

## SCIENTOLOGY OR CENSORSHIP: YOU DECIDE

*An Examination of the Church of Scientology, Its Recent Battles with Individual Internet Users and Service Providers, the Digital Millennium Copyright Act, and the Implications for Free Speech on the Web*

Theresa A. Lyons\*

"Ideas, and not battles, mark the forward progress of mankind."<sup>1</sup>

### I. INTRODUCTION

This is a story of long drawn-out battles fought between numerous controversial entities, all of which use weapons of conflicting legal paradigms in an uncertain space.

On one side is the Church of Scientology.<sup>2</sup> On the other, former disgruntled

Scientologists,<sup>3</sup> Internet Service Providers (hereinafter "ISPs")<sup>4</sup> and the news media.<sup>5</sup>

---

\* J.D. and M.S.W. expected May 2001, Rutgers University School of Law - Camden and Rutgers University Graduate School of Social Work - New Brunswick. Ms. Lyons would like to thank the editorial staff of the Rutgers Journal of Law and Religion and also Professor Rod Dixon for their help and contributions to this article.

<sup>1</sup> This quote, attributed to L. Ron Hubbard, is posted on the boardroom wall at the Religious Technology Center ("RTC") in Los Angeles. See Jim Lippard & Jeff Jacobsen, *Scientology v. the Internet: Free Speech & Copyright Infringement on the Information Super-Highway*, 3 SKEPTIC 3, 40 (1995), at <http://www.skeptic.com/03.3.jl-jj-scientology.html> (update to original article) (on file with the Rutgers Journal of Law and Religion). The RTC is one of the formal entities constituting the Church of Scientology and is known for being a "watch dog" of sorts, actively pursuing those who publish or disseminate controversial Church materials without permission. According to the Church of Scientology, its official purpose "is to protect the public from misapplication of the technology and to see that the religious technologies of Dianetics and Scientology remain in proper hands and are properly ministered." CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 305 (1998).

<sup>2</sup> L. Ron Hubbard founded the first Church of Scientology in 1954. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 48 (1998). Despite its relative youth, the Scientology movement currently boasts over 8 million members worldwide. Natalie Hanlon-Leh, *Lessons from Cyberspace & Outerspace: The Scientology Cases*, 27 A.B.A. SUM. BRIEF 48, 49 (1998). See also The Church of Scientology International, *Church of Scientology*, at <http://www.scientology.org/home.html> (official home page of the Church).

In addition to authoring the aforementioned piece, Ms. Hanlon-Leh also served as the counsel of record for the defendant in *R.T.C. v. F.A.C.T.Net, Inc.*, one of the cases discussed in this article. See *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519, 1521 (D. Colo. 1995).

<sup>3</sup> The three cases examined in this paper all stem from the actions of disgruntled Scientologists. In each of these cases, former Church members disseminated secret Church materials via the Internet in order to publicly criticize Scientology. The Church then responded with litigation, alleging copyright and trademark infringement against not only the disgruntled Scientologists, but also against a number of Internet Service Providers and publishers of various kinds. See *Religious Tech. Ctr. v. Lerma*, 908 F. Supp.

The Church of Scientology arms itself with notions of trademark infringement,<sup>6</sup> copyright protections,<sup>7</sup> and freedom of religion,<sup>8</sup> while its adversaries and critics arm themselves

---

1353, 1355 (E.D. Va. 1995); *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519, 1521 (D. Colo. 1995); *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 923 F. Supp. 1231, 1238-9 (N.D. Cal. 1995).

<sup>4</sup> Users of the Internet do not do so in a "direct manner." Rather, their access is gained through the use of an Internet Service Provider (ISP) that serves as a conduit to the World Wide Web. Popular ISPs include America Online, Prodigy, and EarthLink. In *Religious Technology Center v. Lerma*, the Church of Scientology sued not only the individual who posted the secret materials but also the individual's ISP, Digital Gateway Systems. *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 260 (E.D. Va. 1995). In *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, the Church sued another ISP for the same reasons. *See Netcom*, 923 F. Supp. at 1240.

<sup>5</sup> In later proceedings related to *Lerma*, the Church of Scientology also sued *The Washington Post* and its reporters for publishing a news story about the *Lerma* lawsuit, which contained some quotes from secret Church documents. *Lerma*, 908 F. Supp. at 1364-5. In a number of other lawsuits, the Church attacked various additional publications, including *Time Magazine*, *Reader's Digest*, and the author of an editorial published in *USA Today*. J. P. Kumar, "Fair Game": *Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 751-2 (1997).

In the case against *Time*, the magazine was first granted a partial summary judgment. *Church of Scientology Int'l. v. Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y. 1995). *Time* was then granted summary judgment on the remaining claims. *Church of Scientology Int'l. v. Time Warner, Inc.*, 932 F. Supp. 589 (S.D.N.Y. 1996). The Church responded with a motion to modify its original complaint, which was denied. *Church of Scientology Int'l. v. Time Warner, Inc.*, 1997 WL 538912, \*4 (S.D.N.Y. 1997). The Church continued its pursuit of *Time Magazine* by filing a motion to amend its complaint in an attempt to get nominal damages, which was also denied. *Church of Scientology Int'l. v. Time Warner, Inc.*, 1998 WL 575194, \*5 (S.D.N.Y. 1998). The Second Circuit rejected the Church's subsequent appeal on January 12, 2001 when it affirmed all of the district court's rulings. *Church of Scientology Int'l v. Behar*, 2001 WL 28589, \*7 (2d Cir. 2001).

<sup>6</sup> *See Lerma*, 897 F. Supp. at 261, *F.A.C.T.Net, Inc.*, 901 F. Supp. at 1521, *Netcom On-line Communication Servs., Inc.*, 923 F. Supp. at 1238.

<sup>7</sup> *See Lerma*, 897 F. Supp. at 261, *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. at 1521, *Netcom*, 923 F. Supp. at 1238.

