatible with screen readers so that people with visual impairments can have access to the website. If the website is not a "place," however, then the ADA does not apply, and no accommodation need be made.

What we have here is two different settings where the question is: "Is it a place, is it property?" The dilemma that the panels will address today is that, in the one setting, the owner of the website wants it to be real property. When the hacker or spammer invades their space, the owners want it to be real property so that they can have an easy route to prevent the hacker or spammer from coming back. "You have invaded my real property, and I don't have to prove damages. I get an injunction." It's good for the website owners if it is a "place" in that setting.

On the other hand, if the Internet is a "place," the website owner has obligations under the ADA. Such obligations might be costly, depending on who you talk to. So, in that setting, they would prefer that it not be a place.

So what's the answer? The answer, of course, to each of these questions, whether the Internet is place, property, thing, all or none of the above, will affect commerce, privacy, and other key issues for years to come. The Mercer Law Review Symposium has brought people together from across the country to try to answer the question: What is the Internet? Together with leading academicians, frontline litigators and in-house counsel, who are all struggling with these issues, we will examine the basic questions of the Internet as a property or place.

Our first panel is on the issue of whether the Internet is a place for purposes of the ADA. If you have your program, first let me tell you that there has been a switch in the order. Our first presenter is Henry Timothy Willis, or Tim Willis, for those who are familiar with him. Richard Moberly will be next; and Robin Adams Anderson will speak last on this first issue.

Before they begin, I will do a brief introduction for each speaker, starting with Robin. Robin is a member, a principal, in the firm of Nicholls & Crampton, in Raleigh, North Carolina. Her primary area of practice involves personnel counseling and representing people in employment disputes, including discrimination cases involving age, race,

disability, equal pay, and sexual harassment. One thing that is interesting about Robin is that she represents both plaintiffs and defendants in employment cases, which is very unusual. Usually you get to do one or the other, but she represents both. She graduated from the University of Massachusetts with a Bachelor of Arts. She has a law degree from the University of North Carolina, where she was a member of the Order of the Barristers.

Richard Moberly, seated next to Robin, is an associate with the firm of McKenna, Long & Aldridge in Atlanta. He focuses primarily on employment litigation and also does complex commercial litigation. He primarily represents employers in ADA issues and also works with statutes such as ERISA[5] and the Family and Medical Leave Act.[6] Richard is a graduate of Emory University as well as the Harvard Law School, where he was an editor on the Harvard Law Review.

Finally, Tim Willis. Tim is a sole practitioner in his hometown of Tucker, Georgia, and does work for small businesses and has a substantial practice representing plaintiffs in disability discrimination cases, including disability access cases involving the Internet. Tim, as some of you may know, is also an accomplished athlete. He has represented the United States in the Paralympics in both the 1996 Games in Atlanta as well as the 2000 Games in Sydney. He is a graduate of Georgia Southern University and, most importantly, of the Mercer University, Walter F. George School of Law, where he graduated in 2000.

We welcome all of them, and we will start with Tim.

MR. WILLIS: Good morning.

AUDIENCE: Good morning.

MR. WILLIS: It is quite a pleasure to come out here to speak with all of you about what is in fact a very important topic within the community of people with disabilities and people who represent people with disabilities. I never had any idea this very issue of interpreting the ADA to be a place when talking about websites and Internet accessibility and so forth was such a big issue until about a little more than a year ago.

I was plaintiff's counsel in a case against the Metro Atlanta Rapid Transit Authority, which is MARTA up in Atlanta for those who are not familiar with the State of Georgia [*Martin v. Metropolitan Atlanta Rapid*

5. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2003).
6. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2003).

Transit Authority].[7] One of our allegations in the complaint was that the website was inaccessible and denied people using certain kinds of technology the ability to access information from the MARTA website. In the judge's thirty page decision we got about twenty-four words that said that until MARTA fixes its website, it is violating the ADA under Title II, Title II being public entities.

Well the rest of the case dealt with much more and covered more immediate and important issues, but it was those brief words this judge put in that case that resulted in all four attorneys working on this case getting numerous phone calls for a period of several weeks because that was the first time a judge had stated that, and it was a published opinion.

So it is a big issue. And it is something that the courts have to deal with and struggle with. It is something that companies are going to have to deal with and it is something that attorneys will have to deal with when presenting arguments to courts.

Let me start off and touch on a little bit of what Professor Milani pointed out just a few minutes ago and that is the whole matter under the ADA, a threshold issue. For those who do not know, under every statute there is always a series of questions and tests that have to be met before you even get into the factual situation that is occurring. If you find under the ADA, Title III, that something is not a place, then the ADA does not apply. So no matter what is occurring with the so-called place, non-place, or non-physical space, it will not matter if the court finds the ADA does not cover it. Therefore what happens is your case gets thrown out of court. There has been one decision in that context, which I will talk about briefly, that did exactly that. Fortunately, in the case I was involved in that did not happen on that particular issue.

But when we look at the threshold issue, it is important to look at two things. First, what is the plain language of the statute? What does the statute say? What are the enumerated things in the statute that are covered by the ADA? Second, look at the purpose. What is the purpose of the ADA? Why is the ADA what it is? Why is it there? Why did Congress draft such a lengthy statute thirteen years ago? What was it all about?

I think that when looking at the language, you always have to keep in mind and go a step further and look at the purpose. It is important to look at the purpose from the standpoint of what is the negative consequence that can occur in either direction and whether the court

7. 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

finds that something is a place or not a place. Is this going to end up costing companies lots and lots of money, or is this going to end up allowing or disallowing people with certain sorts of disabilities the ability to access goods and services that are provided on the Internet?

And after I have sat here and said Web accessibility probably a dozen times now and you keep seeing the phrase, many people are probably mystified as to what it means. What exactly does it mean? Well it means that when a person has certain kinds of disabilities, whether it is visual impairment or some sort of orthopaedic impairment with his hands, he has to use specialized software to access a computer. The computer would be no different than a computer in this law school, except it runs an extra piece of software in the background that allows text on a screen to be magnified. It allows text on a screen to be spoken in words. Or it allows someone to use a specialized keyboard to input data. An inaccessible website prevents this kind of specialized software from being used.

So when someone takes one of these pieces of software and loads up a particular website, if the website is inaccessible, then the person using that software or particular device is unable to access any of the information on that site, whether it is booking hotel rooms or airline flights, or just getting general information about the company.

So that is what we are talking about when we talk about accessible websites. We all know what we mean when we say an accessible building. An accessible building is a building that has certain architectural barriers removed so that people with various impairments can access the building. An example would be having a ramp on a store front or an elevator in a multiple floor building. It took many years for architects to grasp those concepts, and now because of the ADA and other laws, multiple story buildings are not built without elevators. They are built with ramps in front of them.

So that is the kind of mindset that Web accessibility and people looking at Web accessibility have to follow. What is it in the architecture of that website that is going to enable people using specialized software to access the same information as anybody else? And with the advances in society and the enhancements of this specialized software, it is becoming more and more crucial that people with disabilities have that same access to utilize the goods and services on websites. There are very few things anymore in today's society that cannot be done on the Web. People, I think I even saw that you can earn a Ph.D. on the Web now. You can do just about anything. Without the ability to use the Web, you miss out on a lot of things in our society.

Today we are focusing on Title III of the ADA, which covers private entities. Entities such as travel services, hotels, bakeries, recreation

areas, auditoriums, movie theaters, and so forth. The ADA enumerates roughly twelve categories, which are fairly broad, and many things can fall up under them. In the Southern District of Florida in the past year, in fact roughly a week after the MARTA case, the Southern District of Florida had a case against Southwest Airlines about its accessible website [*Access Now, Inc. v. Southwest Airlines Co.*].[8]

We all know that all airlines have websites, and that is how most people book their travel reservations. They do this for a couple of reasons. It is usually quicker; they can shop around and browse around; and it is cheaper. At times you can get as much as a thirty to forty percent discount on plane tickets purchased on the Web, discounts not accessible by calling the airline or walking into the ticket office. Just think the last time you called an airline and you got some sort of outrageous rate and the person on the phone said, "Well, you might want to check the Web; you might can find something cheaper." So if you are on the phone, and you could not access that particular rate through the telephone or through the website, you would be shut out of getting that discounted fare.

Well the court in Florida said that Southwest Airlines's website was not a covered entity under the ADA, therefore throwing out the plaintiff's complaint in that lawsuit. And the court found on two grounds why the website was not a place under the ADA. Number one was essentially the plain language of the statute. I am not sure if the judge was expecting the words "Southwest" to be included in the ADA or was expecting the Internet to be included in the ADA, but keep in mind the ADA was passed in 1990, thirteen years ago. I did not know what the Internet was in 1990, and I do not think too many people in here probably knew either what the Internet was. So the one thing that is in the plain language of the statute, which is being argued on appeal, is travel service. Southwest Airlines operates a travel service, and a travel service as you can imagine is something that you utilize to book rates, book fares, airplanes, rental cars, hotels, and the like. Well the court did not agree with any of those concepts and said it is not in the plain language of the statute, therefore it is not covered under the ADA.

The court also went a step farther and said that this website does not have a "nexus" to a place under the ADA. A nexus meaning it is not the means by which you access a place. Now if you look at the enumerated things under the ADA, an airline or an aircraft is not mentioned. A travel service is mentioned. Airlines are not mentioned because there are other laws that cover them when it comes to disability issues;

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8. 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

therefore, it is not included in the ADA. So the judge felt that since the terms airline and aircraft are not in there, it is not a nexus to that place. But of course the plaintiff's contention was that the travel service is the place that is listed, therefore there is a nexus.

And where the judge got this whole concept of nexus from was a case that I think is probably the most similar to this same issue and that is *Rendon v. Valleycrest Products, Ltd.*,[9] which the Eleventh Circuit ruled on about maybe a year and a half ago. *Rendon* was a case in which a group of deaf individuals brought a lawsuit against the "Who Wants To Be A Millionaire" show, and I believe the company that owns that was Valley Crest but everybody knows it as the "Who Wants To Be A Millionaire" show. The reason for bringing the lawsuit was because the dial-in hotline to become a contestant was inaccessible to people with hearing impairments. People with hearing impairments could not utilize their technology with their telephones to bid to be on the actual show. And therefore when the case went to the Eleventh Circuit, the Eleventh Circuit said that the broadcast studio is a place under the ADA and the 1-800 hotline is the means by which people access that particular studio. That is how they become a contestant. They were being denied that ability by them not making accommodations with their particular 1-800 number.

So when we go back and look at what the court is going to look at, particularly in the Eleventh Circuit case, which is going to be heard in about two weeks down in Miami, Florida, I think, at least in my opinion, that people should concentrate on: Does the entity being sued operate a place under the ADA? And there's a lot of case law out there. In fact I was informed last night by Professor Milani that his second year students' appellate brief this year is on that particular issue. But does the entity actually operate a place that falls under the ADA? And if so, how does that entity operate that place?

When we start looking at how that entity operates that particular place, whatever it may be, whether it is the website or whatever, it is always important to look at some of the results that are occurring on the website. Under the ADA you are required to make certain accommodations for what are called auxiliary aids, making sure that people needing certain assistance for certain things in a setting, a place setting, should have the ability to access the same things, whatever they may be. A good example would be if you have ever been to the Fox Theater for a play in recent years. Usually you will see a sign language interpreter up in the front signing. Or at least you probably see it at major sporting

9. 294 F.3d 1279 (11th Cir. 2002).

events and so forth. That is the way an entity is providing an auxiliary aid to provide the same sort of communications to persons with that particular disability.

The next thing to look at when we start talking about the access to the place is: Does the criteria and the method by which the entity is using this website tend to screen out people with disabilities just strictly by the policies and procedures that are in place? Well an inaccessible website that cannot be accessed by people with visual impairments using specialized software will screen those people out. So a visually impaired person using a particular type of software who goes onto that website is screened out from using it. The ADA under Title III clearly bars that sort of activity.

