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PUBLISHING ON THE INTERNET: PITFALLS AND PROTECTIONS

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***34 I. Introduction**

Today, everyone can be a publisher at almost no cost. Whether through commercial on-line services such as America Online or CompuServe or through the Internet and the user-friendly World Wide Web (WWW), any individual or company can easily go on-line with articles, speeches, and advertisements, all of which can be fully illustrated with text, graphics, and sound. This communications revolution has happened almost overnight, and it is already considered to be virtually commonplace.

The scope of the legal risks involved in on-line publishing and how they may differ from the risks associated with more traditional publishing are issues that are slowly being defined. With increasing regularity, electronic publishers are finding themselves defending against legal actions, as well as seeking the law's protection against attempted intrusions. Meanwhile, courts often look to existing law and attempt to apply it to new technologies.

On another front, on-line publishers, particularly electronic Bulletin Board Service (BBS) operators and commercial information services, can be huge repositories of information that are valuable to numerous people, including prosecutors, investigators, and civil or criminal defense lawyers. There have been, and will continue to be, attempts to "tap into" these repositories of information through legal methods such as search warrants, subpoenas, and civil discovery. To what extent can these information services protect themselves from unwarranted or overly intrusive requests for information? This article does not attempt to be a comprehensive discussion of either the "pitfalls" or "protections" out there; indeed, it purposefully avoids several of the more common and extensively discussed legal issues, including liability for defamation and copyright. Rather, this paper attempts to briefly highlight a selection of interesting, but less visible, issues that will inevitably confront those involved in on-line publishing.

II. Selected Electronic Publishing Pitfalls

A. Adult Materials

The peculiarly popular and lucrative nature of publishing adult materials by computer networks was realized quite early. There is an established industry of CD-ROM publishers and BBSs that deal in providing electronic access to adult materials, from live "chat" services on bulletin boards to huge CD-ROM libraries of adult pictures that range from the mild to the outrageously disgusting. This corner of cyberspace attracts a great deal of media and government attention. This section of the paper touches on some of the legal issues that are of predominant concern to publishers of electronic adult materials.

***35 1. The Definitional Problem**

The twenty-two-year-old Supreme Court decision in *Miller v. California*[1] still controls the definition of what material is obscene. *Miller* established a three-part test that material is obscene when taken as a whole, by the average person, applying contemporary community standards, it appeals to the prurient interest in sex; it includes patently offensive depictions of particular sexual conduct; and taken as a whole, it lacks serious literary, artistic, political, or scientific value.[2] Such material is not protected by the First Amendment[3] and can be banned or regulated.[4] *Miller* has effectively set the scope of all state obscenity statutes, which tend to adopt the *Miller* definition.[5]

The *Miller* test is notoriously difficult to interpret and apply. Its definitional inadequacies are particularly noticeable in

cyberspace with regard to two main issues: What shall constitute the "whole" of the material for purposes of the first and third parts of the test,[6] and what community shall provide the standards to be applied? The relevant "contemporary community standards" have always been defined in terms of physical geography. In Texas, for example, the community is the whole state.[7] While cyberspace transcends physical geography, previous arguments that the "community" should be a group of like-minded persons, wherever they may be located, have been uniformly unsuccessful.[8]

A California couple was recently extradited to Tennessee and convicted of distribution of obscenity after an undercover agent in Tennessee downloaded adult material from the couple's California-based BBS.[9] The Tennessee jury, applying its own community standards, decided that the California couple's material was obscene.[10] In light of the current phenomenal growth and diversification of the on-line population and the refusal of courts to recognize non-geographic communities, it seems unlikely that cyberspace will be defined as a community with its own standards of decency.

***36** How do electronic publishers decide what community to look to when making adult material available electronically? The *Miller* test's focus on geography is leading to a "most conservative common denominator" situation for electronic publishers, who either have to tailor their adult offerings so as not to offend the most conservative community in the United States or fear prosecution.

2. The Access Problem

State and federal governments can constitutionally prohibit distribution of nonobscene but "indecent" material to minors.[11] They do. For example, a Texas law prohibits distributing or exhibiting such material to known minors. It also prohibits "reckless" display of such materials to a minor.[12] Because reckless display is penalized, electronic publishers face the problem of how best to ensure that adult material is accessed only by adults, without making their service so inconvenient that it does not get used.

Currently, most commercial electronic adult materials are offered through direct dial-up bulletin board services. These publishers use a variety of validation techniques from requiring a valid credit card number to requiring receipt of hard copies of photo identification. At the time of this writing, no court has addressed what efforts are sufficient to avoid criminal liability. However, several attorneys in the area recommend using the standards set by federal regulations controlling telephone access to indecent materials[13] as a frame of reference.

Recently, a number of adult magazines, including both *Playboy* and *Penthouse,* opened home pages on the WWW. These home pages are sponsored by the respective magazines and contain excerpts from recent monthly issues, including editorials, letters, articles, and, of course, pictures. The home pages automatically display clothed images of models, and each offers point-and-click downloads of nude photos. Access to these sites is free to anyone with Internet access and a Web browser. At the time of this writing, neither magazine makes any effort to restrict access to the home pages beyond *Penthouse*'s warning that minors and persons calling from locations that ban adult materials should not access the adult materials.

This raises the aforementioned definitional problem inherent in applying the *Miller* test to cyberspace: What electronic material should be "taken as a whole" when determining whether the material appeals to the prurient interest or lacks serious value? Print magazines are considered as a whole, pictures and articles together.[14] In the past, ***37** *Playboy* magazine has survived being found obscene largely on the strength of its articles.[15] Can its WWW site draw on the same advantages? *Playboy*'s and *Penthouse*'s WWW sites include lots of textual material along with the pictures. The articles and pictures are accessed by clicking on different icons, though, and the articles can be completely ignored on the way to the centerfolds.