The notion of copyright has its roots in *The United States Constitution*: "The Congress shall have Power to . . . promote the Progress of Science and useful Arts, by securing from limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The codification of Congress's copyright authority is in 17 U.S.C. § 1 et. seq. To prevail in a copyright infringement case, a plaintiff must show 1) that he owns a valid copyright and 2) that the defendant has copied or reproduced components of the protected material. *See F.A.C.T.Net*, 901 F. Supp. at 1524. Some scholars and analysts, however, doubt whether traditional paradigms of copyright are practicably enforceable on the web:

Copyright law is supposed to work in the electronic world as it does in the mere tangible worlds of print and the fine arts. However, once works are put into digital form and uploaded into cyberspace, keeping track of copyright ownership and enforcing copyrights becomes difficult. Works cast in digital form can more easily be copied and modified than when they exist on paper canvas. And it can be difficult to know when the line between copyright violation and permissible copying of ideas has been crossed. Also, once a work has been posted in

with doctrines of fair use,<sup>9</sup> freedom of speech,<sup>10</sup> and freedom of the press.<sup>11</sup> One side views the Internet<sup>12</sup> as vice, the other as venue. When looking closely at these battles,

---

cyberspace it can be simultaneously copied by millions of users in many different countries, even if copying is illegal. There is no practical way to reassert control over work so that copyright can be meaningfully enforced.

John R. Dean, *The Sheriff Is Coming to Cybersville: Trademark and Copyright Law and the Internet*, 11 *BYU J. PUB. L.* 75, 96-7 (1997) (quoting STEPHEN ELIAS, *PATENT, COPYRIGHT & TRADEMARK: A DESK REFERENCE TO INTELLECTUAL PROPERTY* 98 (1996)).

<sup>8</sup> See *Lerma*, 908 F. Supp. at 1355-6. Freedom of Religion has its roots in the Constitution; but, unlike copyright, it is enumerated as a limitation of congressional power rather than an expansion thereof: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The Scientologists specifically argue that allowing wide dissemination of their secret Church documents interferes with their "free exercise of the Scientology religion." *Lerma*, 908 F. Supp. at 1355.

<sup>9</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-line Communication Servs. Inc.*, 923 F. Supp. 1231, 1241 (N.D. Cal. 1995). The doctrine of fair use serves as a general defense to copyright infringement and is meant to bring some common sense balance to strict carte blanche enforcement of copyrights. "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. Hanlon-Leh observed:

In determining whether the use of a copyright work is fair use and therefore not an infringement, the court must consider four factors: 1) the purpose and character of the use, including whether such is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

Natalie Hanlon-Leh, *Lessons from Cyberspace & Outerspace: The Scientology Cases*, 27 *A.B.A. SUM. BRIEF* 48, 53 (1998).

<sup>10</sup> See, e.g., *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1358-60 (E.D. Va. 1995). Freedom of speech is enumerated in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

<sup>11</sup> See, e.g., *Lerma*, 908 F. Supp. at 1359-60. Freedom of the press, along with freedom of religion and freedom of speech, is protected under the First Amendment: "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I.

<sup>12</sup> The Internet has been described as "the most participatory marketplace of mass speech that this country - and indeed the world - has ever seen." Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 *CARDOZO ARTS & ENT. L.J.* 1, 36 (1998). Its realm "expands at a dizzying pace as thousands of new participants join [the] online world everyday." George B. Trubow, *Constitution v. Cyberspace: Has the First Amendment Met Its Match?*, *BUS. L. TODAY*, Mar.-Apr. 1996, at 41. The Internet's explosive growth and the accompanying public euphoria have caused one author to liken it to the "free love" days of the 1960s, calling cyberspace a "consensual hallucination." Christopher P. Beall, *The Scientological Defenstration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 *J. MARSHALL J. COMPUTER & INF. L.* 361, 363 (1997).

two troubling patterns emerge. The first shows that the Church of Scientology has systematically combined its copyright might and electronic power to attempt to chill free speech on the web. The second shows that recent legislation<sup>13</sup> enables this type of activity and exacerbates the struggles that individual speakers face. Three particular cases in which the Scientologists, as plaintiffs, sought to quash critics give credence to this conclusion, especially when they are viewed in combination with current Congressional action.<sup>14</sup>

This paper begins with a brief overview of the Church of Scientology. It next explores three cases in which the Church has sued, among others, various individuals for posting restricted Church documents and dogma on the Internet. The paper continues with an examination of those cases in light of the Digital Millennium Copyright Act.<sup>15</sup> It concludes with the proposition that this new piece of legislation, when combined with the Scientology cases, increases censoring activities and serves as a hindrance to free speech on the web.

---

Yet, this initial utopia of expression has been stifled by the realization that there is still much confusion in cyberspace. The main reason for this confusion stems from the fact that technology has developed faster than the societal means for controlling and conceptualizing it. Lawrence Lessig notes:

There is a choice about how cyberspace should be, but . . . we are disabled from making that choice. We are disabled for three very different reasons. One is tied to the limits we place on courts, the second to the limits we have realized in legislatures, and the third to the limits in our thinking about code. If choice must be made, these limits will mean that we will not be making that choice. We are at a time when the most significant decisions about what this space will be must be made, yet we haven't the institutions, or practice, to make them.

LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 213 (1999).

<sup>13</sup> The legislation discussed in this article is the Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified and amended scattered sections of 5,17, 28, 35 U.S.C.).

<sup>14</sup> See *supra* note 3.

<sup>15</sup> The Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified and amended scattered sections of 5,17, 28, 35 U.S.C.).

## II. THE CHURCH OF SCIENTOLOGY

While some would argue that Scientology is not even a religion,<sup>16</sup> it does enjoy status as such under United States' law.<sup>17</sup> Like many religions, Scientology has a creation story<sup>18</sup> and recognizes as sacred several symbols.<sup>19</sup> Unlike many religions, however, one

---

<sup>16</sup> "Few tasks . . . require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment." *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3<sup>rd</sup> Cir. 1981). There are a number of competing methods for determining what is a religion, which include deity-based beliefs and functional systems of behavior. See generally Paul Horowitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 127-140 (1997). The Church of Scientology, however, is an especially difficult case because "its history and conduct have raised serious questions about the legitimacy of its origins as a religion and about whether its conduct ought to effectively strip it of any rights or privileges that it may claim as a religion." *Id.* at 88.