We should also look at whether or not the person's ability to participate and receive the benefits and privileges from a particular entity are being denied. Whether the website is actually giving better rates to people that can access that website than those that cannot access it.

I am a big believer that there should be a broad reading of this statute. The purpose of the ADA is to eliminate discrimination and to expedite inclusion of people with disabilities. The *Rendon* decision in the Eleventh Circuit also stressed the significance of communication barriers and how the ADA was clearly put in place to break down some of the communication barriers. Those things that are occurring on an inaccessible website are definitely erecting communication barriers to people trying to access them.

Also the ability to access any of the other goods and services that an entity might have on their website is important. It is not only the product that the entity is selling, but there are also things that people can join up on and benefit from in a website setting.

And finally I think it is important to remember that because of today's society, it is easy to make a website accessible. It is readily achievable. The people that are arguing in favor of this are not asking for something that's never been done before. They are not asking for a kind of technology that is not out there. It all goes back to the mindset of the developers and the architects of websites. It is readily achievable in today's society and I think very few entities would have a good defense that it is an undue burden, or it is something that cannot be done, technologically infeasible, as some have said.

So this is something that is in the courts now and will be in the courts probably for a good while. It is my contention and belief that private entities should step up to the plate and make changes. There was one case filed about five years ago against AOL on this same issue, and AOL decided to try to, in my opinion, do the right thing. They agreed in a settlement agreement to fix certain things on their computer software

and their Internet sites that would enable people with visual impairments to use those easier [*Noah v. AOL Time Warner, Inc.*].[10] In many respects it is a good business decision because there are many millions of people who use this specialized kind of technology, and when you shut them out, they are not able to access the same things.

So that is all I am going to say for now. I am going to turn it over to the next speaker, and we will have some questions at the end of our panel. Thank you very much.

MR. MOBERLY: Thank you, Tim, for providing that overview. One of the things that I think Tim mentioned and that is important for all of us to keep in mind is that the ADA was passed in 1990. As Tim said, the Internet was merely a glimmer in the eye of most people, and so it was definitely not on Congress's mind. I think everyone can agree that Congress did not anticipate the advancement of the Internet. So I think when we talk about this question, part of it is statutory interpretation and part of it is figuring out how we are going to apply statutes and laws to new technology that develops. There are a number of different ways you can look at it.

There are two extremes in this regard. I do not mean that to be a critical term. I mean that they are at either end of the spectrum. One extreme is that the ADA does not apply to Internet websites. It would not apply at all to any Internet website because the ADA, according to this view, requires a physical place. And as Tim mentioned, that was the view taken by the court in *Southwest*, the one that is on appeal, and Internet websites according to this court are not physical places.

The other end of the spectrum is articulated by a number of advocates for individuals with disabilities, including the National Council on Disabilities, which is an independent federal agency that advises the President and Congress on disability issues. These advocates have come out and said, you know, we need to reconceptualize our idea of place. The Internet has become such an important part of the economics of this country and of our society that in order to advance the purpose, much as Tim said, of the ADA, to incorporate individuals with disabilities into our society fully, we need to apply the statute to Internet websites in general, all Internet websites.

The position I take on this matter is somewhere in the middle and it is utilizing the approach used in *Rendon*, which is the "nexus" approach. Under the "nexus" approach, the ADA would apply to some, but not all, websites, based upon whether the website was connected to a physical

10. 261 F. Supp. 2d 532 (E.D. Va. 2003).

place of public accommodation. In *Rendon*, the Eleventh Circuit looked at an intangible barrier to access, something you could not physically touch, this telephone hotline. Now the defense asserted that the telephone hotline is not physically a place. The Eleventh Circuit looked beyond that and said, no, but it has a connection to a physical place. And that connection means that it needs to be accessible to individuals with disabilities.

I would argue that that same test needs to be used in this context to apply the ADA to some but not all Internet websites. It would apply to some Internet websites, for example the websites that have a connection to a physical place, such as Barnes and Nobles, the book store, which has a physical place you can enter. A physical place communicates with people and permits access to its goods and services through its website, and, therefore, the website ought to be accessible.

Amazon.com, another book seller, does not operate a physical place. Its website under this approach would not need to be accessible under the ADA. So there is some distinction there. We can talk about that. And as I told Professor Milani when I was talking to him about my theory of this three or four months ago, I said, "Well, gosh, both sides of the extreme will be able to find something that they like about my approach." And he informed me, "Well, actually you're going to get attacked from both sides and neither side is going to like you because they're not getting everything they want." So I am prepared for that, and we will talk about that issue.

But there are essentially three different reasons why I think this approach is the best approach of all these three alternatives. The first reason is it best reflects the statutory language. I handed out, and I do not know if all of you have it, it is at the end of each row, but I went ahead and typed out the statutory language that we are talking about, because as Tim said the first thing any court is going to do when they are looking at this issue is to delve into the language of the statute.

The first term you have to look at are the definitions of public accommodations. As Tim said there are twelve different types of places mentioned once you affect commerce. Any of you who have taken constitutional law know that to affect commerce, although it has been narrowed recently, is a relatively broad concept. Merely by walking out this door, you probably affect commerce in some sense. And as you look through this list what you see are physical places. You see inns and hotels, restaurants, motion picture houses, auditoriums, bakeries, barber shops, places that you can physically enter, that people physically access.

Courts such as the court in *Southwest* and the court in an unpublished opinion, and in other types of intangible areas have looked at this language and said, you know, we are going to require a physical place.

And the court in *Southwest* said that airline websites are not physical places. Courts have held that insurance policies, membership organizations, and newspaper articles are not physical places. All of those places have been found not to be physical places, and therefore they are not places of public accommodation. Courts reached this conclusion through two canons of statutory construction. For those of you who are taking a statutory construction class, we will delve into this just a little bit.

The first is a canon called *noscitur a sociis*, and what that means essentially is that you judge a person by the people they surround themselves with. The people who argue for a broad application of the ADA to the Internet will look at terms such as travel service in (f) and public display in (h), and much like the plaintiff in *Southwest* will say, you know, we are a travel service. That ought to be read very broadly. Well what that canon of statutory construction says is, when you have a broad and ambiguous term like travel service, you interpret that term by looking at the other words that surround it. So for travel service, for instance, you are looking at a beauty shop or a barber shop, a shoe repair service, an insurance office, or the office of an accountant or lawyer. All of those are physical places, much as with public display which is near the terms "museum" or a "gallery." And so you would interpret those types of travel service places not as broadly as the plaintiff would want you to in *Southwest* but as physical places.

The other argument used in *Southwest*, was that, we will look at these broad kind of catch-all terms at the end of the sections: Other places of exhibit, exhibition or entertainment; and other service establishments. We ought to be one of those other places. Another canon is called *ejusdem generis*. This canon means that when you have broad catch-all terms, you interpret them in light of the terms that come in front of them. And this is, quite simply, a way that we can reduce the scope of acts of Congress so that we make sure that we are covering only what Congress wanted us to cover. And so you would look again back to the physical places. That argument has been used in other types of contexts, as I mentioned before.

Under the nexus approach, you accept the premise that the ADA must apply to a physical place because we are going to read the statute narrowly. That reading is reinforced by the language of the regulations. The ADA does not actually define a place of public accommodation, it defines "public accommodations."[11] A "place of public accommodation" is defined in the regulations as a "facility operated by a private entity who falls in one of [these twelve] categories."[12] The regulations then

11. American with Disabilities Act, 42 U.S.C. § 12181(7) (2000).
12. 28 C.F.R. § 36.104 (2002).

define "facility" in very physical terms: "Any portion of buildings or structures or sites or complexes."[13] So I think there is statutory and regulatory support for reading that provision very narrowly.

But here is where the judge, I think, in the *Southwest Airlines* case did not go far enough. Once you realize that a place of public accommodation is a covered entity under the ADA, such places have very broad antidiscrimination responsibilities. So a relatively narrow application to a specific group of covered entities leads to a very broad antidiscrimination prohibition.

There is a very general prohibition under the ADA: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations."[14] That is a very broad list of prohibitions. And what the court in *Southwest Airlines* wanted to do is say, you know, what we are really talking about with that is just physical access. As Tim mentioned, typically this statute has been used to require building ramps for people in wheelchairs and other physical changes. But the court in *Rendon* says, no, it is not just physical access, it is also intangible access, any way you access your goods or your services. Once you are a covered entity, you have to provide equal enjoyment of your goods, services, etc. So therefore, under the nexus approach, if you are a physical place of public accommodation and you give access to your goods and services through your website or you communicate through your website, then you would fall under this general prohibition on discrimination by not having your website accessible.

Tim mentioned several of the specific provisions that are also listed, such as a failure to make a reasonable modification and failure to provide an auxiliary service or aid, such as a Braille reader. I think it is a pretty reasonable interpretation of that statute to say that once you are a covered entity, if you do not provide an auxiliary aid by changing the way your website is accessed, then that is going to be discrimination under the ADA. But that should not be applied in general to Internet websites across the board because a lot of Internet websites do not have a connection, they do not have a nexus, to a physical place.

The second reason that I think this nexus idea works is that it accurately reflects better than the other two approaches what we really use the Internet for today. Under the ADA there is a distinction between providing access to a place's goods and services and making that place change the content of its goods and services. The ADA requires the former but not the latter.

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13. *Id.*
14. Americans with Disabilities Act, 42 U.S.C. § 12182(a) (2000).

An example in the regulations is of a book store. If a visually impaired person wants to access your book store, you have to let them in. You have to sell them books, just like you would anybody else. But what you do not have to do is stock Braille books for them to read unless they ask you specifically. So there is this distinction between access and content.

Under the nexus approach, when you are looking at the Internet, the unique thing about the Internet is that it is really both, isn't it? It provides access to goods, but for a lot of places it is also the actual content of the website. And if you apply the ADA too generally to the Internet then a place like Yahoo! or eBay or Map Quest is going to say, "I shouldn't have to change my website because then I'm changing the content of my good or service because the content that I provide is the website." If you apply it too narrowly and do not apply it to any website whatsoever, then you will not be able to utilize the access function, that the ADA will not be providing access to a certain thing.

What the nexus approach does is draw a very rough line between Internet sites that are connected to physical places and ones that are not. What that line does, I would posit to you, is recognize that a physical place is more likely to have a good or service that is not on its website. It is more likely that a physical place of public accommodation is going to use its website in a way to allow access to its goods and services and to communicate, and that is precisely what the ADA requires of physical places, equal access. However, it is more likely that an Internet only website is going to be the content of the goods or services it provides. Under the nexus approach, by not applying generally to those websites, we can avoid the debate over whether a website will be required to change its content, which the ADA does not allow.

The third rationale for the nexus approach is that it leads to a better policy result. On matters such as this, Congress ought to decide how to apply statutory requirements to new technologies. This is a congressional function.

The important thing to remember is that when Congress wants to speak on technology issues, it does so very specifically. In fact, in Title IV of the ADA is an entire section related to the telecommunications industry and the requirements to have a Telecommunications Device for the Deaf (TDD) display. There are all sorts of regulations set up, but Congress separated that part out and spoke to that very specifically.

Eight years after the passage of the ADA, Congress amended the Rehabilitation Act,[15] the predecesser to the ADA. The Rehabilitation Act applies the same antidiscrimination issues to the federal government but only to the federal government. The ADA was passed to expand those prohibitions to private entities.

In 1998 Congress amended Section 508 of that Act to specifically require federal agencies to make their Internet websites accessible. I would argue by doing that, Congress implicitly had the opportunity to change the ADA and make it specific to apply across the board to Internet websites, and it did not do it. I think those two things show a congressional intent that they are going to wait on this. They are going to see how the Internet develops, and how that technology develops. Our elected bodies are there to balance the needs of individuals with disabilities with the burdens that would be placed on the business community, and at this point they have not decided to do anything about that. And I think we ought to wait until Congress wants to speak to that issue specifically.

