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{1} The rapid growth of technology is changing the way in which we communicate, transact business and pursue entertainment. The impact of the Internet, for example, is staggering. The modern Internet is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers, offering a wide range of digital information, including text, images, sound and video. [1] While estimates are difficult due to its exponential growth, the Internet is currently believed to connect more than 159 countries, and over 100 million users. [2] Content is incredibly diverse and includes, but is not limited to, academic writings, art, music, humor, medical information, news, sexually oriented material, and commerce. [3] The importance of the Internet for sales, marketing, and transacting business probably cannot be overstated. According to the Advisory Committee on Electronic Commerce, 56% of companies in the United States alone are expected to put their products on line by this year. Yet, the opportunities created by the Internet and new technology do not come without a price tag.

{2} Cyberspace has often been compared with the "Wild West" of America's frontier days. This is an apt metaphor. Cyberspace is a land of opportunity with benefits such as websites, search engines, chat rooms, virtual stores, online auctions, e-cash, and other forms of electronic commerce. But like any frontier, it remains largely untamed. It is a vast, decentralized communications medium, wholly insensitive to state and national borders. [4] Also, anonymity is common in cyberspace. For most of the communications between Internet users or "Netizens," there is no effective way to verify the identity of the speaker. [5] Taken together, these factors make the Internet a frontier difficult to police or control. Along with the benefits have come additional burdens like cyberslamming, cyber-squatting,

cyberstalking, "para-sites," and spamming, just to name a few. To alleviate these burdens, law professors, attorneys, legislators and judges alike must try to adapt traditional legal principles to the "wild frontier" of cyberspace and keep pace with technological developments. This is easier said than done. However, the limitless vistas of the Internet and other advancing technologies should be a strong incentive for the legal community to develop rules that are fair and sufficiently clear to build trust for those pioneers who would utilize new technologies and venture into cyberspace.

{3} One aspect of the Internet frontier that challenges government on the federal, state and local level is the problem of taxation. As Wally Dean, ex-Mayor of Cupertino, California, recently explained: "[y]ou once had a manufacturer selling to a wholesaler to a retailer. If this gets hot, you'll have a manufacturer going on the Internet and selling directly to the mass market - bypassing the sales tax. We once built city government on local manufacturers and sales - you didn't think globally. This will mess with a lot of people's heads."

{4} In this issue of the *Journal of Technology Law and Policy*, Eugene R. Quinn, Jr. explores the "Tax Implications for Electronic Commerce over the Internet" and the challenge of applying the existing, "real world" paradigm of taxation to e-commerce. Quinn recognizes that as the value of e-commerce continues to grow, governments at all levels will be motivated to tax transactions in cyberspace. The significance of tax policy in shaping the future of our digital economy probably cannot be overestimated, since both the Internet and e-commerce are still in their infancy and therefore malleable, even vulnerable. For Quinn, the threshold inquiry is not whether there exists an appropriate means for taxing e-commerce, but rather, when is the right time to initiate a tax? Premature application of a tax, Quinn argues, could have an adverse impact on the growth and maturation of e-commerce. Quinn's concerns recall the wry observation of Mortimer Caplan, former Commissioner of the Internal Revenue Service, that "there is [only] one difference between a tax collector and a taxidermist - the taxidermist leaves the hide." At a fundamental level, the dilemma of Internet taxation is similar to other problems raised by the regulation of the Internet. The basic challenge facing lawmakers is to bring a sufficient degree of civilization to the Internet to maintain social order and safeguard the entrepreneurial and creative spirit of "Netizens" without stifling the very forces they strive to protect.

{5} Indeed, it is to be hoped that e-commerce will continue to expand as on-line transactions become more secure in both a technological and a legal sense. Consistent with this goal, in this issue of the *Journal*, authors Francis M. Buono and Jonathan A. Friedman discuss "Maximizing the Enforceability of Click Wrap Agreements." On the Internet, it is common for a visitor to a website to enter into agreement with a website owner or other on-line service provider either by typing in the words, "I accept" or clicking on an "accept" button displayed on their computer screen. The resulting on-line transaction is appropriately referred to as a click wrap agreement. In their paper, Buono and Friedman analyze the uncertain state of the law governing click wrap agreements and offer practical suggestions increasing the likelihood that such an agreement will be enforced in the event of a dispute.