The Church itself proffers that it is in fact a religion because it meets three basic criteria:

1. A belief in some Ultimate Reality, such as a supreme or eternal truth that transcends the here and now of the secular world;
2. Religious practices directed towards understanding, attaining or communing with this Ultimate Reality; and
3. A community of Believers who join together in pursuing this Ultimate Reality.

CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 564-5 (1998).

<sup>17</sup> The IRS first granted the Church of Scientology tax-exempt status in 1957, but then revoked that status ten years later amid much controversy. Michael Browne, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 IND. INT'L & COMP. L. REV. 155, 191-2 (1998). For the next twenty-five years, the Church of Scientology petitioned the IRS until it finally issued a letter in 1993 that restored the Church's tax-exempt status. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 569 (1998).

Interestingly, while the Church of Scientology has achieved begrudging recognition as a religion in the United States, other nations, including Great Britain, Australia, and Germany, have also been slow to recognize it as such, enacting legislative bans and handing down crushing judgments. See Horowitz, *supra* note 16, at 110-127. For example, in an English custody battle, one judge called Scientology "both immoral and socially obnoxious." *Re B & G*, 1 Fam. 134, 157 (Fam. 1985).

<sup>18</sup> According to Scientologists, in an incident that occurred 75 million years ago, the evil prince, "Xenu," exterminated people from the planets and exploded their spirits, or "thetans," through the use of H-bombs in volcanoes. Horowitz, *supra* note 16, at 97. These "thetans" were then gathered up and implanted into the future societies. *Id.* The images later became the premise for all subsequent cultures and religions on Earth. *Id.*

<sup>19</sup> The "Scientology Cross," for example, is a sacred symbol which bears eight points, one for each of the urges which one faces as one journeys through life. These urges include:

the urge towards existence as self, as an individual; the urge to survive through creativity, including the family unit and the rearing of children; the urge to survive through a group of individuals or as a group; the urge towards survival

must "pay" substantially for religious training and spiritual growth.<sup>20</sup> Additionally, Scientology is distinguished because its membership includes many celebrities who are very outspoken about their faith.<sup>21</sup>

Founded by L. Ron Hubbard<sup>22</sup> in 1954, the Church of Scientology has its roots in a book called *Dianetics*.<sup>23</sup> When it was first published, *Dianetics* was proclaimed to have

---

through all mankind and as all mankind; the urge to survive as life forms and with the help of life forms such as animals, birds, insects, fish and vegetation; the urge to survive of the physical universe itself and with the help of the physical universe and each of its component parts; the urge to survive as spiritual beings or the urge for life itself to survive; the urge towards existence of infinity.

CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 526 (1998).

<sup>20</sup> Training and other spiritual sessions may cost a devoted Scientologist up to \$1,000 per hour in educational expenses. Horowitz, *supra* note 16, at 98-9.

<sup>21</sup> John Travolta, Kirstie Alley, Jenna Elfman, and Lisa Marie Presley are just a few of the rich and famous Scientologists. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 233-244 (1998). The Church considers itself a haven of sorts for celebrities, establishing a series of "Celebrity Centres" which help artists practice Scientology throughout the world. *Id.* at xxi. L. Ron Hubbard also publicly praised the arts when he said, "A culture is only as great as its dreams, and its dreams are dreamed by artists." *Id.* at 288.

<sup>22</sup> Lafayette Ronald Hubbard was born in Tilden, Nebraska in 1911 and died in Creston, California in 1986. Browne, *supra* note 17, at 157. Little additional factual knowledge is known about Hubbard's life. Followers tell tales of his wisdom and courage. He is described as an "inquisitive" youth who enjoyed many great successes, including advances in the Boy Scouts of America and the achievement of "blood brother" status with the Blackfoot Indians. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 578-9 (1998). He is also hailed as a hero from World War II whose injuries left him hospitalized and "partially blind with injured optic nerves and lame from hip and back injuries." *Id.* at 42. It was during this time, Hubbard's followers conclude, that he discovered the "revolutionary" tenets of Scientology that helped heal him and the millions who followed after him. *Id.* at 42-3. Yet, "[o]ther biographies assert that the official version of his life is replete with exaggerations and misstatements, if not outright falsehoods. For example, some biographers assert that his hospitalization was for mere aches and pains, and Hubbard was certainly never blinded and crippled and so never cured himself." Horowitz, *supra* note 16, at 89-90.

<sup>23</sup> L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950). The ideas contained in *Dianetics* first appeared as an article that was published in Astounding Science Fiction magazine in May 1950. Horowitz, *supra* note 16, at 90. The book itself was not formerly published until 1951. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 524 (1998). The popularity of *Dianetics* has increased over the years. The Church of Scientology reported in 1997 that almost 18 million copies of *Dianetics* had been sold in 138 countries around the world. *Id.* at 458-9.

the power to control the human mind and completely cure the human body.<sup>24</sup> Shortly after its publication, the Scientology movement exploded.<sup>25</sup>

The basic premise of Scientology<sup>26</sup> is that the human mind is like a computer which is divided into two separate components: the "analytic" and the "reactive" mind.<sup>27</sup> The analytic mind has great positive power to control one's physical being and destiny, while the reactive mind serves as a more negative recording device which stores up previous pain and unpleasant past experiences, referred to as "engrams."<sup>28</sup>

When a person operates at "optimal" levels, and the reactive mind is kept in check by the analytic mind, one is in a state of "Clear."<sup>29</sup> Clear is achieved through a process

---

<sup>24</sup> Horowitz, *supra* note 16, at 90-1.

<sup>25</sup> *Id.* at 93. Estimates show that today's Church of Scientology may comprise of up to 8,000,000 members worldwide. *Id.* at 102.

<sup>26</sup> The word Scientology is derived from *scio*, which is Latin for "know," and *logos*, which is Greek for "reason itself" or "inward thought." Thus, Scientologists proffer, their religion is the study of wisdom and knowledge. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 523 (1998).

<sup>27</sup> Horowitz, *supra* note 16, at 91.

<sup>28</sup> *Id.* at 91-2.