There are two other policy reasons why I think this nexus approach works. First, as a jurisdictional matter it makes it much easier to apply the ADA because it will be grounded in a physical entity that we know is going to be located in the United States. We can then attach onto this physical entity; we can sue it, and we can get it into court. I am sure we will talk about what it takes to get into a court under the ADA later. But that physical place will make it much easier for us to bring suit under the ADA than if it applies to the Internet generally. Who knows where the Internet website is going to be located? How are you going to figure out what server is going to be accessed? Is it just merely going through an American server? Is that enough to get personal jurisdiction? Those issues I think you would avoid under the nexus approach because you'd be grounded in the physical requirement.

And finally, I think this requirement again is a middle ground approach that would allow us to have experience with this requirement before we burden an entire industry with this requirement. To allow Congress to take a look at, okay, here are places of public accommodation that are making their website available. How much is it actually costing them? How much of a burden is it really? And is that enough of a burden that we want to put on them? Is it important enough to make all websites accessible if we're going to change the law to make it apply to everybody? So it provides a test run to see if this would work or not.

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15. Rehabilitation Act of 1973, 29 U.S.C. § 701-796i (2003).

For all those reasons I think that the nexus approach requires, although there are some distinctions here that we are going to have to deal with and talk about, I think what it does is it fairly represents the purpose of the ADA because the purpose of the ADA is to apply to a specific group of private entities very broad antidiscrimination principles, and that is really what we are doing here. Otherwise I think we would be reading into a statute a very broad prohibition on discrimination on a very broad group of entities that Congress did not necessarily intend to have subject to the ADA.

I am going to now pass it on to Robin and let her talk about that, and then we will take some questions.

MS. ANDERSON: Good morning. First I would like to thank Mercer Law School and the members of the Law Review for their offer to be here this morning and the wonderful hospitality they have shown me on my first trip to Macon. I am a member from the state of North Carolina and to some of y'all, a Yankee. But to be able to come so far south of the Mason-Dixon Line is truly an honor.

Second, as I launch into my time, please remember that the contentions that I am going to set forth here—that the Internet is not a place of public accommodation that should be accessible to all members with disabilities may not be those of my personal beliefs. But as I drew the short straw, that is what I will be setting forth. So therefore, my argument may not seem to be politically correct. However, I still think and contend that it is supported by case law and by practical application. It kind of sounds like I am not really a lawyer, I just play one on television. So just bear with me.

As Professor Milani did mention, I do practice on both sides of the fence when it comes to discrimination issues. And for anyone who knows the Fourth Circuit, which is where my jurisdiction is, you would know that is a matter of necessity rather than one of choice.

But having said that, before I came down here, my assistant and I reviewed my practice and took stock of where my litigation is going. Have I effectuated good? What kind of clients have I represented? And I thought that coming to the symposium was a good opportunity for me to go back over my thirteen years of practice and look at my discrimination litigation and determine what I have done. The result of the review was interesting.

The ADA was enacted the same year I graduated law school and actually helped me determine what kind of litigation I wanted to do. It is a fairly substantial part, about maybe one third to one half, of my practice. What I determined is that over the years I have assisted in over seven million dollars in settlements or reasonable accommodation

costs in disability litigation. Well what was most interesting about that number was not what was the total amount number, but the fact that it was a dollar here and a dollar there. Almost every case was what I would call a baby step. That is, every case that I am involved with, especially in the Fourth Circuit, has been with very, very slow progressive change. On a case-by-case basis each lawyer tries to be able to fit the facts with the law and with the judge. Hopefully, the client's goals are accomplished.

Before I flew down yesterday, I consulted my most valuable resource on the topics of my life. I picked up the phone, and I called my mom. She was very interested in the symposium topic we are covering today. Four years ago my mother lost her sight. She has since been battling learning Braille, trying to get around, and she is extremely mad that she lost her license. She still does not understand why she should not be able to drive, but that is outside today's point. As she is very opinionated and not able to keep her opinions to herself, she shared her thoughts about whether the Internet is a place of public accommodation. That is probably where I get it from. But anyhow, I talked to her about the topic. And I thought her take on it was rather interesting and a little shocking being her daughter.

I went on and explained about the Internet and the ADA. My mother actually goes on the Internet quite frequently. As she is my greatest source of junk e-mail, I know how much she uses it. But, anyhow, she said, which I found rather interesting, "Look, I think I should be entitled to find and enter the front door of Wal-Mart. I also think that I should be able to find and have access to public restrooms. But, you know, I am not really sure I want equal access to all of those websites of pornography." After I stopped chuckling, I said, "Mom, how do you know about those pornography websites?" She replied, "Because your dad told me." I said, "I don't want to know this. This is too much information."

I stopped to realize that as we discuss equal access to all websites, the question becomes: Do we want to have them all accessible, or are there only specific websites? For example, let us say you like to go camping, and you are a big L.L. Bean fan. You may want to make sure that its catalog website is accessible to all those with disabilities. Or are we talking about having accessibility to everything?

Which leads me to my dad. One of the things that I was trying to determine is that if we go from Mr. Willis's approach—that it should be blanket accessibility—or Mr. Moberly's nexus approach—that if you have a store front then you have a heightened responsibility to provide public accommodation—I started thinking about my dad. My dad calls it his little "stash of cash." He has decided that he wants to have a separate checking account with a little spending money, and he carves wood

ducks. And so he spends his year carving, and he sells his wares at his little store front. Well, one of the things that a family member has done is design a website for my dad, and most of his work is sold through his website. And that is how he gets his carvings out there to the buying public. And we are not talking about a great amount of money here, we are just talking about a little spending cash. Well, the difficulty is if we go and we follow some of the thought processes presented here, it will cost him a certain amount of money, which I will talk about in just a minute, in order for him to have his website accessible to all.

Further, if we are not careful in defining what type of website is going to be accessible or not accessible at what cost is it going to be for the rest of us? Is requiring across the board accessibility going to basically stop E-commerce and trade? Even for those of us who sell things on eBay? I mean, at what point are we going to balance the economic interests? And would somebody like my dad be shut down because he could not afford to have a website designed that is going to be accessible to all?

My understanding from all of the research I have done is that the goal and the purpose of the Internet is to level the economic playing field. It is to allow the Mom and Pop stores, say up in Seattle having a small camping and supply store, to be able to get their goods and services out there on the same level with L.L. Bean. The thing is, if the courts adopt the nexus approach, then those same two vastly different companies will have the same obligations to have the advanced software that is going to allow disability access. It will cost the same for the Mom and Pop store as it would for L.L. Bean. Identical cost to amend or modify their websites.

One of the facts I found interesting is that ninety-eight percent of all websites are not accessible to the disabled. I am in charge of our website for our law firm, and I have not gotten a solid answer yet about whether or not my law firm's website is accessibile to the disabled. For all of us who have individual or company websites or who have family members who own websites, it is most likely that they are not accessible.

To further add to the difficulty, congressional hearings occurred and stalemated. There has not been any discernable result from those discussions in Washington. I think that one of the challenges to Congress is that it is not clear cut on what you do to make your website accessible. There is a book that describes how to design an accessible website. But one of the difficulties is that every individual with a disability may have different types of software, for example, those for the hearing impaired or physically impaired or mentally handicapped. The ADA covers a wide variety of disabilities without a single solution. For example, it is not like widening your door or putting in a ramp, which was contemplated by the ADA. There is not a single concrete solution.

And I think part of the difficulty, of course, that we are talking about is the Internet. How to fix this problem may be cost prohibitive. To second-guess what the new technology will be and to make sure each company has a website that will accommodate for each of the different disabilities will be economically infeasible.

One of the things that I was able to do prior to coming here today as recently elected Chair of the State Personnel Commission for the State of North Carolina, a bird's eye view of the 120,000 state employees in North Carolina, was to access the information on the economic impact of website accessibility on a larger employer. However, different than the issue being addressed today, state and federal governments are regulated by a different disability title with a higher responsibility to the public to make sure that their websites are accessible. What was interesting about North Carolina's state legislation is that North Carolina had certain financial caps. The legislation stated that if the cost of the modification was going to be in excess of a certain percentage of that individual employee's salary, then it would not be required to install that accommodation. New legislation has removed the cap from the statute. State agencies are now required to make all accommodations, irrespective of cost.

I placed a call to locate what it costs the State of North Carolina to make the web accessible for all individuals with disabilities. They are in the process of trying to identify that number, but it was significant. A difficulty is that the state would get a request from somebody with a particular software need that they had not come across yet. The state would have to go out and make sure that they could accommodate it. As the Internet, software, and disabilities are constantly evolving and changing, this can make accommodation impractible. So even though North Carolina determined that they had at one point caught up, evolving software was costing the state a substantial amount of money to accommodate it. Now if a state is having that much difficulty doing it, I cannot begin to even imagine what my dad is going to be able to do.

And at some point I read information regarding a "universal Web page" that allows a web designer to accommodate a substantial variety of disability needs. Various sources indicate that to require such a design for everyone would most likely shut down all the Mom-and-Pop websites.

But obviously there are some very significant public policy issues at the core. There are 43 million Americans who have a disability, either mental or physical. There are 10 million who are visually impaired. And of those 10 million visually impaired, there are 1.5 million who use the Internet. Now, it would seem logical that if you want to be able to sell your goods and services, you would voluntarily do the "right thing,"

and be in compliance and on the cutting edge. L.L. Bean's goal is to service its customers and be out in the marketplace and sell. One would hope an accommodation would occur voluntarily. However, the difficulty is that it is not happening voluntarily, and that is why there is now litigation. It is my impression that the only reason why companies are not in voluntary compliance is because of the economic cost.

AOL Time Warner settled a lawsuit approximately five years ago, and voluntarily did the "right thing" by redesigning web access. However, this type of change will be slow in coming. Part of the difficulty is getting consensus in the Internet industry: Having them getting their hands around what websites can do and how websites can be designed most cost efficiently.

Now, Professor Milani did address how the language of the ADA and the evolving terminology of the Internet may be consistent. There are chat "rooms" and the information "highway."

Now, alternatively, there is the term "Internet," a network to bring interrelationships or intercommunication together. It is my opinion that the label "Internet" as a "network" is not a "place" as defined under the ADA. It is a means to bring people together—the "Worldwide Web." Other terms are "cyberspace" and "virtual reality," which also do not connotate "place." Metaphors are extremely important in how we and the courts identify whether the ADA applies to the Internet. When you address these terms, most of the courts hold that the Internet is not a place of public accommodation.

Personally, the Internet is a liquid, interactive newspaper because that is how it functions for me. I use it mostly for research. I occasionally go onto eBay to see if I can find something interesting. But primarily for me it is not commerce but a means of gathering information. I think to each one of us, as it is a fairly new phenomenon and was not readily available until 1993, the Internet is an evolving concept. As such, litigation has only just surfaced in the last two years, since 2002.

The first case you have heard about is *Southwest Airlines*, where a virtual ticket counter is discussed. The court in *Southwest* held that a virtual ticket counter is not hooked to any physical, geographic location. The court in *Southwest* distinguished itself from the *Rendon* case ("Who Wants to be a Millionaire") holding that a fast-finger exercise on the telephone was causally connected to a physically, located phone bank, and therefore, the ADA applied.

It appears that both the "virtual ticket counter" and a telephone line fast finger connection are legal fictions. Where is the difference between a phone line and a telephone call to win a million dollars and then the disabled customers of *Southwest* on the Internet trying to get a cheaper price for their airline ticket? The Eleventh Circuit, where *Southwest* is

on appeal, will have to address and resolve some of these intellectual and legal problems that technology has created. For now the federal district court in *Southwest* has definitively held that access to the website, this virtual ticket counter, was not a place of public accommodation.