3. The Release Problem

As with all publishers, electronic publishers should obtain or confirm the existence of valid release agreements from models. This is particularly important for those publishing photos submitted by subscribers. *Hustler* lost a civil privacy lawsuit in Texas because a jury found that the way it confirmed authorization to publish amateur photos--simply calling the number sent in with the photograph--was inadequate.[16]

The age of models is also a concern, since federal and state laws prohibit possession or distribution of sexually explicit pictures of persons under eighteen years old.[17] Until recently, the federal statute imposed liability regardless of whether the

publisher knew the model was underage. Last year, the Supreme Court clarified that the federal child pornography statute requires proof that the publisher knew the model was under eighteen years old.[18] However, the Court did not decide whether this was a constitutional requirement, thereby leaving state laws that do not require knowledge in questionable status.[19]

4. The Copyright Problem

All photographs are copyrighted as soon as they are taken, of course. Photographers and publishers jealously protect their copyrights in materials, particularly when those materials, such as adult pictures, have considerable economic value. *Playboy* magazine has actively pursued BBSs that provide access to unlicensed copies of its centerfolds.[20] Along with confirming model releases, publishers should confirm that the source of images also holds and grants the right to display, copy, and distribute the pictures.

*38 B. Advertising

Electronic publishers who accept advertising (and are lucky enough to develop a roster of clients) may receive a financial boon, but they also take on some additional responsibilities. The primary rule to keep in mind is that if legal action is brought concerning advertisements, the electronic publisher cannot simply point to the advertiser and say, "It's his fault!" Absent an express agreement or special rules, advertisements disseminated by an electronic publisher are viewed as that publisher's speech. As a result, advertisements may lead to liability for defamation or invasion of privacy for the publisher as well as the advertiser.[21] Because of this, electronic publishers should follow two general guidelines whenever possible: review all proposed advertisements for potential legal problems, and execute appropriate indemnity agreements with all advertisers. This section of the paper will now review a few specific areas of potential concern to electronic publishers who accept electronic advertising.

1. Illegal Activity

The First Amendment offers no protection for the advertisement of illegal activities. In the civil arena, the standard of liability for such advertisements has been developed in a series of cases involving classified ads placed by alleged "hit men" in *Soldier of Fortune* magazine. In *Braun v. Soldier of Fortune Magazine, Inc.,*[22] the court held that if an advertisement poses a "clearly identifiable unreasonable risk that it was an offer to commit crimes for money,"[23] then liability is not precluded by the First Amendment.[24] A publisher must ensure that the ad's words, on their face, do not present a "clearly identifiable unreasonable risk" that the advertisement solicits illegal activity.[25] On the other hand, ambiguous advertisements are generally protected.[26] This principle recognizes courts' reluctance to impose a duty on publishers to investigate advertisements beyond their plain language.

From a doctrinal standpoint, there is no reason to believe that the standard for advertisement of so-called "victimless" crimes (e.g., prostitution) would be any different than that of murder for hire. Therefore, it is important for publishers to ***39** carefully examine the content of proposed ads before distributing them. Advertisements that on their face solicit prostitution, sale of controlled substances, or other illegal activities may lead to liability.

2. Regulated Businesses

Although commercial speech does receive First Amendment protection, it is sometimes afforded lesser constitutional status. For instance, although the exact bounds of permissible regulation continue to be refined, lawyers are well aware that states (often through bar associations) can exercise some degree of control over legal advertising.[27] Attorney advertising must therefore adhere to the applicable state regulations. The following is a nonexhaustive list of additional types of regulated speech worthy of electronic publishers' attention.

a) Lotteries and Gambling

Some states and territories have particular laws regulating or banning the advertisement of lotteries and gambling. The Supreme Court upheld a rather peculiar regulatory scheme in Puerto Rico, where casino gambling is legal, that allowed

advertising of gambling as long as the ads were aimed at tourists,[28] while advertisements targeting Puerto Rican residents were banned.[29] More recently, in *United States v. Edge Broadcasting Co.,*[30] the Supreme Court affirmed the constitutional validity of a federal law and, presumably, similar state laws that forbid the advertisement of out-of-state lotteries by radio or television stations actually located in nonlottery states, even if the signals of the stations are primarily directed to a state with a lottery.[31]

The federal statute in *Edge Broadcasting* refers specifically to radio and television, and hinges on the federal licensing scheme for broadcasters;[32] therefore, it is inapplicable to electronic publishers. However, some states, such as North Carolina, have similar statutes that conceivably could apply to an out-of-state electronic publisher whose information is accessed in a nonlottery state.[33] Therefore, before deciding to accept an advertisement for a lottery or gambling establishment, an electronic publisher ***40** should determine if there is a state law restricting such an advertisement, especially if the establishment is from another state. If the advertisement is to be published in many states (i.e., if users from many states will have access to the material), the law of each relevant state should be determined. If there are no applicable restrictions, accepting a non-misleading advertisement is safe.

If a statute is in place that would prevent publication of an advertisement, an electronic publisher has two choices: simply refuse the ad or contact a lawyer about the possibility of mounting a constitutional challenge to the statute. The second choice may not be very promising. The Supreme Court has developed a body of law dealing with "commercial speech" that primarily questions whether the state directly advances a substantial governmental interest in a manner that is not overly broad by restricting or banning certain speech that proposes commercial transactions. The Court, however, has signaled its inclination to allow the restriction of commercial speech concerning "vice" activities, such as gambling, that the government could ban outright if it so chose.[34]

b) The Securities Industry

The dissemination of information regarding securities could lead to problems for the unwary. For example, federal law prohibits the description of a security, paid for by the issuer, without disclosure of both the fact that the issuer paid for the announcement and the amount paid.[35] It is also illegal for someone who is not a registered investment adviser to give investment advice; however, there is an important exception to this statute which exempts "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation" from the category of "investment adviser."[36]

The above-cited statutory exemption, like many laws from earlier eras, specifically addresses traditional media, but leaves on-line publishing in limbo. As a common sense guideline, electronic publishers should steer clear of touting particular securities in all contexts, including advertising, when the person or entity touting the security has an interest in the security. Disclosure of the interest may help, but it is not a guarantee of safety. Potentially misleading advertisements should be avoided at all costs. In general, the government is allowed to regulate speech regarding securities more strictly than other commercial speech due to the government's extensive regulation of all aspects of the securities industry.[37]

***41** This regulatory scheme may include criminal liability when an individual causes confidential information regarding a security to be communicated to others. The use of an on-line service to accomplish this objective, through an advertisement or otherwise, could lead to a conviction under federal wire fraud statutes.[38]

c) Medical Advertising

Like lawyers' ads, advertisements for physicians' services are subject to oversight by professional regulatory bodies. The extent of regulation varies from state to state. Whereas Texas simply prohibits false, misleading, or deceptive physician advertising,[39] other states may have more restrictive regulations. Medical ads that stick to a straight informative format will always be the safest bet.