<sup>29</sup> *Id.* While in a state of "Clear," a person is said to be:

- \*Freed from active or potential psychosomatic illness or aberration
- \*Self-determined
- \*Vigorous and persistent
- \*Unrepressed
- \*Able to perceive, recall, imagine, create and compute at a level high above the norm
- \*Stable mentally
- \*Free with his emotion
- \*Able to enjoy life
- \*Freer from accidents
- \*Healthier
- \*Able to reason swiftly
- \*Able to react quickly

CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 66-67 (1998). Those who achieve "Clear" are entitled to wear a special bracelet bearing a Scientological insignia of two triangles and the letter "S." *Id.* at 165.

called "Auditing."<sup>30</sup> A typical auditing session involves the use of an "E-meter,"<sup>31</sup> a machine which enables one to measure the physiological changes in one's being when presented with a series of memories and experiences, thus rooting out the useless reactive mind and strengthening the more useful analytic mind.<sup>32</sup> Advanced stages of Clear, brings forth total mastery over oneself and one's place in the universe, is known as "Operating Thetan."<sup>33</sup>

In order to progress through the early stages of "preclear" to the later stages of Clear and Operating Thetan, one must undergo intense education and a series of trainings, all of which can cost up to \$1,000 per hour.<sup>34</sup> The documents and other materials needed to attain the status of Operating Thetan are not only closely guarded,<sup>35</sup> but are at the center of most of the litigation involving the Church of Scientology.<sup>36</sup>

---

<sup>30</sup> Horowitz, *supra* note 16, at 92.

<sup>31</sup> The Electropsychometer, or E-Meter, "measures the mental state or change of state of a person," helping "the auditor and the preclear locate areas of spiritual distress or travail" so they can be addressed. CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 83 (1998). The "E-meter" contains two silver cylinders, which the preclear holds in her hand. *Id.* 83-87. The two cylinders are connected, via wires, to a small blue panel, which contains numbers, dials, and a magnetic needle of sorts that is said to measure the physiological changes experienced by the person holding the two cylinders. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 167. "By 'operating' is meant able to act and handle things. And by 'thetan' is meant the spiritual being that is the basic self. 'Theta' is Greek for thought or life or the spirit. An Operating Thetan then is one who can handle things without having to use a body of physical means." *Id.* at 167.

<sup>34</sup> Horowitz, *supra* note 16, at 98-9.

<sup>35</sup> According to Church dogma, the reason these advanced documents need to be guarded, and general access must be restricted, is because, "premature exposure could impede spiritual development." CHURCH OF SCIENTOLOGY INTERNATIONAL, WHAT IS SCIENTOLOGY? 542 (1998). According to the Church, these works "are available only at seven sites around the world and [they] are never removed from these locations." Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1522 (1995).

<sup>36</sup> Hanlon-Leh, *supra* note 2, at 49. It should be noted, however, that the Church of Scientology also strictly guards documents it considers to be public. For example, the Church even posts a strict copyright statement that prohibits all downloading, electronic transmitting, reproduction, data storage, retrieval, recording, printing or photocopying of materials that it posts on its web site, which, in some ways, is



### III. THREE CASES INVOLVING THE CHURCH OF SCIENTOLOGY

The Church of Scientology is no stranger to the courts as it has been a party to many suits in the past.<sup>37</sup> In the interest of brevity, however, this paper focuses on three cases wherein the Church, through its arm, the Religious Technology Center (hereinafter "RTC"), sought to silence former members of its congregation. Also in the interest of brevity, only the copyright claims within each case will be explored.<sup>38</sup> The three cases discussed are *Religious Technology Center v. Lerma*,<sup>39</sup> *Religious Technology Center v. F.A.C.T.Net, Inc.*,<sup>40</sup> and *Religious Technology Center v. Netcom Online Communication Services, Inc.*<sup>41</sup>

---

antithetical to the purpose of the web. See International Church of Scientology, *1996-2000 Church of Scientology International Copyright Statement*, at [http://www.scientology.org/p\\_jpg/csi.htm](http://www.scientology.org/p_jpg/csi.htm) (last visited Jan. 29, 2001) (on file with the Rutgers Journal of Law and Religion).

<sup>37</sup> The Scientologists have found themselves involved a number of "ugly" lawsuits over the past decade. In one case, the Church of Scientology was hit for 2.5 million dollars in damages for the infliction of emotional injury upon one of its former members. See *Wollesheim v. Church of Scientology*, 6 Cal. Rptr. 2d 532 (1992). In another case, the legal battle was so fierce that briefs from both sides were stricken from the court record because they were "acrimonious and unprofessional [in] tone." *Bridge Publ'n, Inc. v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254, 257-8 (D. Colo. 1998). The Church's litigation budget is rumored to be over 20 million dollars per year. Kumar, *supra* note 5, at 749.

Query, however, whether the recent battles with Scientologists and Internet users are entirely based in the Church's confrontational nature, or whether the traditional cycle of copyright law trying to grapple with a new technology bears some blame: "[A]ction[s] for copyright infringement present us with a picture all too familiar in copyright litigation: A legal problem vexing in its difficulty, the dearth of squarely applicable precedents, a business so common that a dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act." Howard C. Anawalt, *Nine Guidelines and a Reflection on Internet Copyright Practice*, 22 U. DAYTON L. REV. 393, 394-5 (1997).

<sup>38</sup> In each of the three cases, the Religious Technology Center also alleged trademark infringement. See *supra* note 6.

<sup>39</sup> *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995).

<sup>40</sup> *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995).

<sup>41</sup> *Netcom On-line Communications Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

### ***A. Religious Technology Center v. Lerma***

The *Lerma* case actually has its roots in another Scientology case, *Church of Scientology International v. Fishman*,<sup>42</sup> in which the Church charged the defendant, Steven Fishman, with defamation. Arnold Lerma, a disgruntled Scientologist, discovered a court document<sup>43</sup> from the *Fishman* case that contained various "Advanced Technology"<sup>44</sup> Church materials, and posted it on the Internet.<sup>45</sup> When the RTC discovered this action, it sued Lerma, alleging he violated copyright law by posting the materials. In addition, RTC sued Lerma's ISP,<sup>46</sup> and *The Washington Post* (hereinafter the "*Post*"), a newspaper that published the story along with sections of the Advanced Technology documents.<sup>47</sup> In its pursuit of the defendants, RTC officially seized Lerma's

---

<sup>42</sup> *Church of Scientology Int'l v. Fishman*, No. CV 91-6426 (C.D. Cal. 1991).