I contend that the decision in *Southwest* is supported by, and is consistent with, other types of analogous litigation. For example, there was a case in the Supreme Court of California by a former employee who was really unhappy with the way Intel had terminated his employment [*Intel Corp. v. Hamidi*].[16] He somehow got hold of his former employer's e-mail address list. The former employee lost in the two lower courts but he was successful on appeal at the California Supreme Court. The employee had sent out mass e-mails six or seven times. Intel contended that its e-mail addresses were defined as property. Intel argued that the employee trespassed into its e-mail system, and he came onto its property. Intel warned him not to do it. He did it again. The employee responded and couched his argument under a First Amendment analysis and a right to free speech, and that it was not trespass. The employee's argument was that e-mail is not a place but a thing. Perhaps another state cause of action, for example, tortious interference with contract or other action might apply. This opinion was touted as a huge victory for individual personal rights. The *Intel* decision, holding that the Internet for e-mail purposes is not a place of trespass protecting individual rights in California, is inconsistent with arguing it is a place for public accommodation under the ADA.

Even under the *Intel* rubric, I think the case law as far as the opinion in *Southwest* is fairly clear, at least in the Southern District of Florida, that the Internet is not a place of public accommodation. However, on the other hand, we have "Who Wants to be a Millionaire?" and whether that is the "final answer" or not as to whether or not there is some kind of distinction between a telephone line and accessing information on the Internet.

One of the other interesting cases is *Noah v. AOL*, decided under the Civil Rights Act, where a gentleman had been discriminated against based on religion in a "chat room." The court stated that a chat room is not a place of public accommodation and the statute did not apply.

So the question is—where do we go from here? We have at least 1.5 million visually impaired, and numerous other hearing impaired and others with disabilities, who use the Internet and who do not have access to practically ninety-eight percent of the websites. It is apparent

16. 1 Cal. Rptr. 3d 32 (Cal. 2003).

that something needs to be done. However, I am not sure exactly what. Litigation under the ADA is not the answer. Congress needs to address the issue of web accessibility under the ADA. But Congress has not stepped up to the plate even after its hearings.

My proposal, for consideration and thought, is neither across the board accessibility nor the nexus approach discussed earlier, but a balancing test similar to that in the employment context. Under Title VII, there are terms like "reasonable accommodations." And most importantly, under employment disability discrimination, there is a small business exception for employers with under fifteen employees. A compromise in Congress was reached to allow small businesses exemption from the ADA for certain purposes. Now obviously we cannot count heads of employees for website accessibility purposes, but perhaps an economic line could be drawn. There needs to be a dialogue that balances the economic interests of making sure that we have an ability to keep smaller websites out there, functioning and flourishing, but also be able to prioritize the majority of software needs to allow as many of the disabled Internet accommodation.

And hopefully as these symposium discussions grow, word to businesses to self-regulate will spread. I have already written an article for my law firm's newsletter that is disseminated to employers to be more consciously aware of Internet restrictions. If there is an ability to show them that they can accommodate in a cost effective way, they will voluntarily opt to do so. I believe over the next five years an increasing trend by websites designers will be noticeable.

PROFESSOR MILANI: Thank you very much for three very enlightening presentations. I will try to ask a few questions, and then I will open it up to the rest of the panel.

First, I would like to ask Tim Willis a couple of questions about the concerns Mr. Moberly raised regarding the issue of cost, specifically the cost to small businesses. Tim, can you give us an idea of what it costs to make a website accessible, and what is your response to the concerns that they have raised?

MR. WILLIS: Yes, I do understand that there is a cost, but cost is usually when you have to go back and redo a website after it is already been done. I am currently plaintiff's counsel in a case against a hotel chain about their website. It is in the discovery phase now. And based on our expert witness, the cost is in this litigation, in hiring expert witnesses, and not in actually fixing the websites. But according to my expert witness, most of these websites that are the subject of this kind of litigation are built with what is called templates, and there are ten or

twelve templates that filter all the information through the website, that anytime information comes into the website it goes through these templates. And if those templates are built correctly, then the website is accessible.

Now I will say that in the MARTA litigation, when they had to make their website accessible, the cost that they incurred was because they had to redo their entire website because it was pretty much totally inaccessible. I do not remember the dollar figure in the settlement agreement. They had to spend so much for the next three years in actually having an expert monitor the website, and I do not recall how much the extra price was, but I do have some sympathy for, or some concern for what Robin brings up, the small businesses. And, really, from a practical standpoint I probably lean that way as well, that there are some entities out there that should not be burdened. But the ADA provides the defenses for undue burdens and so forth, and you have to get by the first threshold issue. So I think the defenses are in place under the ADA. It is just a matter of going beyond that to then do the balancing test.

PROFESSOR MILANI: Okay. I will move next to Richard Moberly. Richard, the only reason I told you that it is difficult to be in the middle is I have been in that position. It was meant to be a warning. I wrote an article a few years ago, which was published in the *Wisconsin Law Review* that had to do with an ADA issue about whether you needed prior notice before you could sue public accommodations.[17] Some courts had said you always have to provide notice and a person has to exhaust administrative remedies, and some courts had said you never have to provide notice and you don't have to exhaust administrative remedies. I took a middle position, and everybody was unhappy with me. So I sympathize with your plight today, and that was what I was trying to let you know about.

My concern here, we talk about small businesses and costs and the approach which I understand you are advocating, is that we can have an entity like Amazon.com or an entity like Yahoo!, which are both publicly traded businesses. Their stock was worth a lot more three years ago than it is now. But nonetheless, they are both multi-million dollar corporations in terms of their market value. They may not generate that much profit. Those companies would not be covered, but the Mom-and-Pop store would. How do you respond to that concern?

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17. Adam Milani, *Go Ahead. Make my Ninety Days: Should Plaintiffs be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act?* 2001 WIS. L. REV. 107 (2001).

MR. MOBERLY: The first thing I think we ought to remember is that there is nothing wrong in the law with having distinctions between different types of businesses. In fact, some have said that it is the purpose of the law itself to draw distinctions. So even under the ADA, under Title I, Robin mentioned the employment situation, the ADA does not apply if you have fourteen employees, but it applies if you have fifteen. That is a distinction. The ADA in Title III itself does not apply to all commercial entities. It applies to places of public accommodation. Places that are not open to the public, that operate warehouses or run out of their garage and sell things solely over the Internet, would not be covered by the ADA. So there are distinctions within the ADA itself.

I think, though, that your criticism has some validity. I do not want to underplay it. And I will even put it in a more stark contrast than I did before. You have two pretty much equal entities in Barnesandnoble .com and Amazon.com, who are doing the same thing. Yet one is going to be under this burden and one is not. However, when you open up a public place, there are certain burdens that you take on. When you open up a store front, you have to make it accessible whether it is by a wheelchair or not, or whether it is physically accessible, and I would say or whether it is accessible over the Internet. There are burdens that Congress has decided to place on entities that open up physical places of public accommodation, and Congress has not decided to make those burdens applicable to companies that don't do that.

For example, I think there is a misconception that under the ADA if you ran a catalog-only service, if you had a big warehouse and you just sent out catalogs, I think there is a question under the ADA whether your company would even be required to comply with the ADA because you don't have a place that is actually open to the public. You send out catalogs. I would put the Internet in that same type of situation, where if you do not operate a place open to the public, you merely are communicating through mass communication from your warehouse. That is my view of it.

And I think there are a number of justifications for why you would have that distinction. At the end of the day, maybe that distinction will make Congress act.

And the other thing I think is important to remember is that by having a more nuanced approach, that as an economic matter, once businesses start making their website accessible, those 1.5 million consumers are not going to go to Amazon.com, they are going to go to Barnesandnoble.com, who is going to get an economic boost from that, which hopefully may lead to some private resolution of this. I mean Amazon is certainly going to notice that. And of course, when I have told people that before, their response, and I think it was a good one, is,

well, shouldn't that happen anyway? You know if there really is an economic benefit to it, shouldn't Amazon be doing it already? But I think what the experience of the ADA has taught us is that there is an economic benefit from making places physically accessible and accessible in general, but that companies tend not to notice it until they are forced to do it. And there are a number of studies out there whereby forcing companies into compliance with something like the ADA they actually will reap economic benefits from it but they are not necessarily willing to take that risk on their own.

PROFESSOR MILANI: Before I ask Ms. Anderson a question, I will agree totally with what Mr. Moberly said. There is a great story which goes back to the Rehabilitation Act which he mentioned applies to people who receive federal funds and federal governmental entities. One of the first cases that was brought dealt with the accessibility to the post office, which is run by the federal government. Someone sued the post office saying that it was not wheelchair accessible because there were a number of steps up to the post office. The postmaster did not understand why that was a problem because he had never had people in wheelchairs in the post office. Someone explained, yes, because there are five steps into the post office.

People have taken that same approach in the business arena. "We don't have people with visual impairments coming into our store or our website," or "We don't have people with auditory impairments requesting interpreters." That is true because, if they are not available they will not be requested. So it is a matter of the mindset.

I think this goes back to something which Tim Willis said in the beginning and that is it was not until architects were told by federal law and state law that you have to start designing buildings in a way that ensures access (there are ramps, there is Braille on the elevators and on the bathroom doors) that they began doing that. And maybe the same thing should happen here.

My question to Ms. Anderson is the approach that you advocate, let's carve out a small business exception, I am not sure that the number of employees is perhaps the way to do it. My question is: What about if you put into the regulations that if your website gets X number of hits (I have no idea what X would be), then it is covered by the statute. If it gets fewer hits than that, then it should not be. Is that an approach which you would be comfortable with and how do you see it working?

MS. ANDERSON: We are out of time, aren't we?

PROFESSOR MILANI: We have five minutes.

MS. ANDERSON: I think that the restriction is in the language of the statute. I would agree that some sort of small business exception might be the right way to do things under the current ADA. However, it is my opinion that there needs to be an amendment to the ADA. The language of the statute, the strict interpretation of the "public accommodation" language, specifically enumerates "inns, motels, hotels, restaurants, bars, etc." The Internet is nowhere even contemplated in this language. The list addresses physical locations. A few of my personal favorites are funeral parlors and shoe repair services. Now can you imagine what the legislators who were drafting this language did? They must have jotted down everything that they did over a month's period to figure out what they were going to define as a place of public accommodation, and obviously the Internet did not make the cut. And so I think that what is going to happen is that through congressional dialogue, they will need to change the language of the ADA. Under the current language of the ADA, even with a small business exception, the enumerated list is not inclusive of changing technology and does not allow for expansion.

PROFESSOR MILANI: Thank you. And do we have any questions from the audience? Professor Nehf?

PROFESSOR NEHF: I was wondering if any of you know whether or not Congress is contemplating or had legislative discussions about this issue?

MR. MOBERLY: The House Judiciary Committee held a hearing, a day long hearing. They had Internet business representatives; they had advocates for individuals with disabilities; they had technical people describing what it would take. I have read the entire transcript, and I think Robin describes it best as inconclusive. You have people who say, if the ADA applies, we are going to be tearing down millions of websites every day to make them accessible and it would be a huge burden. And then you have other people who propose the position much like Tim did that this is really not going to be that big a deal if you do it, especially if you do it from the beginning. I think revamping a website everyone agrees would be a more arduous task.

From a legal matter, you know, they debated the exact same things that we have debated here today: Should it apply? Nothing has happened.

PROFESSOR NEHF: But no legislation is proposed otherwise?

MR. MOBERLY: No.

PROFESSOR MILANI: Any other questions? Yes.

AUDIENCE: My question is directed to Mr. Moberly who brought up this point, but anyone from the panel may answer. You brought up the point that for someone like Amazon.com, he would have to change the content of his website. I guess my point would be that they would be changing more than the format of their website. I am just having a difficult time understanding that distinction.

MR. MOBERLY: Sure. That probably depends on whether you look at the glass as half full or half empty. I mean I think the argument that was pertaining to Amazon or Map Quest is that the very format, how they set it up, is a business decision, the way they present their material, that they should not have to change. There is almost a proprietary way in which you set up something to make it easy for the user you anticipate using it to use. There will be changes. An accessible website often looks different than a nonaccessible website. Part of the problem with all of this is, in the early 1990s, the Internet was basically textual. If you remember, it was very boring to look at. I mean you just read text. Now because of broadband, people have greater access. There are rockets shooting up, colors moving around, pictures coming in and out, and a lot of places believe that that is a very proprietary way that they are presenting their business. And to get rid of some of those for someone who is let's say color blind, reducing the amount of colors on the screen, for someone who is learning disabled making it a simpler way to use the website, for someone that cannot move their hand very well and can't use a mouse, you need to tab from various column to column as opposed to pointing and clicking. So I think that is kind of a content issue. But I see your point. I think that is a good point. I do not know if anybody else wants to address it.