3. Non-Misleading Advertisements

The non-misleading advertisement of lawful products or services is afforded constitutional protection (with the limited exception of certain regulated advertising, discussed *infra*). For example, a boys' magazine publisher was granted summary

judgment on a claim that its inclusion of an advertising supplement on shooting sports led to a twelve-year-old's accidental shooting death.[40] Similarly, a claim that a magazine publisher was responsible for a woman's case of toxic shock syndrome because of its advertisement of a tampon was rejected.[41]

The Texas Supreme Court recently reversed a lower court holding that injected an element of uncertainty into this area. The lower court had ruled that a radio station may be liable for its "negligent promotion" of a tavern if the station could foresee that a listener might go to the tavern, become intoxicated, and injure someone while driving drunk.[42] The Texas Supreme Court, however, established solid protection under state law for the advertisement of lawful products and activities, holding that liability could be imposed only if the speech at issue was directed toward inciting imminent unlawful action and was likely to bring about such a result.[43] Thus the Texas high court incorporated the "incitement" test from the First Amendment (discussed below) into state tort law.

***42 4. Misleading and Deceptive Advertisements**

State statutes, and some federal laws,[44] routinely prohibit false, misleading, and deceptive advertisements. For example, the extensive scheme of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) establishes a framework encompassing a wide variety of activities.[45] These statutes, however, are primarily aimed at parties who place advertisements-- those who actually offer the advertised goods and services--rather than the distributors of the messages.

Unfortunately for electronic publishers, the statutory exemptions for distributors of advertisements may leave the status of electronic publishers undefined. For example, the Texas DTPA does not apply to "the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard."[46] Does this include on-line publications? It is impossible to say with any certainty. We do know that an entity distributing information regarding its own goods or services does not bring itself within this "media exemption" simply by putting out pamphlets.[47] This means that electronic publishers must never use potentially misleading or deceptive means of publicizing their own goods or services.

The trickier question is whether an electronic publisher opens itself up to DTPA liability simply by carrying the misleading or deceptive ads of another party. It seems likely that an enlightened court would recognize the parallel between electronic publishers and the more traditional media specifically subject to the exemption, and thus will protect on-line publishers. However, the DTPA does specifically state that it is to be "liberally construed and applied to promote its underlying purposes," which are to protect consumers and to prevent deceptive advertising.[48] Conceivably, this provision could be used to support the idea that only the media specified with particularity in the statute are entitled to the exemption. However, applying the exemption to electronic publishers would be the more logical course.

In any event, no media outlet, be it traditionally earthbound or in cyberspace, is exempt from DTPA liability if the outlet or its employees know of the false, misleading, or deceptive nature of the advertisement, or have a "direct or substantial financial interest" in the good or service.[49] So even if it is someone else's advertisement, electronic publishers should not accept it if they know the advertisement ***43** is false, misleading, or deceptive. A watch also must be kept for advertisements touting goods or services in which the publisher or its employees have a direct or substantial financial interest. It is possible that a publisher may be liable for misleading statements in these advertisements, even if it does not know of their deceptive nature. If the electronic publisher is accepting a percentage of revenues generated from on-line sales, it cannot take advantage of the "media exemption." The best way to be safe is easy: if an advertisement looks misleading, do not accept it.

C. Incitement, Imitation, and Inspiration

Although rarely successful, lawsuits in which a litigant claims that speech inspired an individual to commit an illegal or otherwise undesirable act have not been all that uncommon. Fortunately, the First Amendment provides broad protection against liability of the speakers in such circumstances. It is questionable whether online speech could ever fit the constitutionally mandated definition of "incitement" and thus be unprotected. Electronic publishers should, however, have a basic knowledge of this area of the law in order to recognize potential problems.

Common types of "incitement" lawsuits include claims that music (usually heavy metal) inspired a listener's suicide,[50] that a violent movie incited someone to copy the violence,[51] and that visual scenes of stunts or risky activity led to imitation and injury.[52] Because these types of suits have failed so uniformly, one would expect that claimants would stop bringing such

suits. However, this point has not yet been reached. For example, one case currently pending in Texas federal court involves a claim that rap music caused the murder of a law enforcement officer,[53] and another recently dismissed case alleged that a news broadcast about capital punishment caused a teenager's suicide.[54]

In *Brandenburg v. Ohio,*[55] the Supreme Court established that even speech advocating armed revolt against the government in the abstract is protected by the First Amendment. The defendant in *Brandenburg* was a robe-wearing Klansman who, in a speech to a group of like-minded individuals, stated that "revengeance" may be necessary if the President, Congress, and Supreme Court continued to "suppress the ***44** white, Caucasian race."[56] The Supreme Court held that the defendant was not subject to prosecution because his speech fell within the broad bounds of the First Amendment.[57] As a result, only a very narrow range of liability exists for speech that allegedly motivates others to commit negligent or illegal acts. To fall outside constitutional protection, speech must be "directed to inciting or producing imminent lawless action and likely to incite or produce such action."[58] Advocacy of illegal action to be taken at some time in the future simply cannot fit this definition of incitement. Therefore, it is unlikely that written material can ever constitute incitement.[59] On the other hand, if the Klansman had made his exhortations to an armed and frenzied crowd on the Capitol steps, the outcome might have been different.

The case frequently cited by plaintiffs in incitement-based litigation is *Weirum v. RKO General, Inc.*[60] In this case, a radio disk jockey (DJ) was driving around Los Angeles doing live broadcasts and encouraging listeners to locate him and collect a prize. While speeding after the DJ on the freeway, one member of the radio audience ran a car off the road, killing the driver. The driver's family won a jury verdict against the radio station, which was upheld by the California Supreme Court.[61] The court's analysis concentrates almost exclusively on tort law, with one dismissive paragraph brushing off any constitutional concerns.[62] *Weirum* is the only significant modern case upholding liability for the wrongful actions of a third party that allegedly were inspired by the defendant's speech. One factor that may set *Weirum* apart from other incitement cases is that the speech involved commercial self-promotion, which may be afforded only limited First Amendment protection.[63] In any event, other courts have distinguished *Weirum* on so many bases that it retains little, if any, vitality.