<sup>43</sup> This document "has come to be known as the Fishman affidavit, to which there were attached 69 pages of what the Religious Technology Center ("RTC") describes as various Advanced Technology works, specifically levels OT-1 through OT-VII documents." *Lerma*, 908 F. Supp. 1362, 1364 (E.D. Va. 1995).

<sup>44</sup>"Advanced Technology" refers to the "advanced scriptures of Scientology." CHURCH OF SCIENTOLOGY INTERNATIONAL, *WHAT IS SCIENTOLOGY?* 307 (1998). These documents are closely guarded and tightly controlled by the Church, which gives the following explanation of its actions:

The bulk of Scientology scriptures are broadly available to anyone seeking spiritual enlightenment. However, the advanced technology, which represents a very small portion of the scripture, is maintained as strictly confidential. Before a parishioner is allowed to use these materials, he or she must meet the highest ethical standards and have completed earlier levels of spiritual release . . . which form the foundation for more advanced religious services. An individual who has not completed the prior levels of spiritual attainment will be unable to receive the full spiritual benefits of the more advanced technology. Scientology churches that minister the advanced technology are monitored . . . to ensure the materials of each level are kept secure, that each church's license requirements are strictly observed and that advanced services are ministered exactly as written by Mr. Hubbard.

*Id.* at 307-8.

<sup>45</sup> *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 260 (E.D. Va. 1995).

<sup>46</sup> The ISP, Digital Gateway Systems, was initially joined as a party but then was later dismissed from the suit. Hanlon-Leh, *supra* note 2, at 50.

computer,<sup>48</sup> although the court eventually reversed its order and restricted RTC's access, finding its inspection methods had exceeded the intentions of the Copyright Act.<sup>49</sup>

Lerma asserted the doctrine of Fair Use,<sup>50</sup> arguing that he had a right to post the materials in question because his use of the documents was evaluative and analytic in nature.<sup>51</sup> He also argued that the nature of the Internet and the "unique characteristics of

---

<sup>47</sup> The article contained not only a news account of the happenings, but also showed various quotes from the "Fishman Affidavit." See Marc Fisher, *Church in Cyberspace: Its Sacred Writ Is on the Net. Its Lawyers Are on the Case*, WASH. POST, Aug. 19, 1995 at C1. The paper obtained the documents in spite of the best efforts of Scientologists. Church members, worried about the dissemination of such materials, had been going to the court house every day at 9:00 a.m. to check out the materials, holding them all day until the close of the court session in order to keep others from gaining access to them. See Lerma, 908 F. Supp. at 1364.

<sup>48</sup> See Lerma, 897 F. Supp. at 261. The ability to legally seize and search allegedly infringing materials and mechanisms is enumerated in § 503 of the Copyright Act:

At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 503 (a). This remedy, however, does not give free reign to plaintiffs who move for seizure:

[I]t is an undisputed legal principle that the federal Copyright Act "does not authorize any search of any premises . . . it only authorizes impounding of claimed infringing articles in the custody of the court for eventual destruction if found at trial to infringe." In other words, the public policy embodied in the portion of the Copyright Act that authorizes seizure and impoundment of allegedly infringing materials [is] the recognition that a copyright owner is entitled to assurance that the infringing work will be destroyed after a successful trial, not hidden or transferred to the defendant. The power of a court to order a seizure and impoundment is neither a warrant to take discovery, nor a license to harass.

Hanlon-Leh, *supra* note 2, at 57.

<sup>49</sup> See *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1361 (E.D. Va. 1995). While the court fell short of holding that RTC perpetrated "fraud upon the court," it did note that RTC misled the court and violated the spirit of the writ of seizure because, rather than using independent inspectors to examine the contents of Lerma's computer, RTC carried out the "inspection" at the office of its counsel, without an official independent observer. *Id.*

<sup>50</sup> *Id.* at 1359-60. See also *supra* note 9.

<sup>51</sup> *Religious Tech. Ctr. v. Lerma*, 1996 WL 633131, \*4 (E.D. Va. 1996).

computer interactions" warranted special treatment under copyright law.<sup>52</sup> The court rejected this argument and granted the Church summary judgment for copyright infringement against Lerma.<sup>53</sup>

The *Post* and the ISP fared better than Lerma. The Court held that the *Post* was indeed entitled to the Fair Use defense and it granted the paper summary judgment on all counts.<sup>54</sup> The court afforded the *Post* more protection, noting both that the story of the Church of Scientology was newsworthy investigation and reporting and that the paper published fewer verbatim materials belonging to the Church than did Lerma.<sup>55</sup> RTC subsequently voluntarily dismissed its action against the ISP.<sup>56</sup>

#### ***B. Religious Technology Center v. F.A.C.T.Net, Inc.***

*Religious Technology Center v. F.A.C.T.Net, Inc.* also has its roots in the "Fishman Affidavit."<sup>57</sup> F.A.C.T.Net is a non-profit educational organization that maintains a library of information on what it refers to as "mind controlling organizations."<sup>58</sup> On August 15, 1995, F.A.C.T.Net posted a message to a newsgroup<sup>59</sup>

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*13. The court, however, shied away from the imposition of heavy fines against the defendant, noting financial hardship. *Id.* at \*15. Rather than imposing the statutory maximum under 17 U.S.C. § 504(c)(1) of \$20,000 per infringement for a total fine of \$100,000, the court instead imposed the statutory minimum of only \$500 per infringement for a total fine of \$2,000. *Id.*

<sup>54</sup> See *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1369 (E.D. Va. 1995).

<sup>55</sup> See *id.* at 1365-7.

<sup>56</sup> See *supra* note 46.

<sup>57</sup> Hanlon-Leh, *supra* note 2, at 50.

