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Paradigms lost

The tyranny of paradigms dominates legal analysis. Traditional mathematical analysis begins with undefined elements and axioms. It then derives theorems from them, in the hope the results will correspond to something useful, so that the system is a model for physical behavior of interest. In contrast, legal analysis seizes on a paradigm, explores its implications, and applies them as a tool for resolving conflicting legal interests that the paradigm is supposed to represent.

Thus, as explained in an earlier Micro Law column ("Legal Mythology," Feb. 1987, pp. 73-75), the law has tried to resolve conflicts between factory owners and surrounding property owners objecting to toxic wastes emanating from the factories by vacillating between two conflicting paradigms:

1. A man's home is his castle. Therefore a factory owner (whose factory is equated to his home) is free to engage in toxic waste generating activities, within the sanctity of his home/castle/factory, if he pleases.

2. Noxious effluvia are like wild beasts. A land owner who chooses to keep lions and tigers in his personal park is absolutely liable to others if the beasts escape and devour the neighbors' children. Hence factory owners are strictly liable for their pollution.

Closer to home, a computer program is like a book. Therefore an owner of a copyright on a computer program has the right to keep others from imitating any arbitrary features of this "book," even those features that become de facto standards in the software industry. (For example, consider the keystroke patterns of Lotus 1-2-3 and dBase.)

If the analogy is misguided, that is the problem of the other party in litigation or of the public. The prize of legal victory nonetheless goes to the proponent of the most persuasive or dramatic paradigm. Never mind how nonsensical the consequences of applying the paradigm to phenomena that do not have the same inner structure. (Imagine Volta concluding that elec-

tricity is like hydraulic pressure. He applies a 30V potential to a late frog and inspires a non-linear, galvanic response. "Aha!" he says, "it must be turbulence in the electric fluid. Let's see now whether the electrical fluid follows Bernoulli's law.")

The most recent paradigm battle in Micro Law's territory is over defamation on the Internet. Sidney and Jacqueline Blumenthal of Washington, D.C., filed a \$30-million libel lawsuit in late August against AOL and its Internet gossip columnist Matt Drudge. AOL carries the Drudge Report, which recounts the latest rumors without first verifying their accuracy. Drudge falsely reported that S. Blumenthal, a White House staffer, had spousally abused J. Blumenthal, director of the President's Commission on White House Fellows, since 1996. The report continued by stating that the abuse was being covered up (apparently by the Clinton Administration). The Blumenthals said the false statements caused them to suffer ridicule and contempt as well as severe emotional distress causing headaches and nausea.

Drudge acknowledged that the report was incorrect and withdrew it from his Web site. He takes the position that his failure to investigate does not constitute "actual malice." The First Amendment requires White House staffers and other public figures to prove so-called actual malice before they can win a libel suit. According to Drudge's and AOL's lawyers, unless someone in Drudge's position (or that of his employer, if AOL is that) has doubts about the truth of a statement it is about to disseminate, there is no obligation to investigate the truth of the allegations being made. (This proposition is based on the Supreme Court's decision in *N.Y. Times v. Sullivan*, in which the Court overturned a gigantic judgment against the *New York Times* that a Southern jury returned against it in the early 1960s. The *Times* had misreported some minor details of how a Southern sheriff dealt with anti-segregation pro-

testers. The Court said there was no actual malice in the *New York Times'* account of the sheriff's conduct, even though the *Times* got some details wrong. The case established the rule that a public figure, such as the sheriff, must be the victim of actual malice, meaning intentional or reckless falsehood, to recover for libel.) The Blumenthal lawyers apparently accept the principle that actual malice must be proved, but they say theirs is a case of actual malice, given Drudge's position that he need not check accuracy and AOL's knowledge of Drudge's reputation and style.