PROFESSOR MILANI: There was a question over here also.

AUDIENCE: This question is not so much about the legal issues. It is more a question for Mr. Willis. Just as a practical everyday attorney in the field, so much of our research, especially unpublished opinions, is done on the Internet. I was just curious as to what some of these legal research sources on the Internet have done to accommodate.

MR. WILLIS: Okay. That is a very good question and very much on point. I was a law student here not very many years ago. And of course, the vast majority of our legal research was done, well, I guess it was supposed to be done in the library but, you know, people did it on Westlaw. And when I was in law school in the late 1990s, Westlaw, their website was kind of accessible. It probably would not pass any sort of accessibility standard of an expert looking at it, but also at that time the assisted technology software that I was using was not nearly as advanced as it is now because it has made rapid advancements. But due to section 508 of the Rehabilitation Act, in which Westlaw had a huge federal contract, the federal government told Westlaw if you want to keep your federal contract, you need to make sure your website is accessible. Actually they have a separate website that is actually called Text.Westlaw.com and, if you want to see what an accessible website would look like, they have stripped it down. The goal of Westlaw, number one, is to meet the accessibility requirements so they do not lose their federal contract. By using Text.Westlaw.com, you are able to consult text, you are able to actually use it in a courtroom through a mobile device because it does not take up as much to download information and so forth. So Westlaw took it from two approaches. Number one, to follow the mandates of the feds but also to hope to grow its business so that people could use that in a more remote way.

But, yes, the other thing on the day-to-day stuff as an attorney, there is a thing out there called pacer [public access to court's electronic records]. I do not know if you all are familiar with it, but courts use it to post all of their decisions. From my initial view of that, it is not accessible. And that is a federal service and federal website, and I do perceive that at some point a Title VIII claim being brought against the federal judiciary. I do not know who is going to rule on that, but I am sure someone will lodge a complaint at some point.

PROFESSOR MILANI: Other questions? If not, then we have done the impossible. We have finished precisely on time. I would like to thank our panelists for their presentations this morning.

(SHORT BREAK)

PROFESSOR MILANI: Thank you for those of you who have returned. To those of you who are just coming, welcome. I have a quick announcement. If we have any attorneys who are here to get CLE credit, please make sure you have signed up so you can get CLE credit. I see some of our more recent graduates whom I assume are here to get CLE credit. They are not just here because they are interested in the

topic or because they work for the law firm of one of our panelists. But even if those are true, you can still get CLE credit, so please sign up.

Our second panel this morning is going to deal with the issue of spamming. And any individual who has an e-mail address receives spam. Some of those spams you delete really really quickly because you do not want anybody coming to your computer seeing some of these "Re" lines on there. We will not get into those since it is going to be transcribed into the record, and I do not want it to appear after my name. So you receive spam, and you probably hit the delete key very quickly. And the question is whether the ability to hit the delete key very quickly is enough of a solution to the problem that the Internet Service Provider (ISP) should not have to worry about it. Or do the ISPs have greater concerns?

Our first presenter is Jennifer Granick, who is a lecturer in law and Executive Director of the Center for Internet and Society at Stanford Law School. Ms. Granick is nationally recognized for her expertise across a broad spectrum of Internet issues including computer crime, national security, and constitutional rights. She is a graduate of the University of California, Hastings College of Law.

Our second presenter is Paul F. Wellborn, III, known as Pete, who is a founding member and a partner in the firm of Wellborn & Butler in Atlanta. He is most well known probably for representing Earthlink, the Atlanta-based ISP. On behalf of Earthlink and others, he has obtained multi-million dollar judgments against spammers. He has also been an adjunct professor at both of his alma maters, Georgia Tech and the Mercer Law School, teaching about Internet law. He is here today to talk to us about his perspective, as someone who represents ISPs.

But first we will begin with Ms. Granick.

MS. GRANICK: Good morning. Thank you for having me. So let's have a short quiz. How many people here use the Internet? Okay. How many people here use something other than e-mail or the Web? A couple of file sharers back there. How many people, with their e-mail, how many people get spam? How many people think spam is a problem? Okay. How many people who are getting e-mail spam are using Earthlink? That is me, too. So maybe Earthlink needs to crack down more.

But what I am here to argue is —

MR. WELLBORN: I get my turn in a few minutes. She gets twenty minutes.

MS. GRANICK: I am here to argue something different than that the ISPs need to crack down more. I am here to argue that the metaphor of cyberspace as place is actually a proxy, that that metaphor has become a proxy for efforts to control content. Is the Internet a place? Clearly, no. It is not a place like other places that we have been. It is not a place like Mercer Law School. But it has the characteristics, some characteristics like a place.

Is the Internet a thing? Clearly, no. It is made up of things. It is made up of computers. It is made up of wires. But together it is a network. And the thing about a network is that networks have network effects. They have emergent properties. They are something more than the sum of their parts.

But the metaphor of cyberspace as a place or cyberspace as things is accepted currently. A lot of it feels right. When you are in a chat room, in the old days back when I got on the Internet back in 1991, we did not have chat rooms, we had channels. You had channels and IRCs. You did not have that metaphor, you did not even speak of it as being a room. That is a more recent development, the idea of where you chat as being an actual physical place, and it is not necessarily the way that we have to look at it. There are other ways to look at it, too. But that metaphor, that experience when you are on the Internet, of it being a place is something that feels right.

And so as a result, what courts have done—because the Internet is new and also because many judges, unlike people in this room, actually do not use the Internet—is that judges have looked to metaphors or analogies or comparisons with things that we are more familiar with in order to figure out how and when to regulate the Internet.

So our discussion right now is about spam. And I am going to define spam. Spam is usually defined as unwanted bulk commercial e-mail. There are other kinds of unwanted e-mail which we will talk about in a little bit. But usually when we are talking about spam, we are talking about those commercial solicitations that we are all so familiar with.

The first case that really looked at, or really used, the concept of the Internet as a place upon which you could trespass, a place where unwanted contact or unwanted messages, unwanted electrons really, because that is what all messages on the Internet truly are is just electrons, were a trespass was in 1996, *Thrifty-Tel, Inc. v. Bezenek*.[18] This case claimed an act of conversion, a type of theft, against the parents of some phone phreaker kids. Who knows what phone phreaking is? Thank you, somebody does. Phone phreaking is a type of

18. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

computer hacking involving the phone system, and you need an intimate knowledge of the system and how the switching system works, and that can give you an immense amount of access to, not only to free long distance and telephone calls but also to listening in on other people's conversations and that sort of thing. Probably one of the more well-known phone phreak cases involved somebody who had such a mastery over the phone system and such control that they were able to rig radio station contests. So if you called in and you were caller number ten, you would win a Porsche, then what these people were able to do was always be caller number ten, and they and all their friends were winning Porsches.

And actually it is not that hard to do. Basically I can explain how it works. Now the note pads come out. You have a couple of different lines. What happens is if you call the main radio station line, if that one is busy, it rolls over to the next. If that one is busy, it rolls over to the next. So anybody who has set up a phone system for work may know if you have a couple of lines if you call the main number then it will roll over. But what they did is they basically found out what the rollover lines were, and they just cut off the rollover to it. So if you called, you would get the main number. Now instead of rolling over you would get a busy signal, and they would just call in directly to the rollover lines. So they were blocking the rest of the public from reaching the rollover lines, and only they and their cohorts were getting into those lines. So it made their odds of winning the Porsche higher.

In *Thrifty Tel* the court said, well, these electrons that are coming into this phone system are trespass-to-chattels. And this was sort of the first real indication of the concept of trespass-to-chattels in this context. It was not something that the lawyers actually had argued. It would be nice for our profession if it was some smart lawyer, but actually it was the court that came up with this. It reawakened the trespass-to-chattels tort, which had been kind of sleeping a quiet sleep in the annals of common law, and it became something that was very popular to use in Internet cases and particularly to address the issue of spam. Here is a question I did not ask. Who here likes spam? See, everybody hates spam. Nobody likes spam. And spam, it is amazing actually how people's dislike for spam has kind of wrecked the Internet. Not only in the way that I am about to discuss but in numerous other ways in which regulations have been put into effect that have made the Internet work less well in an effort to stop this kind of flood of unwanted commercial communication.

So after *Thrifty-Tel*, there is a case in 1997, *CompuServe, Inc. v. Cyber Promotions, Inc.*,[19] in which the ISP was successful in saying that these unwanted spams from Cyber Promotions, which they had tried to filter but failed, were harming their chattel, that is their Internet service. And the court said that there were three ways in which they were harmed. One was the burden on the equipment, or the burden on the e-mail equipment of carrying this extra traffic. Two was the time that the ISP employees spent trying to block these unwanted e-mails that disturbed the ISPs customers so much. And three was customer goodwill because customers were upset and unhappy that when they were using the CompuServ service that they were getting all this spam.

That case led to two cases in 1998 where AOL also used the trespass-to-chattels tort to say these servers are our property and we have the right to say to you, "No, I'm sorry, you can't send us these e-mails." But if you look at these cases, and you read them and look at the nature of the harm that the court finds here, they are really finding a different kind of harm than the harm that was traditionally cognizable under the trespass-to-chattels tort.

Under trespass-to-chattels there is no absolute right to exclude unwanted intrusion. The classic example of this is with a dog. A dog is property, even though you may not agree. For all the animal rights people out there, I also have a cat and I do not think of him as property. But traditionally dogs and cats were thought of as property. And you could pet my dog and I could not sue you; but if you kicked my dog, then you are harming him, and I could sue. So if you use the dog in the way in which he is intended to be used, which is petting and loving him, then that is okay. But you cannot hurt him; that would be actionable.

But looking at the cases, the spam cases, you see that really the courts are looking at this not as a harm to the server, that the e-mail server is somehow being used in some way that is harmful to it, but another kind of harm, harm to the company's business and the company's desire to have its business operate in a certain way, either its reputation with customers or harm to its preferred way of doing business. And so these cases developed so that, where even though the courts would sort of pay lip service to trespass-to-chattels they were really looking at a trespass right that was more like a real property right, and a real property right is an absolute right to exclude unwanted uses.

The next big case in this trend of trespass-to-chattels cases was *eBay, Inc. v. Bidder's Edge, Inc.*[20] In *eBay,* eBay challenged an auction aggregator company's right to collect information about eBay auctions

19. 962 F. Supp. 1015 (S.D. Ohio 1997).
20. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

and to present it in a different format. eBay's complaint was that this auction aggregator had a little software robot that would come on eBay's site and collect information and data about these auctions and then it put that data elsewhere. We are going to talk about this type of thing a little bit later this afternoon when we talk about scraping. *eBay* was not really a spam case, but what it did say is any use, however slight, is something where you can have an injunction against that use. Not even so much because the Bidder's Edge robot was taking up or harming eBay's servers in any way. In fact the Bidder's Edge software robots were less than two percent of the total load on eBay's system, but because in aggregate and with potential unwanted use by others, that was a sufficient harm that could result in system unavailability for eBay. So there was no actual harm. It was the threat of system unavailability as a result of the defendant's actions in conjunction with others, the potential harm, and so they were allowed to exclude this unwanted use.

So the court in *eBay* rejected the real world analogy that the plaintiff, eBay, tried to present to them. eBay said this would be like if robots came into a store and were taking up the time of the salespeople buying stuff. I am enough of a science fiction geek to think that might be kind of cool, but the court said, well, it is not really a great analogy. You would need two out of every hundred customers who would be robots, and the robots would not actually be seen by the customers. They would be invisible robots. That is already less cool. Hence it is not really a good analogy. And I think that is one of the things that we have to really be careful about in this area is that analogies are really here to help us, but none of them are really good analogies because the Internet is something that is really new and something that we really have not seen before.