Media outlets engaging in speech that criticizes and questions the status quo are frequently the defendants in lawsuits alleging incitement, imitation, or inspiration. Online speech, because it often offers dissenting viewpoints, sometimes more extreme than those commonly found in the mainstream media, could be a target for such lawsuits. For example, in the wake of the tragic bombing in Oklahoma City, some published reports indicated that stridently anti-government militia groups use electronic publishing to disseminate their messages. It is possible that if the survivors of a ***45** bombing victim think that on-line speech motivated the bombers, they may decide to sue the electronic publisher.

D. The Federal Fair Credit Reporting Act and Other Laws Relating to Information Services

A great advantage of electronic publishing is the ability to make vast amounts of information available for storage, search, and retrieval. The big on-line databases of West Publishing Company and Mead Data were among the first commercial successes of on-line publishing.

A number of software developers offer sophisticated BBS software. This software allows outside persons to contact the BBS by modem, arrange for payment through credit cards, search databases, and retrieve the results of the searches. It is now quite inexpensive for a company to go on-line with a specialty information service.

Many courts and government agencies are now making public records and digests of public filings available in electronic format for a modest fee. Everything from bankruptcy filings to civil filings to felony arrest records are public. Gathering these government databases in a single place can create a very valuable resource for numerous individuals, from landlords to prospective employers. Companies are starting to combine BBS software with government databases, and they are going into the information publishing business. For a single-use fee or a subscription rate, a user can dial up, access the database, and download the results of the search. However, what seems like a very innocent and efficient use of government information may implicate particular statutes intended to protect personal privacy. This paper uses the Federal Fair Credit Reporting Act as an example of such a statute.[64]

The Federal Fair Credit Reporting Act regulates "consumer reporting agencies" and is intended to assure that companies in the business of reporting on consumers' creditworthiness do so fairly.[65] It also provides a variety of remedies for consumers who are harmed by practices that violate the Act. The Act's language does not restrict itself to regulating traditional credit agencies like TRW, for its language is very broad. A "consumer reporting agency" is "any person which, for monetary fees,

dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."[66] A "consumer report" means essentially any information about a person's consuming habits or creditworthiness. As stated in the Act, "consumer reports" include:

> ***46** any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) [consumer] credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized by [this title].[67]

Consumer reports can only be furnished by consumer reporting agencies under certain circumstances "and no other:"

(1) In response to the order of a court having jurisdiction to issue such an order;

(2) In accordance with the written instructions of the consumer to whom it relates;

(3) To a person which it has reason to believe--
(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.[68]

The Act provides civil remedies, including actual and punitive damages, attorney's fees, and costs to a party that successfully challenges a violation of the Act.[69]

It would not be hard for an on-line publisher to become a consumer reporting agency. This is particularly true for those publishers whose services include databases of government information on individuals. Companies limiting the information they provide to that contained in public government records can cite no statutory exception. In fact, public record information is specifically included.[70]

Consumer reporting agencies must keep their information current as there are specific penalties for providing certain information that is over ten years old.[71] These ***47** agencies must "maintain reasonable procedures designed to avoid violations" of section 1681c's time limits,[72] and must "follow reasonable procedures to assure maximum possible accuracy of the information."[73] Agencies must also disclose to a consumer, upon the consumer's request and identification, the nature and substance of the information in their files on that consumer, the source of the information, the recipients of consumer reports for employment purposes for the last two years, and the recipients of reports for any other purpose for the last six months.[74] If the company provides information from public records, it must either notify the consumer of the records that are being provided, or "maintain strict procedures designed to insure that [the information is] complete and up to date."[75]

The breadth of the Fair Credit Reporting Act invites a challenge to its constitutionality. Read literally, it imposes enormous restrictions on the free dissemination of information. However, at the time of this writing, no court has held the Act, or any part of it, invalid, and the careful electronic publisher should comply with it. Keep in mind that the Act requires two basic things: it limits the persons who can be provided with "consumer reports," and it requires that data be kept current, and not go back too many years. Although slightly clunky, the first requirement can be met by an interactive session, conducted before

releasing the information, to confirm the user's need for the information. The second requirement demands steady attention to the content of the database.

E. A Note on Statutory Provisions and Judicially-Created Exceptions

Relatively few laws, such as the Electronic Communications Privacy Act of 1986,[76] have been drafted with the world of computer communications in mind. Commonly, the development of "on-line law" or the "law of cyberspace" has consisted of the struggle to apply existing law to this new medium. Whether the specific law in question is engraved in a statute or developed through judicial decision may well determine the outcome of any particular case. Two recent cases illustrate this point.

In a decision that has received little attention, the Wisconsin Court of Appeals faced the question of whether electronic BBSs are entitled to an important procedural benefit in libel cases, namely, the Wisconsin retraction law.[77] In Wisconsin, before a person can sue for libel, he or she must demand that the offending publication publish a ***48** retraction. If a retraction is not demanded, the case can be dismissed.[78] This law, however, applies only to lawsuits for allegedly libelous materials published "in any newspaper, magazine or periodical."[79] In *Fuschetto,* the Wisconsin Court of Appeals had to decide whether the BBS in question qualified as a newspaper, magazine, or periodical.[80]

The alleged libel occurred on SportsNet, a national computer service used by sports memorabilia dealers. The parties agreed that SportsNet was not a newspaper or magazine, so the issue turned on whether it could be considered a "periodical."[81] In the absence of a statutory or judicial interpretation of the term, the court looked to an old standby, *Webster's Unabridged Dictionary.* That dictionary defines "periodical" as a publication "of which the issues appear at stated or regular intervals."[82] Because the SportsNet bulletin board could be continually accessed and could accept postings at any time, the court held that it could not be considered a periodical.[83]

Strong arguments could be made that the *purposes* of the retraction statute, forcing potential litigants to give publications a chance to correct published defamatory statements, thus minimizing any harm those statements might cause, and preventing potential litigants from lying quietly and then springing a lawsuit on an unsuspecting publication, apply equally to SportsNet as they do to periodicals. However, the *Fuschetto* court felt bound by the plain meaning of the statute rather than the reasons that might be behind that law.[84] Nonetheless, the court did support its holding by referring to extra-textual sources. For example, an earlier opinion held that the retraction statute did not apply to the broadcast media and thus was not applicable to all forms of alleged libel.[85] Given the text of the statute, it is not surprising that the court would not find it applicable to a bulletin board, since it had already been held not to apply to radio and television. Somewhat more surprising was the court's observation that the statute could not apply to a medium that did not exist at the time the law originally was written. Rather than using a flexible approach to adapting existing law to new technology, the Wisconsin court decided that the legislature, rather than the courts, had some work to do, explaining, "[I]t is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway. [W]e conclude that extending the definition of 'periodical' to ***49** include network bulletin board communications on the SportsNet computer service is judicial legislation in which we will not indulge."[86]