<sup>58</sup> *Id.*

<sup>59</sup> A newsgroup may be described as "a newspaper without an editor, or an electronic version of the colonial American town square. A newsgroup is a forum in which persons may exchange information, data, ideas and commentary, and where they may interactively debate topical issues. Each newsgroup

that contained much of the *Fishman* documents along with commentary that supported Fishman's position against the Church of Scientology.<sup>60</sup> RTC subsequently brought action against both F.A.C.T.Net and two of its members for copyright infringement.<sup>61</sup> Much like the *Lerma* case, RTC sought and was granted official seizure of the defendants' computers and other equipment in order to conduct an official investigation into the level of infringement.<sup>62</sup> Similar to the *Lerma* case, the court later ordered RTC to return the equipment amid court reprimands for abuse and actions exceeding the intent of the Copyright Act.<sup>63</sup> Unlike *Lerma*, however, the court denied the Church's request for a preliminary injunction because it found little likelihood of success on the merits for its copyright infringement claim.<sup>64</sup> The court found, that while F.A.C.T.Net had posted some protected materials via the newsgroup, the vast majority of the information obtained by F.A.C.T.Net was not posted publicly.<sup>65</sup> Rather, it was contained in the form of electronic data within the private section of its digital library and the individual computers of its members.<sup>66</sup> It can be inferred from the decision that, although the public posting of materials may constitute copyright infringement, the scanning, copying, and

---

typically is devoted to a particular subject." *Id.* at 51. "The Internet newsgroup relevant for [this] case is alt.religion.scientology [a.r.s.]. Participants include employees of Scientology, former Scientologists struggling to recover from their own involvement with Scientology, and other persons. Users of a.r.s. discuss, study, and debate Scientology, its management, practices, litigation, and doctrines." *Id.*

<sup>60</sup> Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1521-2 (D. Colo. 1995).

<sup>61</sup> *See id.* at 1521.

<sup>62</sup> *See* F.A.C.T.Net, Inc., 901 F. Supp. at 1529-30.

<sup>63</sup> *See id.* at 1530-3. *See also* Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 907 F. Supp. 1468, 1470-1 (D. Colo. 1995).

<sup>64</sup> *See* F.A.C.T.Net, Inc., 901 F. Supp. at 1525.

<sup>65</sup> *Id.* at 1524.

<sup>66</sup> Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1522-4 (D. Colo. 1995).

storing of electronic data in one's private digital files does not.<sup>67</sup> The court also noted the importance of the newsgroups' non-profit status and the educational mission of F.A.C.T.Net when rendering its decision.<sup>68</sup>

***C. Religious Technology Center v. Netcom On-line Communications, Inc.***

While the ISP, Netcom, was certainly the most prominent defendant named in this case, in truth, the allegations began with Dennis Erlich, a former Scientology minister who later became a vocal critic of the Church.<sup>69</sup> After 14 years of ministry in the Church,<sup>70</sup> Erlich left angrily and adopted a new "life calling" to foster critical debate about Scientology and its practices.<sup>71</sup> The main vehicle for this activity was an online news group called "alt.religion.scientology."<sup>72</sup> When the Church discovered this newsgroup, and what it deemed to be secret documents posted by Erlich, RTC demanded that Erlich cease his posting activities immediately.<sup>73</sup> Unable to persuade Erlich to do so, RTC then sent letters to the operator of his Bulletin Board Service (BBS),<sup>74</sup> and Netcom,

---

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* at 1525.

<sup>69</sup> *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 923 F. Supp. 1231, 1238-9 (N.D. Cal. 1995).

<sup>70</sup> Erlich was a counselor who, after training in the Church, was able to conduct "auditing" sessions that enabled others to achieve the state of "Clear." *Id.* at 1239. *See also supra* notes 29-33 and accompanying text.

<sup>71</sup> *Netcom*, 923 F. Supp. at 1239.

<sup>72</sup> *Id.* This is the same newsgroup that came under fire in the F.A.C.T.Net case. *See supra* note 59 and accompanying text.

<sup>73</sup> *Netcom*, 923 F. Supp. at 1240.

<sup>74</sup> *Id.* Tom Klemesrud was the operator of the BBS "support.com," to which Erlich subscribed, paying an annual fee. *Id.* at n.2, n.6. Erlich did not technically post these materials directly to the web. Rather, he first sent them to Klemesrud, who then posted them on his BBS. *Id.* at n.6. Klemesrud, in turn, posted them through the ISP, Netcom, with which he had leased access to the Internet. *Id.*

its ISP, asking them to suppress Erlich's activities by dropping him from their systems.<sup>75</sup> When the BBS and the ISP, Netcom, refused to curtail Erlich's behavior and insisted that the Church first provide proof that its copyright claim was valid,<sup>76</sup> RTC followed with a copyright suit against all three parties.<sup>77</sup>

Like *Lerma* and *F.A.C.T.Net*, the Church also seized the defendant's electronic materials and equipment.<sup>78</sup> The seizure included books, papers, computer disks, and copies of Erlich's hard drive from his personal computer.<sup>79</sup> In spite of Erlich's contentions that he was protected from copyright infringement because of fair use,<sup>80</sup> the court granted RTC an injunction, blocking Erlich from posting further Church materials on the web.<sup>81</sup>

The court next turned its focus to the BBS and Netcom.<sup>82</sup> The Church had sought relief against Netcom and the BBS under direct copyright infringement, contributory

---

<sup>75</sup> *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 923 F. Supp. 1231, 1240 (N.D. Cal. 1995).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1240.

<sup>79</sup> Concerned about the "chilling effect" such a seizure would have, and the harm that could befall the individual defendant, the court took a more protective stance of the individual, finding that, if granted, the seizure would be an unwarranted prior restraint on a person who may indeed have the right to criticize the Church. *Id.* at 1259.

<sup>80</sup> *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 923 F. Supp. 1231, 1242-44 (N.D. Cal. 1995). *See also supra* note 9.

<sup>81</sup> *Id.* at 1265. The Church later sought to expand the injunction to include materials not posted publicly, but rather housed in Erlich's private files as well; however, this request was denied. *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, U.S. Dist. LEXIS 23572, \*24 (N.D. Cal. 1997).