So, the court in *eBay* nevertheless found that this use was or could be enough of a significant trespass for eBay to get a preliminary injunction.

So the problem is if you have a trespass or a trespass tort where you do not need to show any actual harm to the server and any actual harm to the chattel, then basically any unwanted traffic, any wanted traffic becomes trespassing. There is this absolute right for the server owner to exclude.

What is the problem with that? Well we see that problem in *Intel Corp. v. Hamidi,*[21] recently decided by the California Supreme Court. In this case Intel sued and obtained an injunction against its former employee, Ken Hamidi, who later ran for governor in California in our

21. 71 P.3d 296 (Cal. 2003).

recent recall election. I do not know how many votes he got, but he did not finish in the top five. They wanted Hamidi to stop sending them e-mails, which were critical of Intel's employment policies. Why did they want to do this? Did it harm Intel's servers? No. Although certainly these electrons had some effect on Intel's servers because Intel's e-mail server had to process them. But Hamidi was sending an e-mail like anybody would send e-mails. Truthfully he was not sending Intel e-mails. He was sending e-mails to Intel's employees. And if Intel's employees no longer wanted to receive his e-mails, they could communicate that to Mr. Hamidi, and he would take them off of his list. The problem was that employees of Intel had to deal with trying to filter these e-mails because they did not want the other employees to read them and that they had to address the employee concerns when employees got these e-mails claiming maybe Intel is a bad place to work and, the employees are wondering, "Why am I getting these e-mails telling me that Intel is a bad place to work," and those kinds of concerns.

One of the things that really shows how the metaphor overtook actual truth and reason in *Intel* is, well, let me first tell you what ends up happening. Mr. Hamidi lost and there is an injunction against him saying you cannot send employees of Intel any more e-mails. He lost at the appellate level. And then he appealed to the California Supreme Court, and the California Supreme Court ruled on the narrow trespass-to-chattels ground and said that under California common law trespass-to-chattels requires harm to the server. And I know that George is going to talk a lot more about *Intel* later on, so I just wanted to point it out, as well as the notion of harm to the server versus other kinds of business harm. The California Supreme Court made the right decision because what Intel was trying to do was not to protect its server, but to try to stop its employees from getting the message that Intel is a bad employer. That was what they wanted to prevent. So it led to this illogical argument that they made during the litigation of the case, which is that they were not suppressing Mr. Hamidi's speech because Hamidi was free to put up a website and he could have his website say whatever he wanted it to say and that would be fine.

But, here is the metaphor: You send e-mail, but you visit a website. But actually the way that the Internet works is that receiving e-mail is no different to Intel than visiting a website, the electrons from the e-mail come through the Intel servers and the Intel employees when they access the website, those electrons also come through the Intel server. So it is the same exact thing in terms of the website maybe the employees will not ever find it and know that it exists whereas with the e-mails it is coming right to the employees.

Now I think that those employees if they do not want to receive those e-mails, they should be able to say to Mr. Hamidi do not send me those e-mails anymore, and Mr. Hamidi would then have an obligation not to send them anymore e-mails. But what I do not think is that Intel, as the owner of the computer server, is entitled to make that decision for the employees.

Let's put that in an Earthlink context. I have Earthlink and I think it is excellent, but I do not want Earthlink to make decisions for me about what e-mails I receive. I want to make that decision. And the idea that it is the users of the Internet who make the decision about what traffic, what content the Internet carries, is deeply imbedded in the principles behind the Internet. The Internet was built on an end to end principle. This is a common principle, which is that the network is neutral. The network does not discriminate on the basis of content. It does not say we carry e-mail traffic better than Web traffic. It does not say we will not carry file share traffic, but we will carry Telnet. Basically it is neutral. All electrons are the same. And the intelligence, the discrimination in the Internet takes place on the ends of the network, in the applications. So as long as you can conform to the basic protocol, the basic computer language of the Internet, which is TCPIP, you can write different applications and use those applications on the network. That is why we have had such an immense amount of innovation on the Internet and we have gotten things like the World Wide Web.

Who here used the Internet before the Web? Anybody? So it is better now with the Web in a lot of ways. I still like using the old stuff, but it is better now. And the reason we can have cool stuff like the Web is because we have this neutral protocol. So it is an engine for innovation. But end to end is also an engine for innovation in speech. It allows you and I as the communicators to determine what we hear instead of letting the intermediaries decide. It is the way radio could have been. But now, you know, you listen to whatever junk they play to you on the radio. Well we do not have to have that on the Internet. We get to decide, and if we give server owners the right to make that decision for us, we have lost something very precious and very special about the way the Internet works.

So the California Supreme Court in *Intel* did not address this free speech concern. They decided on this very narrow trespass-to-chattels ground, and there was a lot of Chicken Little, the sky is falling for people after the *Intel* case. Oh, companies will not deploy e-mail systems, and it is horrible for us and we will just have to accept spam and it will be terrible and we have no rights to protect ourselves anymore, none of which is true. If there is harm to the server, somebody

sends you so many E-mails that your server cannot process it, then certainly you would have a cause of action under trespass-to-chattels. Nothing about this prevents either the United States Congress or international bodies or state bodies from passing anti-spam laws. Certainly statutes can give companies rights that the common law does not give. And maybe Congress is really the place for this to occur because there you can do a kind of balancing.

And that is what I advocate and what I recommend for the spam problem and for the problem of any kind of unwanted e-mail is balancing: that we balance the rights of the computer owners with the public interests of free communication and free speech, and with the interests of the people who are actually doing the communicating. And that kind of balancing is going to lead to something that is much better for speech, much better for the people who use the Internet and will still protect the rights and interests of the property owners who want to deploy their Internet systems. Intel could have made a decision that it was going to filter all traffic and only accept e-mails that were business related. It could have made a rule with its employees that said you are not allowed to receive personal e-mails at work. There are a lot of things that it could have tried to do, rather than say I pick you out of all the people in the world and I do not want to receive your messages. Or I pick the Democratic Party out of all the political parties in the world and I do not want my employees receiving those messages. That kind of absolute right to exclude is completely contrary and in opposition to the very basis and the very sort of engineering principles and really the social benefit that those engineering principles has resulted in with respect to free speech on the Internet. We get to decide how we communicate and that has made the Internet so valuable today.

Thank you.

MR. WELLBORN: I have been about to bust, so I am going to start with my punch line. All spammers are criminal and ignorant. So I will get to that later. That is not me talking, that is every court that has considered the issue.

How many of you all have had Professor Cole here, Criminal Procedure, Criminal Law? What is the right answer in his class?

AUDIENCE: Yes and no.

MR. WELLBORN: Yes and no, that is right. I did not get that here but now to me that is one of the most profound things that I learned here. It really, really is. And you will understand that the longer you

practice. I got out of here in 1989. Anybody remember *Calder v. Jones*?[22] Civil Procedure? Shirley Jones, the mom from the Partridge Family, sued the National Enquirer and a writer and publisher, but she sued them in California, her home state. The Enquirer, of course, had plenty of contacts there so it was subject to jurisdiction, but the writer and editor claimed they never had contacts to California. One had only been there once for a two-day vacation, and one had never been there and had no contacts at all. Out of that case came a great jurisdictional rule, one that lets me sue anybody who ever did anything wrong to Earthlink in Atlanta.

So this is my visual aid today [holding up a copy of the *National Enquirer*]. We know now that Scott is going to get killed in prison, Di was murdered, Matt Lauer does cocaine, and John Ritter's widow is battling to save his show. What is this? Is this intellectual property? Is this a thing? Is this a means of communication, a conduit for publication? Is this minimum contact? And the answer is yes to all those things. Which one of those answers is important totally depends on the context that you are looking at it in. And it is the same thing with our main question today—what is the Internet? Well, it is going to be a different answer depending upon the context that you look at it in. It might be a different analysis or answer for ADA than for spamming than for First Amendment protected noncommercial type of speech. So if you remember one thing after the seminar today, remember that, the yes and no. It can be any of the above, but you have to look at the particular context that you're examining the Internet in.

Spamming—we are talking about spamming this hour. What is spamming? My definition is unsolicited commercial e-mail. You could get six of the most prominent anti-spammers and six of the most prominent spammers up here, and you might get twelve different answers. I do not include a bulk aspect in my definition of spam because spam from a user's point of view should not be determined or defined based upon whether someone else suffered the same harm as I did. So I pull the bulk out when I am defining it.

Spam is already illegal. And again, that is not me talking, that is every court that has considered every case where an ISP has sued a spammer. A spamming case in today's world, by definition, is going to involve some form of fraud or spoofing because otherwise the filters will catch it. You know who gets spam where it has the real from address and the real remove address? There might be one in ten billion that has honest information there. And remember the definition of spam, too, the

22. 465 U.S. 783 (1984).

word "unsolicited." If you sign up and you buy something at Sears, and you check the box or do not uncheck the box or what-not, if they send you mail, that is not unsolicited. So we are talking unsolicited commercial e-mail.

Let's talk about the invisible robots a little bit. The harm that is done, the real harm that is done by these invisible robots. By the way, I want to talk about what you all want to hear today. I would hate to have to sit and listen to me talk for twenty minutes or thirty minutes or two hours of whatever non-stop, so if you all have a question, I want to talk about what you all want to hear. So do not hold it for the end and don't, you know, be shy; just go ahead and ask. I would much rather have a conversation just like the fifty of us were sitting around drinking beer as opposed to a formal coat and tie speech at a seminar. So please, let's make this a conversation.

The damage these invisible robots do, let's talk about that. Ten billion dollars a year is the cost to businesses in lost worker productivity in efforts to stop the spamming, to fight the spamming. Just the cost of delivery, for an ISP to deliver an e-mail from point A to point B costs about a tenth of a penny. That is no big deal, right. You know, even, heck, if you have ten e-mails that's one cent. No big deal. Well it does get to be a big deal when these spammers send a billion e-mails a year which translates into a million dollars out of pocket for the ISP just to deliver the e-mails. I am not talking about computer resources. That is just what they pay for the band usage. I am not talking about the storage, not talking about the user goodwill, not talking about the attorney fees. Just getting that e-mail from point A to point B.

There is a cost in computer resources. Is that going to vary with ten e-mails versus ten million e-mails? Certainly it is. But there is a real cost in computer resources. There is a cost in computer stores. There is a cost in customer goodwill, a cost in spam fighting, in the necessary spam fighting tools to keep these people from trespassing upon the personal property, the ISPs computers, that do make up the Internet. There are legal fees. So there are very real and very big costs. This is not just about some little old lady being mad or annoyed because she got a porn advertisement in the mail. This is not just about the annoyance. It is about money. It is about real money.

A significant portion of whatever you all pay for your ISP or your monthly rate goes straight to fighting spam. If I could snap my fingers and make all spam go away, your cost of using the Internet would go down dramatically.

Let's talk specifically about the Internet as a place; the Internet as a thing. What is the Internet? What if you cannot show injury in a spam case? I am here to tell you that is a red herring. There is always by

definition going to be injury in a spam case. Those very categories that we just talked about. It is important here to make a distinction. Is the Internet real property? Is it a place? What is it? People tend to lump together the virtual property and the things that really are real. A computer and a server and related equipment, those are real things. Nobody can deny that those are chattels. Do not get caught up in the analogy or rolled up into one ball of the red dragon that your character Quasar just paid 500 quid for in your favorite on-line game, which is a separate topic for a separate seminar. But there are booming virtual economies. So you know, do not get lured down that slippery slope of the Internet is all about virtual property. That is where the analogy breaks down. It cannot be real property. Look at the things that are selling in this game or that game. We are not talking about virtual property or a pretend thing. We are talking about computers and equipment that are just as solid as this podium and just as real. You know, not the invisible robots. And this is all good-natured, by the way, just so you all know.

MS. GRANICK: I did not come up with the invisible robots, that was Judge Whyte.