In contrast, a trial court in a recent New York case was not as devoted to strict textualism as the Wisconsin Court of Appeals, even though the New York court was applying a law written years before the advent of computer on-line services.[87] In this case, Delphi, one of the major on-line information services, hosted a bulletin board conference discussing shock-jock and media figure Howard Stern's New York gubernatorial bid.[88] Delphi did not itself contribute editorial content to the bulletin board, but it was facilitating its subscribers' discussions of Stern's political aspirations.[89] In promotional ads in newspapers and magazines, Delphi used a photo of Stern "in leather pants which largely exposed his buttocks."[90] Stern had not given Delphi permission to use the photo, but he did not deny that he posed for the picture, and that it accurately depicted him.[91]

Stern, not usually adverse to publicity, sued Delphi, claiming it had violated a New York statute forbidding the use of "the name, portrait or picture" of any person "for advertising purposes, or for the purposes of trade" without prior written permission from that person.[92] Given only the plain language of the statute, which contained no exceptions, Stern should have had a cause of action against Delphi. However, the court granted the defendant's motion to dismiss.[93] The rationale included, first, the recognition of judicially created exemptions to the statute, and, second, the application of an exemption to the new technology of electronic bulletin boards.

The New York courts, partially in recognition of free speech principles, had long ago developed the "incidental use exception," finding the use incidental to dissemination and not leading to liability if a person's name or image is used for purposes of advertising the dissemination of news.[94] This exception was created by the courts and applied on a case-by-case basis. It was not codified into the statute, unlike the Wisconsin retraction law. The New York court in *Stern* was therefore more free than the Wisconsin court in *Fuschetto* to grapple with the novel issue of whether Delphi was a "news disseminator," entitled to the incidental use exception.

***50** The resolution of this issue was made much easier by two principles. First, a computerized bulletin board is not fundamentally unlike more traditional disseminators of information, and, second, the incidental use exception applies to all news disseminators, not just newspapers and magazines. In regard to the first principle, the court noted that on-line systems have been analogized to traditional vendors such as bookstores and libraries, citing the much-discussed *Cubby, Inc. v. CompuServe, Inc.*[95] Addressing the second principle, the court cited New York case law applying the exception to various "news disseminators." In determining whether Delphi was a news disseminator for purposes of this case, the court correctly noted that the question was not whether Delphi always played such a role, but rather whether the service was entitled to use Stern's image in promoting this particular activity of running a bulletin board for discussion of a candidate for governor.[96] The court analogized Delphi to a television network, which is engaged in both entertainment and news dissemination. When a party serves the latter function, "it should be entitled to the same privilege accorded other such media where the statutory right to privacy is at issue."

The *Stern* case is notable for its flexible approach to new technologies. Since the court was interpreting a judicially-created doctrine, it was free to recognize that Delphi was performing a function analogous to more traditional media, and that when Delphi did so, it was entitled to the same protection from liability that traditional media enjoy.[97]

If there is one lesson to be learned from these cases, it may be that when it comes to statutes, what you see in the plain language is not always the last word.

III. Selected Protections Available

A. Protection from Forced Disclosure

For years, with varying success, newspapers, magazines, and television have called on a variety of legal theories to resist search warrants, subpoenas, and civil discovery. These media outlets wish to avoid forced disclosure of their notes, work product, "outtakes," confidential sources, and other sensitive information to prosecutors, defense counsel, and civil litigators. Will electronic publishers be able to look to the same protections? What is the scope of these protections?

*51 1. Federal Constitutional Provisions

Unlike the law of defamation, press confidentiality has not found a solid grounding in the Federal Constitution. In 1972, the Supreme Court held, in a fractured opinion, that the First Amendment does not create a privilege that protects the press from subpoenas seeking the identity of confidential sources.[98] Six years later, the Supreme Court held that the First Amendment did not prevent law enforcement officials from using search warrants to obtain evidence of suspected criminal activity that a newspaper had witnessed, but in which the newspaper did not participate.[99] However, the Court did suggest that the Fifth Amendment's "particularity" requirement, that a search warrant clearly state the particular evidence sought, ought to be applied with special care in press searches.

2. The First Amendment Privacy Protection Act of 1980

In reaction to *Zurcher,* Congress passed the Privacy Protection Act of 1980.[100] This Act prohibits federal and state law enforcement officials from using search warrants to search for or seize materials held by publishers except when the publisher itself is a criminal suspect or when life or national security is in danger.[101] Even then, the Act limits government access to materials relevant to the crime under investigation.[102]

Unlike many state "shield" laws, this Act does not limit itself to traditional media:

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize *any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication,* in or affecting interstate or foreign commerce.[103]

The Act provides a civil remedy against federal or state officers who violate its provisions, including actual damages, statutory damages, attorney's fees, and costs.[104]

The Act is not widely known, and has rarely been applied. One of the few reported cases involves electronic publishing. In *Steve Jackson Games v. U.S. Secret Service,* the operator of an electronic bulletin board system argued that this Act applied ***52** to its electronic publishing.[105] The company, which used its BBS for a variety of publishing activities, had suffered an unfortunate and disruptive search by the U.S. Secret Service, which thought it was on the trail of computer "hackers."[106] The company was not a suspect in the investigation, but its offices were searched and its BBS and related materials were seized anyway.[107] Judge Sam Sparks of the Western District of Texas held that the company's publishing business, although unorthodox, was protected from search and seizure by the Act and that the Secret Service's raid was illegal. The judge awarded actual damages, fees, and costs.[108]

3. Electronic Communications Privacy Act

Another practical protection for electronic publishers can be found in Chapter 121 of Title 18, concerning "Stored Wire and Electronic Communications and Transactional Records Access" and enacted as part of the Electronic Communications Privacy Act of 1986.[109] Among other things, this chapter limits government access to electronic mail stored on computer systems that offer access to the public.