Thus the paradigm battle is not over whether Drudge is like a newspaper reporter, even though he uses the Internet. There does not seem to be any serious argument that the same First Amendment principles (and similar legal principles) govern Internet "columnists" as printed media columnists and reporters. The paradigm battle is over AOL's status as codefendant in the suit. AOL says its relation to Drudge is like that of the telephone company to someone who makes a telephone call and in the course of it defames somebody. Or maybe it's like a newsstand selling newspapers, for the contents of which newsstand proprietors are not responsible. The Blumenthal lawyers say that, au contraire, AOL is like a newspaper publisher running Drudge's column as a feature to attract readers and sell newspapers. They say AOL makes money from Drudge's efforts, compensates him, promotes his column to the public, and is therefore responsible for his actions.

Who will win the paradigm battle here is uncertain. In point of fact, AOL subscribers log on to AOL, keypunch "Drudge," and are immediately linked to the Drudge Report. Apparently, AOL compensates Drudge, and it features Drudge because doing so profits AOL. Clearly, that all goes somewhat beyond what a telephone company or even a newsstand proprietor does. Does it have all of the attributes of a newspaper-columnist relationship? (This is left for the reader to puzzle out.)

Why are we asking and why should we answer questions like, "Is AOL more like a telephone company or a

newspaper publisher?" Is that a rational way to decide how to resolve controversies like that between the Blumenthals and AOL? AOL is neither a telephone company nor a newspaper publisher. Can we really figure out how to resolve controversies of this kind by straining for analogies—by fighting the Battle of the Paradigm?

Is there a better alternative? Attempting to develop an axiomatic system is probably hopeless. That is not the only possible alternative, however. Suppose instead we simply try to isolate the competing interests at stake. The interest of the Blumenthals in their personal privacy, for example, that of the public in being informed of real cover-ups at the White House (such as Watergate), and those peculiar to the Internet and its viability as a medium of communication. Suppose, also, we consider the likely impact on those interests of adopting one legal rule or another.

What would be the effect on Internet viability if Internet service providers (ISPs) became financially liable for some harms that the information-content service caused? Remember that their revenues appreciably depend on a particular information-content service being made available to subscribers.

What would be the effect if the harms in question included those resulting from failure to verify assertions of fact? Would the loss in information flow harm the public interest? Would it be trivial? Is the loss in speed of publication and increase in operating cost involved, if factual allegations must be verified, something that will lead to the public being deprived of a service of public value. Is the public value sufficient to justify shifting the cost of mistakes to the persons harmed by the misinformation? Should the cost of these harms be assessed against the ISP that profits (and perhaps therefore passed on to the ISP's subscribers). Or should the cost rest with the harmed persons as part of the price of their living in an information society (if they don't like it, they can opt out and move to a desert island)?

The issue here is similar to that involved when a copyright owner complains to an ISP that a newsgroup

posting contains the owner's copyrighted material and thus infringes the owner's copyright. ISP providers object to being obliged to verify the claim. They also assert that it is too expensive and time-consuming for them to determine whether the use is a fair use, even where copied copyright-protected material has been posted. There is, of course, a significant difference. In the copyright case, the ISP does not significantly profit from the posting of copyright-protected material. The ISP also does not have the kind of ongoing relationship with the subscriber, who is making the postings, that permits the ISP to have an informed opinion about the typical behavior of the poster. But AOL apparently does profit significantly from Drudge's work and has a continuing relationship such that it ought to know by now whether he is careful about what he reports.

Regardless of that, however, the similarity between the controversies over ISP copyright infringement liability and ISP defamation liability is that both have involved battles over Internet paradigms. The debate has focused on that to the exclusion of the merits of the relative interests at stake—the interests being what the effect will be on the public and its interests if one side or the other prevails.

The value of paradigms probably falls considerably short of the difficulty that their use causes in reaching right results. They are used as a supposed aid in appreciating the issues. But they become a substitute for, and they prevent, rational analysis of the competing interests. Legal analysis would be better off if its reliance on paradigms ended. That is to say, the public would be better served by a legal system in which the outcome depended on the well-articulated, intrinsic merits of the parties' respective positions rather than on which party put forward the more exciting paradigm or analogy.

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