<sup>82</sup> The Church sued the ISP and the BBS, not only for direct copyright infringement, but also for contributory infringement, and vicarious liability. *See Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 907 F. Supp. 1261, 1381 (N.D. Cal. 1995). The issue of vicarious liability, although not mentioned in the Church's initial complaint, was argued vigorously at trial. *See id.*

infringement, and vicarious liability.<sup>83</sup> The court refused to hold either Netcom or the BBS liable for direct copyright infringement<sup>84</sup> because it found it unlikely that an ISP or BBS could truly be responsible for direct infringement solely because of the acts of its users.<sup>85</sup> The court did, however, leave the door of liability open as it relates to both contributory infringement and vicarious liability,<sup>86</sup> acknowledging that there may indeed be some other instances in which an ISP or BBS could be held responsible for the actions of their users under these two theories.<sup>87</sup> It is this portion of the ruling that has caused great anxiety<sup>88</sup> and has contributed partly to the adoption of the Digital Millennium Copyright Act.<sup>89</sup>

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1372, 1381.

<sup>85</sup> *Id.* Direct copyright infringement occurs when a defendant violates one of the exclusive rights of the copyright holder as enumerated in 17 U.S.C. § 106. *Id.* at 1366. *See also supra* note 7.

<sup>86</sup> Netcom, 907 F. Supp. at 1381-2.

<sup>87</sup> *Id.* at 1372-81. The judge based his decision of possible contributory infringement on the fact that ISPs and BBSs could have knowledge of their users' infringing activities and may substantially participate in the activities. *Id.* at 1373-75, 1381. This recognition of possible vicarious liability acknowledges that ISPs and BBSs may have the ability to control their users' infringing actions and may gain a direct financial benefit from their failure to do so. *Id.* at 1375-77, 1381.

<sup>88</sup> One scholar noted that, construing these theories too loosely "can be as much of a snare and concern for BBSs, ISPs, and other Internet servers and users, as strict copyright liability can be to the First Amendment." Fraser, *supra* note 12, at 48.

<sup>89</sup> The Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified and amended scattered sections of 5,17, 28, 35 U.S.C.).



#### IV. THE DIGITAL MILLENIUM COPYRIGHT ACT

Passed in 1998, the Digital Millennium Copyright Act (hereinafter “DMCA”) sought to clarify copyright liability in the digital age.<sup>90</sup> The DMCA provides ISPs and BBSs with a “safe harbor” of non-liability for the copyright infringement of their users that is directly related to an ISP's knowledge of events and subsequent actions after such knowledge is acquired.<sup>91</sup> If an ISP or BBS has no knowledge, or apparent knowledge, of its users’ infringing activities, then it is generally free from liability for copyright infringement.<sup>92</sup> If, however, an ISP or BBS obtains knowledge or awareness of its users’ infringement, then it must move “expeditiously to remove, or disable access to, the material” to avoid liability.<sup>93</sup> For, if they do not move “expeditiously” to do so, they risk being held responsible for the actions of their users. An ISP’s awareness can come in the form of a “good faith” notification by a third party<sup>94</sup> and the ISP’s subsequent “expeditious” removal of the materials in question must occur immediately, regardless of whether the merits of the third party's allegations are initially substantiated.<sup>95</sup> It is this

---

<sup>90</sup> Adding to the confusion about ISP liability was the White House’s Information Infrastructure Task Force Working Group. In its official report, known as the *White Paper*, the Task Force advocated that ISPs could indeed be held strictly liable for the infringing actions of their users. This is, of course, contrary to the judicial opinion rendered in *Netcom*. Hanlon-Leh, *supra* note 2, at 56-7.

<sup>91</sup> See 17 U.S.C. § 512(c) (1998).

<sup>92</sup> 17 U.S.C. § 512(c)(1)(A) (1998).

<sup>93</sup> *Id.*

<sup>94</sup> 17 U.S.C. § 512(c)(3) (2000).

<sup>95</sup> The exact language of the Digital Millennium Copyright Act requires an ISP to “expeditiously . . . remove, or disable access to, the material that is *claimed* to be infringing or to be the subject of infringing activity . . . ” *Id.* (emphasis added).

portion of the DMCA which, when combined with the litigation style of the Scientology cases, has the most chilling effect on free speech on the web.

## **V. WHY THE SCIENTOLOGY CASES, IN COMBINATION WITH THE DMCA, HINDER FREE SPEECH ON THE WEB**

The litigation style contained in the Scientology cases, and the recent enactment of the DMCA, when combined, hinder free speech on the web for two reasons. First, it appears that the Church of Scientology's main purpose for asserting its copyright privileges may be to silence its critics and send a warning message to other disgruntled Church members.<sup>96</sup> It, therefore, may not be seeking a balanced discussion about its policies and practices. Rather, the Church may be attempting to limit the discussion to include only its own views,<sup>97</sup> which would then lead to selective enforcement of copyright and, inevitably, an unbalanced marketplace of ideas. Second, the DMCA

---

<sup>96</sup> The Church's blatant desire to silence their critics is perhaps best summarized by L. Ron Hubbard himself:

The only way to defend anything is to attack, and if you ever forget that, then you will lose every battle you are ever engaged in, whether it is in terms of professional conversation, public debate, or a court of law . . . the law can be used very easily to harass, and enough harassment on somebody who is simple and on thin edge anyway . . . will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.

Kumar, *supra* note 5, at 748.