{6} In addition, the efforts to define the scope of copyright protection are important for the development of cyberspace. "From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment - the printing press - that gave rise to the original need for copyright protection." [6] Changes in copyright law followed the development and popular use of the player piano, the photocopier, cable television, and the audio tape recorder. [7] Like all of these inventions that went before, today's Internet tests the outer limits of the copyright law. For instance, if an artist displays his or her work in a digital form on a website, that work will have unique characteristics which bedevil copyright law, including ease of replication, transmission and alteration. Either out of ignorance or indifference, many Netizens behave as if everything on the Internet is free for the taking to do with as they please, whether or not the material is copyrighted or has a copyright notice. Under these circumstances, copyright holders

justifiably fear infringement on the Internet and beyond.

{7} For example, in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.* [8] music industry associations representing record companies and artists unsuccessfully sued under the Audio Home Recording Act ("AHRA") to enjoin manufacture of the Rio portable music player. The Rio is a small device with headphones that permits a user to download MP3 audio files from a computer and make the files portable. [9] The music industry feared that music "pirates" would use this digital recording technology to create and distribute near perfect copies of commercially prepared compact disk recordings for which they had not licensed the copyrights. [10] The Ninth Circuit refused to enjoin manufacture of the Rio, holding that the AHRA did not apply to music recorded through a computer. It is predicted that music industry losses to digital piracy will soon surpass $300 million annually. [11] In an effort to alleviate this problem, the Rio's manufacturer has now incorporated a copyright protecting serial-copy management system or "SCMS" in the Rio's software. The legal controversy surrounding the Rio provides a dramatic illustration of the clash between computer technology, the Internet and copyright.

{8} Recently, in *Kelly v. Arriba Soft Corp.*, [12] a federal district court in California confronted a new problem: whether the display of copyrighted images (without their copyright management information) by a visual search engine on the Internet resulted in copyright infringement or a violation of the Digital Millenium Copyright Act ("DMCA"). [13] A visual search engine retrieves images instead of descriptive text, and offers a list of reduced, "thumbnail" pictures related to the user's query. The visual search engine in *Kelly* worked by maintaining an indexed database of about two million "thumbnail" images. The database included copyright protected images without permission or compensation to the original owner. Users could obtain a full-sized version of the "thumbnail" images without their copyright information by clicking on the "thumbnail." The court held that use of others' copyrighted images by an Internet visual search engine is a prima facie copyright violation, but may be permissible under the fair use doctrine. The court found that, under the facts and circumstances of the case, the fair use doctrine applied and the DMCA was not violated. In so doing, the court reasoned that: "[w]here, as here, a new use and new technology are evolving, the broad transformative purpose of the use weighs more heavily than the inevitable flaws in its early stages of development. [14] This decision, as it relates to images on the Internet, raises practical concerns for creative artists, graphic designers, photographers, and other copyright owners who wish to post information to the Internet and reap the benefits of the new medium without the fear of losing their rights in cyberspace. For those interested in a further exploration of the ongoing tension between technological innovation and copyright, the *Journal* presents Matthew C. Lucas' paper on "The DeMinimis Dilemma: A Bedeviling Problem of Definitions and a New Proposal for a Notice Rule, " a stylish call to arms for those who would have lawmakers respect the integrity of copyrights and resist the worst temptations of the digital age.

{9} In the 21st Century, individuals and businesses who ignore the potential - or the pitfalls - of technological advancement will do so at their peril. For the Internet and other information sharing technologies are becoming as essential to our daily lives as the telephone is today, and ultimately may render even the telephone obsolete. If we wish to fully realize the potential of these technologies, it will be the duty of the legal profession to create laws that on the one hand, encourage growth, and on the other hand, maintain the order and security needed to inspire confidence in the future of the digital revolution.

ENDNOTES

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[1] *See* Reno v. American Civil Liberties Union ("Reno I"), 521 U.S. 844, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997), *aff'g* American Civil Liberties Union ("ACLU") v. Reno, 929 F. Supp. 924 (E.D. Pa. 1996).

[2] *See ACLU v. Reno*, 929 F. Supp. at 831.

[3] *See Reno I*, 117 S.Ct. at 2335.

[4] *See ACLU v. Reno*, 929 F. Supp. at 831.

[5] *See Reno I*, 117 S.Ct. at 2336-37 (*quoting ACLU v. Reno*, 929 F. Supp. at 845).

[6] *See* Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417, 530, and n. 11 (1984).

[7] *See id.*

[8] 180 F.3d 1072 (9th Cir. 1999).

[9] *See id.* at 1073.

[10] *See id.* at 1074.

[11] *See id.*

[12] No. SACV99560GLTJW, 1999 WL 1210918 (Dec. 15, 1999).

[13] *See id.*

[14] *See id.* at 5.