MR. WELLBORN: Oh, I know. I know. I understand that.

MS. GRANICK: Though I do think they would be cool.

MR. WELLBORN: They would be cool. They would probably cause less damage than these spammers do. I liked your analogy. I had never heard the analogy about the pet dog. I liked that a lot.

But let's talk for a second about the need for real damage. I would say that one unsolicited commercial e-mail coming into your system is damage. Is it a small damage? Is the degradation of performance of your system so small that you might not even notice? Yeah. It is still there. There is damage, period. But let's step back and look at this in terms of petting the dog versus kicking the dog.

Let's change the analogy just a little bit. Suppose you park your car in the same parking lot every day, and there is a fellow who comes up the moment that you park your car, and he sits there and throws BB's as hard as he can at your car windows the whole time while you're gone, okay. But it does not hurt your car. The one BB, it just bounces right off. So under the theory of no damage, you cannot stop him. You would be powerless to stop this fellow from tossing BB's at your window the whole day.

Now once word gets out that you have no way to stop this one fellow, all of his hundreds of friends come and they start tossing BB's. Now what is going to happen? Maybe one BB does not break your window, but when a hundred hit at the same time, it pops your window. So there has to be some exception or some recognition of the fact that, even if the work of one spammer does not degrade or hurt your system, your real property, your chattel, bad enough to be initially cognizable, if enough people are doing it, then it is. And if you want to require a showing of some kind of joint tortfeasor theory, I say, fantastic, because that means every single spammer will be on the line for the sum total of the damage from spam suffered by an ISP. That means that instead of getting fifteen to twenty-five million dollar judgments against these illegal spammers for Earthlink, we will be getting billion dollar judgments against the spammers. So, if the spammer defenders want to go down that road, that is fantastic, but I think because spam is innately harmful to the system that that is an analogy that just will not fly.

One of the most important contexts that we look at the Internet and the idea of servers and computers and things right now is the statutory framework. What is going to happen with the federal bill? And to me that is one of the most fascinating aspects of spam. You all might not have seen that the Burns-Wyden Act[23] just passed the Senate. They call it the "Canned Spam" Act. I call it the "I Can Spam" Act. That bill possibly and other bills that are proposed definitely are actually pro-spam bills that have been disguised as anti-spam bills. There is no argument right now. Spam is illegal. Every single case that has involved an ISP suing a spammer, the ISPs won. In every one I have seen, the ISP has won suing the person that actually sent the mail. The ISP wins and the two causes of action that are always mentioned and that always carry the day, among others, are the Computer Fraud and Abuse Act[24] and common law trespass.

And if you think about it, the Computer Fraud and Abuse Act is a criminal statute that has one of those provisions that says, there is a civil cause of action under this law as well. The only difference between a civil action under the Computer Fraud and Abuse Act and a criminal prosecution would be the burden of proof, that limbo land. I call it the O.J. land, between a preponderance of the evidence and beyond reasonable doubt. Well, these ISPs are not winning the spamming cases in that limbo land. It is a slam dunk. I mean, 99.999 percent of the battle in a case against a spammer is finding them because it has been a game of technology one upsmanship and craftiness one upsmanship.

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23. Burns-Wyden Act, 15 U.S.C. § 7701 (2003).
24. Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (2003).

What used to be as simple as knowing how to speak spammer, which means that the word suite, like in "150 Main Street, Suite 27," means, "Hey, Ma, I've got a box at Mailboxes, Etc." You know that you look up "Mailboxes, Etc." on the Internet, and you send a subpoena to them and, boom, you have the spammer's name, and you have a copy of his driver's license. You know, case over.

They have gotten so much more sophisticated now, it is really, really difficult to track where the spam is coming from. But once you know who it is from and once you locate that person, it becomes a slam dunk for the ISPs, no matter how diligently the case is lawyered and how lawyered up the spammer tries to get on the case, it is just no win. It is not even a defensible practice by any means.

But Burns-Wyden is kind of hazy; it's a little bit gray. Some of the bills are even more blatant about how they are trying to do it. They purport to preempt all of the causes of action that relate to spam. And think about it, spam is already illegal. What most of these bills say is, "Hey, spam is illegal except for spam that has a real street address and has a working reply field," and, you know, whatever laundry list of characteristics they want to include in that particular bill. There's like I think over a dozen right now at the federal level.

If that federal bill, if the federal law preempts a common law trespass claim, a Computer Fraud and Abuse claim, if that is the only game in town when it comes to suing the spammers, what they have just done is not tighten the noose, they have loosened the noose. They have made a huge category of spam that was until then illegal now legal. And if such a law ends up in, if such a bill ends up being signed into law, I think it is going to be just a race before either the law is repealed because e-mail as we know it is completely shut down by the glut of spam, or somebody makes a convincing argument that that is an unconstitutional taking, that you are depriving the ISPs of their right to dictate the traffic on their computer service. So that is really to me one of the most important ongoing issues that we have.

I get asked time and time and time again, you know, would not a law be a great thing, and my answer is, you know, it is one more bullet in a gun that is already loaded. Spamming is already illegal. I don't think a Federal law will any more cut down on spamming than if Georgia passed a law that said it is illegal to shoot somebody who is wearing a red shirt. Well, it is already illegal. Somebody who is going to break that law is going to break this new law, too. So I do not think that a law, a federal law or a state spam-specific law would have a great effect on deterring spam in and of itself.

AUDIENCE: I am just curious. When I receive spam, I delete it without even reading it. When I see the re- line, delete, delete, delete, and we all go through that. I am assuming that spammers make money and that is why they do this. But how?

MR. WELLBORN: That is a great question. That is the best softball question I have ever seen. The reason that spammers can make money are hit rates. From my cases, one hit rate was one per hundred, ten e-mails, thirty sales, one in three hundred thousand. And that was high. This was the herbal-Viagra-type spam. So you know, that was a pretty high hit rate for those. How can a spammer making $10 per sale getting one sale for 300,000 e-mails, how is it worthwhile? And the way it is worthwhile is that spam, by definition, transfers the cost to the recipient.

The best analogy, spam is a C.O.D. package that you and your ISP are forced to accept. Spam is a collect call that you are forced to accept and pay for. So that is how, the spammers do not pay. Once they get online, if we had a $100 e-mail list and we have got the computer at home, and it takes about an $800 computer, and about a $200 bulk e-mail software, my eight-year-old could pop out a million e-mails a day. I mean you do not have to be a rocket scientist. That is what is so scary about this.

You can measure society and technology in one way by thinking about how much harm can one person do? If you go back a thousand years, you know, that is how many arrows are in his quiver and how strong is his bow really. Then go back a couple of hundred years. Well, it is how many pieces of dynamite he can have in his saddlebags. But with technology now, this is not just Internet, this is all kinds of technology, but the Internet is a good example. With the Internet, one person can open flood gates on a dam and flood a city, shut down an air traffic control system, wreak havoc with the stock market, and put a country into a depression. The harm that one person can do is immense.

And it is the same thing we see with spamming. You do not have to be a criminal genius to spam today. You do not have to be a genius at all. There are idiots out there who are spamming away. That is mostly who I sue because there are so many out there that the ISPs have to pick and choose who they go after. And by definition, if you are stupid enough to be on the top three or four of any given ISP's hit list, then you are too stupid to have any money and probably too stupid not to be in jail.

And actually that gets me to the last point, the criminal aspect. I want to stress, going back to what I was saying about the Computer Fraud and Abuse Act. That is a criminal statute and the prosecutions under the Computer Fraud and Abuse Act are now being won in that

limbo land between the burdens of proof. So what I would like to see, and we have seen recently, the last two spammers that Earthlink has sued, one trial starts in two weeks and the other was sentenced last week in relation to a spam related scheme. Both those cases also involved identify theft and credit card fraud.

What I would like to see is some ambitious prosecutor, D.A., solicitor, U.S. Attorney, whatever, go after someone just for spamming. I would like to see one of them understand that if a spammer sends a billion e-mails a year, right out of the gates, he has cost the ISP a million dollars for delivery, plus the goodwill, plus all the other aspects of damages that we have talked about.

I am sure you want rebuttal, so we will save time for that. Are there any questions?

MS. GRANICK: I will just say I disagree.

MR. WELLBORN: Thank you.

PROFESSOR MILANI: I will ask a couple of questions before we open it up to the audience. First to you, Jennifer. I guess, I am going to use an analogy here, a metaphor.

MS. GRANICK: Beware.

PROFESSOR MILANI: Beware. Spam to me is comparable to junk mail. I think that is a fair analogy. And I do the same thing with junk mail that I do with spam. It is usually just pitched. And it costs me about the same amount of time to do it. The difference that I see between junk mail or, what is the politically correct term for it, direct marketing, is that the person who sends the direct marketing campaign to me pays for it. I mean they have paid the postal service, some vastly reduced amount unquestionably, but they have paid for it, and the spammer does not pay for it. The ISP pays for it. I think that is a distinction that it seems to me is important in terms of the idea of what we are trying to do here: Protect communications directly from one person to the other person. I think that if you are shifting the costs to the sender and not paying for it that makes a difference.

MS. GRANICK: I think that it does make a difference and explains the popularity of spam and why companies can afford to go on a ratio of one hit for every 300,000. I think certainly you have to keep in mind that that one person who purchased that herbal Viagra could very well have wanted to receive that spam. Commercial speech is still speech,

and it does have social value. The problem is this shifting of the cost burden to the recipient and to the ISP. There are solutions other than to allow ISPs to decide what e-mails we get. One of those solutions is micropayments. The Internet enables micropayments so that we can set up a system whereby if I do not receive spam, I can charge people to send me e-mails, and if you are not on my list of people, I can say to you, "You need to pay me a penny or you know, half a penny or some percentage of a penny," and that shifts the burden back to spammers. It puts the power to decide in my hands and allows me to make the decision, not the ISP to make those decisions for me.

One thing we have to realize is that ISPs do not have an exclusive right to dictate what e-mails come through their server, nor do I think they should. And second, commercial e-mail is not per se illegal. Every single spam case that has been decided is based, not on the contents of the spam and not purely on the ISP's decision not to receive that spam, but on the volume and the harm that the volume of the spam does to the ISP's business. Now we can throw around a million dollars here and a million dollars there. I do not know how they come up with these numbers and calculate them, but there certainly is some cost associated both to the ISP and to us as the unwilling recipients, and a micropayment scheme can really shift that burden back onto the direct marketing people. And I am sure that the direct marketing people hate that idea, but I feel it is the best way to keep the seat of power and control in the people who deserve to decide what e-mail they read, which is us, the recipients.

PROFESSOR MILANI: Okay. Thank you. Let me ask one quick question of Pete, and that is about the ISPs bearing the costs. An earlier presentation was about a statute known as the ADA, and part of the idea behind the ADA was that companies would have to bear the costs of providing reasonable accommodations to employees with disabilities or to people who came in to use their services, for example, providing interpreters for the deaf. What is the problem with having the ISPs bear some of the costs here in the same way that we ask companies to bear the costs of providing accommodations to employees with disabilities?

MR. WELLBORN: First off, it is not even apples to oranges, it is, apples to spaceships to compare enabling access of the handicapped to giving criminals an unfettered right to steal resources from the computer system. So that is my short answer.

PROFESSOR MILANI: All right. I am opening up the floor to questions right now.

AUDIENCE: May I ask a question to Pete and Jennifer also? From a contractual standpoint, as an ISP you have a sort of contract because you make a payment to this particular company. Now contractually if that particular company decides that they want to cut out all the spam or dictate what goes through their particular portal, you know, it is a free society. You can switch from one ISP to another ISP. So where does the freedom of speech versus the contract issues get involved?