<sup>97</sup> One recent tactic Scientologists have used to make their views known is "web spamming." Modemac, *The War Between Scientology and the Internet*, ¶ 7, available at <http://www.modemac.com/cos/cos2.html> (last visited Nov. 12, 2000) (on file with the Rutgers Journal of Law and Religion). Web spamming involves posting mass numbers of web pages into cyberspace in the hopes of flooding the Internet with one view of information, making it more likely that when a user consults a search engine, he will find that information rather than information posted from other views and sources. *Id.* The Scientologists have recently set a goal of adding 116,000 new web pages to the Internet, all of which present their views on the Church. *Id.* These web pages each highlight one Church member and each contains the identical six links: 1) About Myself; 2) My Success in Scientology; 3) My Favorite L. Ron Hubbard Quote; 4) Groups I Support; 5) Favorite Links; and 6) A link to the official homepage of the Church of Scientology. *See, e.g.* International Church of Scientology, *Meet Scientologists On-line*, at <http://on-line.scientology.org/> (last visited Nov. 14, 2000) (home page of more than 15,000 individual sites by Scientologists).

creates censorship before adjudication<sup>98</sup> and, consequently, inadvertently contributes to attempted censorship by organizations like the Church of Scientology. The DMCA, by "requiring" ISPs to remove speech that may or may not actually be infringing on the copyrights of others, creates a kind of "prior restraint"<sup>99</sup> that comes at substantial expense to individual Internet users and free speech.<sup>100</sup> (On a side note, while some may argue that the DMCA does not qualify as a "prior restraint" because it is carried out by individual private plaintiffs, the DMCA may, in fact, be construed as state action because it provides the procedural and substantive mechanism with which private citizens are able to silence potential speakers.)<sup>101</sup> The facts and holdings as they relate to two particular parties in the Scientology litigation illustrate the dangers to free speech on the web.

In *Lerma*,<sup>102</sup> the *Post* was vindicated when the court refused to grant the Church an injunction and allowed the *Post* to escape copyright infringement liability for publishing a story and accompanying documents about the Church.<sup>103</sup> This did not occur,

---

<sup>98</sup> See *supra* notes 89-95 and accompanying text.

<sup>99</sup> A "prior restraint" is an attempt to silence a speaker before he expresses his thoughts or ideas and "[a]ny system of prior restraints of expression comes . . . bearing a heavy presumption against its constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). While some may argue that the Digital Millennium Copyright Act does not qualify as a "prior restraint" because it is carried out by individual plaintiffs, it may also be argued that its very enactment qualifies as state action because the statute provides the procedural and substantive mechanism with which private citizens are able to silence speakers on the web, pending adjudication. See *supra* notes 89-95 and accompanying text. When a statute has the "operation and effect" of silencing speakers, it bears a heavy constitutional burden. *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

<sup>100</sup> See Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1888-9 (2000).

<sup>101</sup> See *supra* note 99.

<sup>102</sup> *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995).

<sup>103</sup> *Id.* at 1366-7. The *Post* was also awarded attorney fees from the Church. *Id.* at 1367-8.

however, until three months after the Church's initial complaint against the *Post*.<sup>104</sup> If the *Post* had opted to publish the article in question via the Internet instead of solely in print,<sup>105</sup> the application of the DMCA in this case could have amounted to a three-month blackout of news reporting about the *Lerma* case pending litigation. In the fast pace world of the Internet, three months can be the equivalent of a lifetime, especially as it relates to news reporting. It is estimated that there are currently over 200 million Internet users in the world today.<sup>106</sup> Thus, three months of silence would cause the *Post* to lose access to 50 million potential readers.

Another case that demonstrates the downfall of the DMCA is *Religious Technology Center v. F.A.C.T.Net, Inc.* In *F.A.C.T.Net*,<sup>107</sup> the court vindicated a web-based, non-profit educational library, holding it not liable for copyright infringement for information stored and exchanged privately between library members.<sup>108</sup> Again, if the DMCA was applied to this case, an educational and literary blackout could have occurred within a library pending the court ruling. This is particularly disturbing as it relates to

---

<sup>104</sup> The article in question first appeared in the *Post* on August 19, 1995. *Id.* at 1364. The order vindicating the paper was not issued, however, until November 28, 1995. *Id.* at 1362.

<sup>105</sup> See, e.g., Washington Post Company, *Washingtonpost.com - News Front*, available at <http://www.washingtonpost.com/> (home page of the Post and source of online news) (last visited Nov. 12, 2000).

<sup>106</sup> Colette Luchetta-Stendel, *The E-Vote: A Proposal for An Interactive Federal Government*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1101, 1142 n. 24 (1999).

<sup>107</sup> *Religious Tech. Ctr. v. F.A.C.T.Net*, 901 F. Supp. 1519 (D. Colo. 1995).

<sup>108</sup> See *supra* notes 65-67 and accompanying text.

libraries because they serve as places where people store knowledge and a society without knowledge is doomed to fail.<sup>109</sup>

Still, even after examining these stories, some critics may argue that future temporary news and educational blackouts, similar to those described above, will be innocuous since they will only last for a short time. In truth, however, such blackouts under the DMCA are indeed troublesome for an additional two reasons. First, in cases where litigation is lengthy, the informational blackouts would be correspondingly longer. Second, there may be some web users who do not possess the resources of the *Post* or F.A.C.T.Net. Such users may be unlikely to litigate and challenge the silencing that takes place through their ISP at the behest of groups seeking censorship. Consequently, some information removed by the ISPs and BBSs may never be redistributed or reposted to the web. Thus, the DMCA may actually lead to the silencing of individuals who have every legal right to speak. Legitimate free speech on the web will suffer tremendously as a result.

## VI. CONCLUSION

The Scientology cases, in combination with the DMCA, present a danger to free speech on the web because they encourage parties with both malicious, and non-

---

<sup>109</sup> James Madison wrote of the importance of education and knowledge within a functional society in a letter he sent to W.T. Barry on August 4, 1822:

The liberal appropriations . . . for a general system of Education cannot be too much applauded. A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 THE WRITINGS OF JAMES MADISON, Vol. 9 103 (Gaillard Hunt, ed., 1910).

malicious, intent to censor individual speakers. Additionally, the DMCA inadvertently require ISPs to enable and partake in such actions. It may be important to protect the economic interests of those who genuinely possess copyrights. As is stands now, however, combined court and Congressional actions cause substantial expense to individual speakers and have the potential to silence many who, until recently, have enjoyed freedom of expression on the web.<sup>110</sup>

---

<sup>110</sup> One scholar likened copyright law's relationship to the Internet as similar to the old-time "sheriff" coming to tame a "wild western" town. *See Dean, supra* note 7, at 101.