Section 2703(a) requires that for electronic communications in storage for 180 days or less, government agents may only secure such communications through a valid search warrant.[110] For electronic mail in storage for more than 180 days, section 2703(b) requires that the government agent either obtain a warrant for the communications sought, or obtain a valid subpoena or court order authorizing disclosure of the communications.[111]

For years, government agents have been raiding and seizing computer communications systems without regard to these provisions. These seizures have been very disruptive of computer publishing operations. The Secret Service's seizure of the BBS at Steve Jackson Games violated this law.[112] These provisions, when obeyed, have the practical effect of reducing the disruption of an electronic publication's operations by limiting the government's access to electronic evidence, and requiring a less intrusive means of gathering the evidence.[113]

*53 4. State Shield Laws/Reporter-Press Privileges

Through statute, common law, or constitutional interpretation, a number of states have recognized various levels of protection for the press from subpoenas or civil process seeking information. This paper cannot cover the status of the law in each state. Rather, it focuses on the three most populous states. When this issue arises for an electronic publisher, the relevant state's law should be consulted.

a) Texas

Texas has no statutory shield law. Last year, the Texas Court of Criminal Appeals held that there is no state or federal constitutional "reporter's privilege" either.[114] The Texas Supreme Court, which only has jurisdiction over civil cases, has not spoken on the issue, but has a recent history of recognizing strong state constitutional protection for free expression. Lower courts in civil cases have recognized a qualified privilege based on both the federal and state constitutions.[115]

Note, however, that Texas law does provide some procedural protection from the disruption caused by government investigations. Article 18.01(e) of the Code of Criminal Procedure precludes the issuance of an evidentiary search warrant for articles "located in an office of a newspaper, news magazine, television station, or radio station," with certain exceptions.[116]

Unlike the federal Privacy Protection Act, however, this statute's language is limited to traditional media outlets. It also lacks any accompanying civil remedy for violations.

b) New York

New York has a statutory reporter's shield law[117] which provides "professional journalists," "newscasters," and their employers an absolute privilege from contempt sanctions for failing to disclose confidential news in response to a subpoena,[118] and a conditional privilege protecting non-confidential news.[119]

The statute provides a very broad definition of news agencies, including any "*professional medium of communicating news or information to the public.*"[120] This ought to provide electronic publishers of news with the same protections enjoyed by traditional news agencies. Likewise, "news" is broadly defined as "written, oral, ***54** pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare."[121]

c) California

California's shield law is enshrined in its constitution as well as in statute.[122] However, the California privilege is narrower than New York's because it only protects the source of information and unpublished information.[123] Whether the California law also covers electronic publishers is less clear, though it protects from citation for contempt a "publisher, editor, reporter, or other person connected with or employed upon [[[sic] a newspaper, magazine, or other periodical publication, or by a press association or wire service" and "a radio or television news reporter."[124] The statute does not define "newspaper," "magazine" or "wire service," making it currently necessary to argue that an electronic publisher would fit into these terms.

B. Is There Constitutional Protection from Unequal Taxation?

Texas, like many states, provides certain exemptions from sales tax for newspapers, magazines, and non-cable commercial radio and television broadcasts.[125] Newspapers and magazines are defined in large part by their format. Newspapers must be "printed on newsprint," and magazines are publications that are "usually paperbacked and sometimes illustrated."[126]

Texas does not provide similar sales tax exemptions for electronic information services, even though they might deliver identical information. Instead, their services are expressly subject to the tax.[127] Section 151.0038(a) of the Texas Tax Code provides that an "information service" means: "(1) furnishing general or specialized news or other current information, including financial information, unless furnished to a newspaper or to a radio or television station licensed by the Federal Communications Commission; or (2) electronic data retrieval or research."[128]

The media has traditionally been very sensitive to tax discrimination, and has established a line of case law putting some constitutional restrictions on laws that ***55** unevenly impact on the press. Recently, for example, the Supreme Court held that a Cincinnati ordinance that prohibited placing commercial leaflets in newsracks, but permitted newspapers to be sold from such racks, violated the First Amendment.[129]

Sales taxes imposed only on general interest magazines are unconstitutional because the enforcement authority must examine the content of a publication to decide whether it is subject to taxation.[130] A tax structure that targets publications based upon their number of subscribers also violates the First Amendment.[131] A sales tax that exempts only religious publications violates the First Amendment's Establishment and Press Clauses.[132]

What about a tax structure that discriminates against on-line publishers? Reuters America, Inc., is in the business of providing electronic news services to subscribers, particularly daily financial information. Reuters sued the State of Texas, arguing that the distinction drawn by the Tax Code between "newspapers" and "information services" violated the First Amendment and Article I, Section 8 of the Texas Constitution, and federal and state equal protection clauses.[133]

The Court of Appeals rejected this constitutional challenge, holding the Tax Code did not discriminate within a medium, but between different types of media, print newspapers and electronic publications.[134] The Court believed that discrimination between types of media did not raise the same constitutional concerns as a tax that disproportionately impacted particular

sectors of a medium.[135]

The Court of Appeals distinguished cases which held that uneven tax burdens among publications of the same medium violates the First Amendment (such as *Minnesota Star,* above), and followed cases holding that distinctions among different media are not content-based, and therefore must only survive a rational relationship scrutiny.[136]

Apparently, the Austin Court of Appeals has decided that in Texas, electronic publishers must pay sales taxes on their services even if their service is publishing an ***56** electronic version of a print newspaper. While this might not seem to make a whole lot of sense, accepting the assumption that the content of print newspapers and electronic newspapers is identical, the Court of Appeals seems correct that there is little fear of content or viewpoint discrimination by a tax that unevenly impacts electronic newspapers.

The general applicability of that assumption is questionable, however. Because on-line publishing can be cheap to the point of being free, the content tends to be much different and more offbeat, iconoclastic, and dissenting than the content of traditional print media. Other states have recognized that distinctions between newspapers and other publications can become distinctions based on content, and therefore unconstitutional.[137] Is the content/format distinction really meaningful? Is there more threat to diversity of speech from the tax that unevenly impacted large newspapers over small-town newspapers in Minnesota than there would be from a tax that prevents publishers from going on-line? Taxes on electronic publishing could take away the cheap, effective, world-wide printing press that the Internet provides.

The fact that Reuters brought a facial challenge to the statute should not necessarily have precluded developing evidence that a tax that disproportionately impacts electronic publishing would in fact be indirect content regulation. Applying merely a rational review to tax or regulatory structures that impose heavier burdens on electronic publishers may act to skew the content of debate. Certainly it was an interesting and fact-intensive question that went unaddressed by the court of appeals.