MR. WELLBORN: You all, I promise I did not plant him in the audience. That is a fantastic point, and in fact that is right. That is entirely consistent with the idea that the ISP's computers and servers and property are not governmental, they are not utilities, they are not pseudo governmental, they are not pseudo utilities, they are private property. And in fact, the Internet would already be virtually unusable, but all ISPs do something called blocking at the gateway, which means that there are some e-mails that come into the system and based upon how the individual users have their filters set up, it may or may not get to the user, and that is within the user's hands. There are billions of e-mails a day that are blocked at the gateway before they get in the door to be filtered because they are coming from an IP block of a known spammer or because for whatever reason they are not routed. They are not even admitted. And if an ISP did not engage in some sort of blocking at the gateway, I guess the end result would be that your monthly cost is going to go up, you know, thirty percent, forty percent, fifty percent, as the ISPs would have to get a whole lot more equipment to deal with these people that are trying to steal their computer resources.

AUDIENCE: What does Jennifer have to say about that?

MS. GRANICK: I am making a distinction between use which harms the computer server and use which does not harm the computer server but which has some other sort of cost that the business does not like. The thing to remember here is that there are certainly property interests but there are public interests at stake as well. And even in the property context we use other kinds of legal doctrines to balance public interest and private interest. Rather than, for example, giving the ISPs the absolute right to exclude any e-mail traffic they do not want and the harm that comes from that, and I can give you some examples.

One example is Mr. Hamidi who is prevented from communicating his message about Intel's employment practices directly to the people to whom it matters most. Another example is a case that I had where my client sent e-mail to the employee, or rather to the customers of his former employer, telling them that the former employer's Web mail service was insecure and they should be careful because other people could read their e-mails. These are cases in which if the ISP had their way and could block these communications, none of this information would get through. And if my ISP decided they do not support this political candidate and they support that one, they could say, "I'm sorry, but this candidate can't send our customers e-mail, and that is a tragic social cost."

So instead of saying that we are going to give ISPs the absolute right to exclude, an unprecedented and completely new property right, we could use a theory like nuisance, which is a theory we use with real property, where you balance. You balance the rights of the computer owners with the public interest and the rights of the people to receive e-mails over that system. Think about it just for a minute, ladies and gentlemen, of what the Internet would look like if your ISP can tell you what you could send, who you could talk to, what programs you could run. That would not be the Internet, that would be TV. And when you talk about suing people for unwanted content, I personally nominate the WB Network. FOX gets a pass from me because of "The Simpsons."

PROFESSOR MILANI: We have several other questions.

MR. WELLBORN: Let me just say one thing real quick. I want to make it clear that, first off, it is to me a Big Brother argument to talk about ISPs filtering content-based e-mails, and you end up with an Orwellian type scenario. That is just not happening. The *Hamidi* case, really we do not even need to talk about it. It should not even be mentioned here. That is not a spam case.

I was very careful to define spam as unsolicited commercial e-mail. Commercial speech, commercial e-mails, are afforded the least protection under the First Amendment. My position would be: I may still to defend the right to do it, but it would be an entirely different conversation. Talking about filtering one political candidate's promotional e-mails. That flunks the stupid test, too, though because candidates who spam end up being hated for their spam. But anyway, *Hamidi* was more akin to a consumer comment type case. I mean by analogy, look at trademark law. There is a huge difference. If I set up a "University of Georgia" sucks website, which, you know, I went to Georgia Tech so I can say that. I grew up hating the Dawgs. I am just teasing, of course.

MALE VOICE: That explains the red shirt comment. Now I understand it.

MR. WELLBORN: So anyway, if we had a "University of Alaska sucks" website that would be an entirely different situation than if I set up a University of Alaska official merchandise, officially merchandised logo, officially whatever logo endorsed merchandise, you know, selling University of Alaska T-shirts and other things that I am representing were approved by the University of Alaska. They are both use of the University of Alaska name but they are in an entirely different context, and that is the same thing here with Hamidi's consumer comment if you break it down to its truest essence. Spamming is an attempt to steal computer resources for the criminal's financial gain.

PROFESSOR MILANI: Another question?

AUDIENCE: Just a little political reality here. Why is it taking so long for Congress to act on anti-spamming legislation? I know there are some state laws and there are some constitutional issues.

MR. WELLBORN: Three letters, D-M-A, the Direct Marketing Association who has an incredibly powerful lobby, whose efforts have prevented the passage of any bill in the past and even more egregiously have resulted in a number of the "wolves in sheep's clothing" bills that we see now which are actually pro-spam bills disguised as anti-spam bills.

PROFESSOR MILANI: In the back there were several questions.

MR. WELLBORN: Jennifer, do you —

MS. GRANICK: No, I agree.

MR. WELLBORN: Oh, we agree on something.

PROFESSOR MILANI: Go ahead.

AUDIENCE: If the costs are associated to the ISPs, how come they have not developed a system, assuming most of these spammers use ISPs, that can limit them. Apparently these spammers are paying their monthly fees. How many e-mails go out, like 500 per (inaudible), or is the ISP masking such a problem that they can't tell?

MR. WELLBORN: The ISP masking is a problem, and it has been a game of technological one upsmanship from day one. It is a rare, rare, rare situation now where you will see a spammer spamming from a paid account with a major ISP. What they are doing now is either, you know, just as some for instances, they will have their spamvertize, the advertising spam website, hosted overseas. They may send their mails out from an overseas service that then routes them through the misconfigured mail server of some random company that has their computer set up wrong so the mail is going to be coming from that company. The newest thing, and this is within the past few weeks, the spammers claim that they now have a service or product by which they can host their websites anywhere they want to, even on an Earthlink or an AOL or whatever, and this product makes it impossible to determine from the domain name what the IP address is. The thing that blows my mind is that if some of these spammers had put their minds to good use, as opposed to figuring a way to beat the system, they could have been millionaires many times over instead of petty criminals.

PROFESSOR MILANI: Nancy Terrill in the back.

MS. TERRILL: You mentioned the costs to the ISP, but you were also talking about the cost to the consumer. If we get rid of spam, then basically the cost of our Internet service would go down, our monthly fee. Has there been consumer class action? Would that be possible assuming you could locate the spammer for costs, stealing because they are not just stealing from the ISP, they are stealing from me, and I am having to pay?

MS. GRANICK: The ISP is going to lower our monthly rate, yeah.

MS. TERRILL: According to Pete they are.

MR. WELLBORN: Most ISPs will tell you right now that they are not passing the costs of spam fighting on. It is a free market. I have got to think if spam went away and all of the profit margins of the ISPs were quadrupled, you would have ISPs dropping their costs to try and get more business. You know, it is just free enterprise. That is a great idea I think. You may even have a third party beneficiary type of, contract type of claim under the policies of the ISP, where it is the user who is protected. By stealing the computer resources, there is always the argument in these spam cases that the spammer is bound by the terms of service, the company posted terms of service, that governs anyone's use of those computers, user or not, of that particular ISP.

PROFESSOR MILANI: Professor Oedel.

PROFESSOR OEDEL: Pete, I was interested in hearing your comments about Jennifer's proposal about a nuisance theory being possibly valid in this context. Have you used it in some of your cases? Does it have the benefit of being a more balanced, nuanced test that might be able to accommodate, for instance, the First Amendment kind of concerns?

MR. WELLBORN: First off, I think it would be very difficult to draw the line. You know, when does no damage become damage. If costing the ISP a dollar because a hundred e-mails were delivered is not damage, you know, is a thousand damage, is ten thousand damage? I think there is a great difficulty there in trying to draw some artificial line when, in fact, the courts should recognize that any e-mails are damage. As a practical matter, I have not seen that much because there are so many spammers out there, like I said before, that the ISPs by definition are going after the people that are stupid enough and prolific enough to be up at the top of the hit list for the ISPs. So by definition the spammers that are being sued are the ones who are popping out a billion a year.

What I would like to see happen is some of the ISPs go after the quote, "legitimate" spammers, and by that I put legitimate in quotes and understand that it's said sarcastically. These are the spammers who may have a valid reply e-mail address, they may have a real store on the street, and they may be selling real things. But despite the fact that their e-mail does not also involve the aggravating layers of credit card fraud or fraud in the sale or identity theft or what-not, the spam of those legitimate businesses is nonetheless illegal, is just as actionable. I think some cases against those types of spammers would send a message to any other people out there who were somehow operating under the misperception that spamming is legal. What I think a lot of spammers out there are doing, at least the non-career spammers think, "Yeah, I know it is wrong, and, yeah, I know it is illegal but it is akin to jaywalking." We all know jaywalking is illegal, but everybody jaywalks because, in your mind, it is just not that big a deal. You know it is illegal, but it is not that big a deal. And I think there is a subset of spammers that function in that world, that, "Yeah, I know it is wrong; yeah, I know it is against the law, but it is not a big deal." If some of those people were given the financial death penalty in civil cases and that was publicized, that would cause the other jaywalker spammers to think twice.

MS. GRANICK: Even if we ignore the problems of defining commercial speech versus political speech, the proposition that any unsolicited commercial speech is per se illegal, regardless of any kind of requirements of the server, has immense First Amendment problems.

PROFESSOR MILANI: Question here.

AUDIENCE: I have a question. In recent months there's been, you know, great controversy about the national "do not call" list, and I guess my question is two-part. First of all, do you perceive a do not e-mail list in the future as far as personal e-mail accounts go. And, secondly, if the two situations can be analogized, would a judicial ruling in favor of the marketers, telemarketers, would that be something the spammers, these people who send out unsolicited e-mail, could use as an argument for their side?

MS. GRANICK: Definitely. There are very similar issues between a telemarketer "do not call" list and an anti-spammer "do not e-mail" list. But I think that one of the big obstacles to developing a do not spam list, which I think is one of the proposals that's on the floor of the Congress right now, is the security issue. As a direct marketer wouldn't you just love that list? I mean when you talk about getting together a great list of e-mails to target people. So I think, you know, one of the great concerns is having this list. If somebody stole that list then that would be out there and that would be really bad. But you could then have some kind of penalty system where you have at least an expressed statement for people who have signed up for the list saying I do not want to receive these e-mails and if you do send me e-mails then you can seek civil or criminal penalties. And I am much more comfortable with that because that puts the power again in the hands of the consumers to say what kind of messages they would and would not like to receive. I think that we will move toward something like that or toward maybe even labeling to enable user filtering.

PROFESSOR MILANI: I am going to let Pete respond and then we are going to have to end. I am sorry.

MR. WELLBORN: Okay. Real quick. Two points. First off, the telemarketing law, to compare that to spam, I think the analogy breaks down a little bit because with telemarketing there is going to be a person at the other end of the line when they call you. Otherwise it already

violates the Telephone Consumer Protection Act.[25] The other provisions of the Telephone Consumer Protection Act really give a better analogy to a spam law, and that is the junk fax laws. It is against the law to send commercial faxes. Why? I mean, yes, it is just electrons. Yes you know, commercial speech still has some minute degree of protection under the First Amendment. But as with spamming, a junk fax totally distributes the cost of delivery to the recipient. And it takes the recipient's stuff. It takes his chattel. It uses up toner. It uses up resources of the fax machine.

Secondly, for the list, I believe whole heartedly an e-mail specific do not spam list would be idiotic if it were put out in the public domain for spammers to follow the law and not spam these people. There has been technology where the proposals direct all e-mails will go through this and it will be blind filtering. That would be horrendous as well. If there is going to be a list, what I propose and what I think is a good idea is don't make it e-mail specific, make it domain specific. And by that I mean you can already get a list of pretty much every domain that is out there, so that is not giving away any state secrets. Instead of all forty million AOL users or fifty million AOL users having to each put their five addresses on the list and have those out there for the whole world to see, let's just let AOL say no spam to anybody at AOL.com. Remember, spam is unsolicited commercial e-mail. And I am sure that if some ISP wants to garner the business of the nine people in the country who like spam, they will not put their domain on the list. By doing that you could not give away any privacy. I bet you if we did that the top ten domains or top twenty domains on that list would probably cover ninety percent of the e-mail addresses in the country so it would be very efficient and one good way of stopping at least the ethical spammers, if there is such a thing, from continuing.

PROFESSOR MILANI: Thank you. Pete just solved the problem.

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25. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2003).