IV. Conclusion

The landscape of laws that have been applied to situations involving "traditional" media (i.e., print and broadcast) is exceedingly broad. All indications are that this wide panorama of legal issues will have an equal impact on on-line communications. This paper could not begin to address all the issues, but rather it illustrated the types of concerns that operation of an electronic information service may entail. Although principles of free speech provide a great deal of breathing space, providers of on-line services should not take freedom for granted. Awareness of the potential pitfalls and protections will aid in the effective use of the great opportunities offered by new technologies.

Footnotes

a1 George, Donaldson & Ford, Austin, Texas.

aa1 George, Donaldson & Ford, Austin, Texas.

1 413 U.S. 15 (1973).

2 *Id.* at 24.

3 *Id.* at 23.

4 *Id.* at 24, 36-37.

5 *See, e.g.,* TEX. PENAL CODE ANN. § 43.21(a)(1) (West 1994).

[6] *See infra* Part II.A.2.

[7] Brewer v. State, 659 S.W.2d 441, 442 (Tex. Crim. App. 1983).

[8] *See, e.g.,* U.S. v. Guglielmi, 819 F.2d 451 (4th Cir. 1987); T.K.'s Video, Inc. v. State, 883 S.W.2d 300 (Tex. Ct. App.--Fort Worth 1994, *review refused*).

[9] *See* David Landis, *Sex, Law & Cyberspace; Regulating Porn: Does It Compute?,* USA TODAY, Aug. 9, 1994, at 1D.

[10] *Id.*

[11] FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978).

[12] *See, e.g.,* TEX. PENAL CODE ANN. § 43.24 (West 1994) (prohibiting distribution of "harmful material" to minors).

[13] *See* 47 C.F.R. § 64.201 (1994).

[14] *See, e.g.,* Penthouse Int'l, Inc., v. McAuliffe, 610 F.2d 1353 (5th Cir.), *cert. dism'd,* 447 U.S. 931 (1980).

[15] *Id.*

[16] Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1093 (5th Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985).

[17] *See, e.g.,* 18 U.S.C. § 2252 (1994) (activities relating to sexual exploitation of minors).

[18] United States v. X-Citement Video, 115 S. Ct. 464 (1994).

[19] *See, e.g.,* TEX. PENAL CODE ANN. § 43.25 (West 1994).

[20] *See* Playboy Enters., Inc., v. Frena, 839 F. Supp. 1552, 29 U.S.P.Q.2d (BNA) 1827 (M.D. Fla. 1993).

[21] As one example, the landmark Supreme Court libel case, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), involved the liability of the *New York Times* for a political advertisement, not hard news or editorial content.

[22] 968 F.2d 1110 (11th Cir. 1992), *cert. denied,* 113 S. Ct. 1028 (1993).

[23] *Id.* at 1121 n.12.

[24] *Id.* at 1121 (holding that the ad posed a substantial public danger when viewed in its entirety and because the ad contained the phrases "Gun for hire" and "All jobs considered").

[25] *See id.*

[26] *See, e.g.,* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989) (holding that ad which indicated that an ex-Marine was willing to accept "high risk assignments" was protected), *cert. denied,* 110 S. Ct. 729 (1990).

[27] *See, e.g.,* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

[28] Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

[29] *Id.*

[30] 113 S. Ct. 2696 (1993) (upholding 18 U.S.C. §§ 1304, 1307 (1988)).

[31] *Id.* at 2708.

[32] 18 U.S.C. § 1304 (1994).

[33] N.C. GEN. STAT. § 14-289 (1994) (prohibiting advertising by "circular or letter or any other way" on account of a lottery, whether within or without the state).

[34] *E.g., Edge Broadcasting,* 113 S. Ct. at 2703.

[35] 15 U.S.C. § 77q(b) (1994).

[36] 15 U.S.C. § 80b-2(a)(11)(D) (1994).

[37] SEC v. Wall Street Publishing Instit., Inc., 851 F.2d 365, 372 (D.C. Cir. 1988), *cert. denied,* 489 U.S. 1066 (1989).

[38] *See, e.g.,* Carpenter v. United States, 484 U.S. 19, 5 U.S.P.Q.2d (BNA) 1059 (1987).

[39] TEX. REV. CIV. STAT. ANN. art. 4495b, § 3.085 (West Supp. 1995).

[40] Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. Ct. App. 1993, *writ denied*) (upholding summary judgment on negligence and products liability claims on "no duty" and "not products" grounds).

[41] Walters v. Seventeen Magazine, 241 Cal. Rptr. 101 (Cal. Ct. App. 1987).

[42] Riley v. Triplex Communications, Inc., 874 S.W.2d 333, 353 (Tex. Ct. App. 1994).

[43] Triplex Communications, Inc. v. Riley, 900 S.W.2d 716, 720 (Tex. 1995).

[44] *See, e.g.,* 15 U.S.C. §§ 45, 52, 55 (1994) (Federal Trade Commission Act) *and* 15 U.S.C. § 1125(a)(1)(B) (Lanham Act).

[45] TEX. BUS. & COMM. CODE ANN § 17.40-46 (West 1987).

[46] *Id.* § 17.49(a).

[47] *See* Mother & Unborn Baby Care of North Texas, Inc. v. State, 749 S.W.2d 533 (Tex. Ct. App. 1988, *writ denied), cert. denied,* 490 U.S. 1090 (1989).

[48] TEX. BUS. & COMM. CODE ANN. § 17.44 (West 1987).

[49] *Id.* § 17.49(a).

[50] *See, e.g.,* Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd,* 958 F.2d 1084 (11th Cir. 1992), *cert. denied,* 113 S. Ct. 325 (1992).

[51] *See, e.g.,* Lewis v. Columbia Pictures Indus., 23 MEDIA L. REP. 1052 (Cal. Ct. App. 1994) (advertisement for the movie BOYZ N THE HOOD).

[52] *See, e.g.,* Sakon v. Pepsico, Inc., 553 So. 2d 163 (Fla. 1989).

[53] Davidson v. Time Warner, No. V-94-006 (S.D. Tex. filed Jan. 25, 1994).

[54] Ritter v. Whittle Communications, No. W-95-CA-039 (W.D. Tex. dismissed June 2, 1995).

[55] 395 U.S. 444 (1969).

[56] *Id.* at 446.

[57] *Id.* at 445.

[58] *Id.* at 447.

[59] *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987).

[60] 539 P.2d 36 (Cal. 1975).

[61] *Id.* at 42.

[62] *Id.* at 40.

[63] *See Herceg,* 814 F.2d at 1024.

[64] Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1994).

[65] *Id.*

[66] 15 U.S.C. § 1681a(e) (1994).

[67] 15 U.S.C. § 1681a(d) (1994).

[68] 15 U.S.C. § 1681b (1994).

[69] 15 U.S.C. § 1681n (1994).

[70] *See* 15 U.S.C. 1681k (1994).

[71] 15 U.S.C. § 1681c (1994).

[72] 15 U.S.C. § 1681e(a) (1994).

[73] 15 U.S.C. § 1681e(b) (1994).

[74] 15 U.S.C. § 1681g (1994).

[75] 15 U.S.C. § 1681k (1994).

[76] Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

[77] It's In The Cards, Inc. v. Fuschetto, 535 N.W.2d 11 (Wis. Ct. App. 1995), *review denied,* 537 N.W.2d 574 (No. 94-3162) (Aug. 28, 1995) (table).

[78] WIS. STAT. § 895.05(2) (1995).

[79] WIS. STAT. § 895.05(2) (1995).

[80] *Fuschetto,* 535 N.W.2d at 12-13.

[81] *Id.* at 14.

[82] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1680 (unabr. 1976)).

[83] *Id.* at 15.

[84] *Id.* at 13-14.

[85] *Id.* at 14 (citing Hucko v. Jos. Schlitz Brewing Co., 302 N.W.2d 68, 76 (Wis. Ct. App. 1981)).

[86] *Fuschetto,* 535 N.W.2d at 14-15.

[87] Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (N.Y. App. Div. 1995).

[88] *Id.* at 695-96.

[89] *Id.*

[90] *Id.* at 695.

[91] *Id.* at 696.

[92] *Id.* (quoting N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992)).

[93] *Id.* at 700-01.

[94] *Id.* at 696 (referring to Humiston v. Universal Film Mfg. Co., 178 N.Y.S. 752 (1st Dept. 1919)).

[95] *Id.* at 697 (citing Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991)).

[96] *Id.* at 698-99.

[97] Whether the court recognized it or not, the *Stern* decision actually went an important step further. Unlike traditional newspapers and broadcast news programs, Delphi does not gather, edit, and publish the "news." Rather, it facilitates the debate of matters of public interest. By extending the "news disseminator" definition to electronic bulletin boards, the *Stern* court protected the truly unique nature of BBSs--their ability to promote direct discussion of public events without the filter of increasingly centralized news and information conglomerates.

[98] Branzburg v. Hayes, 408 U.S. 665 (1972).

[99] Zurcher v. Stanford Daily News, 436 U.S. 547 (1978).

[100] 42 U.S.C. §§ 2000aa - 2000aa-7 (1988).

[101] 42 U.S.C. § 2000aa(a).

[102] *Id.*

[103] *Id.* (emphasis added).

[104] 42 U.S.C. §§ 2000aa-6(a), 2000aa-6(f) (1988).

[105] 816 F. Supp. 432, 440 (W.D. Tex. 1993), *aff'd on other grounds,* 36 F.3d 457 (5th Cir. 1994).

[106] *Id.* at 436.

[107] *Id.* at 436-37.

[108] *Id.* at 444.

[109] 18 U.S.C. §§ 2701-2711 (1994).

[110] 18 U.S.C. § 2703(a) (1994).

[111] 18 U.S.C. § 2703 (1994).

[112] *See* Steve Jackson Games, 816 F. Supp. at 440.

[113] For example, a court order may be denied for records if it would cause an "undue burden" on the service provider. 18 U.S.C. § 2703(d) (1994).

[114] Texas *ex rel.* Healey v. McMeans, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994).

[115] *See, e.g.,* Dallas Morning News Co. v. Garcia, 822 S.W.2d 675, 678 (Tex. Ct. App. 1991, orig. proceeding).

[116] TEX. CRIM. PROC. CODE ANN. § 18.01(e) (West 1977 & Supp. 1995).

[117] N.Y. CIV. RIGHTS LAW § 79-h (1992).

[118] N.Y. CIV. RIGHTS LAW § 79-h(b) (1992).

[119] N.Y. CIV. RIGHTS LAW § 79-h(c) (1992).

[120] N.Y. CIV. RIGHTS LAW § 79-h(b), (c) (1992) (emphasis added).

[121] N.Y. CIV. RIGHTS LAW § 79-h(a)(8) (1992).

[122] *See* CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West 1995).

[123] *See* CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070(a), (b) (West 1995).

[124] CAL. EVID. CODE § 1070(a), (b) (West 1995).

[125] *See* TEX. TAX CODE ANN. §§ 151.319(a), 151.320(a), 151.323(3) (West 1992).

[126] TEX. TAX CODE ANN. §§ 151.319(f), 151.320(b) (West 1992 & Supp. 1995).

[127] TEX. TAX CODE ANN. § 151.320(b) (West Supp. 1995).

[128] TEX. TAX CODE ANN. § 151.0038 (West 1992).

[129] City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517 (1993).

[130] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232-34 (1987) (sales tax targeted general interest magazines but exempted religious, sport, trade, and professional magazines).

[131] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (use tax on purchases of ink and paper over $100,000 targeted small number of large-circulation newspapers).

[132] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[133] Reuters Am., Inc. v. Sharp, 889 S.W.2d 646, 647-48 (Tex. Ct. App. 1994, *writ requested*).

[134] *Id.* at 652.

[135] *Id.*

[136] *See, e.g.,* Hearst v. Iowa Dep't of Revenue & Fin., 461 N.W.2d 295 (Iowa 1990), *cert. denied,* 499 U.S. 983 (1991) (holding a distinction between newspapers and magazines constitutional).

[137] *See* Emmis Publishing Corp. v. Indiana Dep't of State Revenue, 612 N.E.2d 614, 621 (Ind. Tax Ct. 1993); Department of Revenue v. Magazine Publishers of Am., Inc., 604 So. 2d 459, 462-63 (Fla. 1992); Newsweek, Inc. v. Celauro, 789 S.W.2d 247, 249-50 (Tenn. 1990), *cert. denied,* 499 U.S. 983 (1991).