

**ENJOINING THE WORLD: DOES THE INTERNET  
MAKE PRIOR RESTRAINTS IMPOSSIBLE,  
OR ARE THEY EASIER THAN EVER?**

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## **ENJOINING THE WORLD: DOES THE INTERNET MAKE PRIOR RESTRAINTS IMPOSSIBLE, OR ARE THEY EASIER THAN EVER?**

### **I. Introduction**

Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, recently gave the First Amendment an extended eulogy in a lecture he titled "The Late, Great First Amendment." His central premise was straightforward: Why do we need the Constitution when anyone can say anything they want, anytime, online, in a manner that may be impossible for governments or courts to prevent?

While Judge Kozinski may not be entirely correct about the demise of James Madison's most famous offspring, he did hit a true note when it comes to the doctrine of prior restraint. The Internet has made it possible to evade judicial restraints on speech in ways that were unimaginable 20 years ago. But new forms of prior restraint have arisen as well.

On one hand, the accessibility and diffuse nature of the Internet can make regulatory or judicial prior restraints on speech seem almost obsolete. Information propagates and proliferates far too quickly now for the slow wheels of justice to keep pace. By the time a judge can issue a temporary restraining order, the information at issue could be on servers on three different continents, accessible to people across the globe. Indeed, in several recent cases, the very attempt to impose restraints accelerated the diffusion of the information sought to be restrained.

On the other hand, the Internet also creates opportunities for restraining speech in ways that achieve the same result as judicial or governmental prior restraints, but lack the independent oversight that courts provide—mechanisms such as take down notices and subpoenas to internet service providers, whose terms of service with their users generally grant them free rein to remove or disable access to any content posted by the user. What a lawyer may once have had to go to court to get, he or she may now be able to accomplish with a letter. And for those who do not have the resources (or the notoriety) to evade such private restraints, there may be no recourse whatsoever.

No cohesive doctrine of prior restraints addressing the unique issues presented by the Internet has yet emerged. However, courts have been forced to grapple with these issues, and some outlines of the impact of the Internet on prior restraints are beginning to emerge from the cases.

### **II. Restraint Basics**

Before discussing these cases and how they reflect the challenges that the Internet presents for traditional prior restraint doctrine, it is important to have the history of that doctrine in mind. If you already know all about prior restraints, as you probably do, feel free to skip ahead.

Legal skepticism of prior restraints predates the Constitution. Blackstone wrote that the freedom of the press "consists in laying no previous restraints upon publications and not in

freedom from censure for criminal matter when published."<sup>1</sup> Embracing this perspective, the United States Supreme Court has held prior restraints in particularly low regard, observing that they are "the most serious and the least tolerable infringement on First Amendment rights."<sup>2</sup> The "chief purpose" of the First Amendment is "to prevent previous restraints upon publication."<sup>3</sup> Thus, prior restraints are presumptively unconstitutional.<sup>4</sup> "Under our constitutional system prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances."<sup>5</sup>

The First Amendment forbids prior restraint of speech even more categorically than the criminal punishment of speech because criminal punishments become operative "only after judgment has become final, correct or otherwise," while "[a] prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>6</sup>

Court orders that forbid dissemination of confidential documents, such as those at issue in both the Wikileaks and Zyprexa cases, discussed below,<sup>7</sup> have been held to constitute prior restraints, regardless of how the documents were obtained.<sup>8</sup>

Prior restraints may be imposed by means other than court order or injunctions. Government regulations may impose prior restraints through unfettered government discretion in the licensing of public forums, motion pictures, print media and the Internet, and such restraints are strongly disfavored.<sup>9</sup>

Of course, not all government restrictions on the dissemination of speech are prior restraints.<sup>10</sup>

Even before the Internet was widely used and accessible, courts recognized the futility of restraining information which has already been widely dispersed.<sup>11</sup>

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1. W. BLACKSTONE, COMMENTARIES, 151, 152 (T. Cooley 2d rev. ed. 1872).

2. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

3. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

4. See, e.g., *Goldblum v. NBC*, 584 F.2d 904, 906-907 (9th Cir. 1978).

5. *CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1983).

6. *Nebraska Press Ass'n*, 427 U.S. at 559.

7. See pages 4-7, *infra*.

8. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (injunction against publication of classified documents illegally taken from the Defense Department was a prior restraint); *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) (temporary restraining order barring publication of FBI logs and memoranda was a prior restraint).

9. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (holding Birmingham, Alabama parade ordinance unconstitutional); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (holding Maryland film-licensing statute unconstitutional because it lacked necessary procedural protections).

10. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (rejecting former CIA intelligence officer's claim that CIA employment contract, which required prepublication review and potential censorship by the CIA, constituted a prior restraint under the First Amendment).

But the Internet provides dramatically expanded capabilities for dispersal, and has incalculably increased the number of platforms from which information may be "published" to the local community, to the nation, and to the entire world. So while the courts in *In re Charlotte Observer* and *In re North* confronted the dispersal of information by a small number of publishers, courts now face a potentially countless multiplicity of platforms from which information may be disseminated. Furthermore, that information can be published in an instant and can propagate across state and international boundaries at, almost literally, the speed of light.

Not surprisingly, there has been a noticeable increase in prior restraint cases involving Internet publication in recent years.<sup>12</sup> Many involve defamation lawsuits by commercial entities against individuals for comments made on websites.<sup>13</sup> While it is difficult as yet to draw any firm conclusions about how, or even if, courts handle Internet publication differently from traditional publications, it does not appear in the cited cases that the appellate courts have grappled in any detail with the efficacy of prior restraints in the Internet age.

Nonetheless, the following examples suggest the broad outlines of how the Internet is changing the landscape of the law of prior restraints.

### III. Cases In Point

A few cases frame the issues well. *In re Zyprexa Products Liability Litigation* involves the dissemination of information by traditional print and broadcast media ,the Internet, and the grudging acceptance of the limits of judicial power. *Bank Julius Baer & Co. Ltd. v. Wikileaks* involved a paradigmatic expression of the power of the Internet to resist prior restraints, with a temporary restraining order resulting, paradoxically, in the informational equivalent of a nuclear explosion as Internet activists deliberately and comprehensively disseminated the information sought to be restrained. *Turks Ltd. et al. v. Doe* provides a cautionary tale of the ability of the wealthy or well-connected to restrain, at least for a time, the spread of information about their malfeasance. *DVD Copy Control Assn., Inc. v. Bunner* was an early demonstration of the power of collective action to disperse potentially enjoined material across the Internet.

#### A. *In re Zyprexa Products Liability Litigation*

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11. See, e.g., *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (overturning district court for issuing prior restraint where "[o]nce announced to the world, the information lost its secret characteristic"); *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994)(authorizing publication of independent counsel's report where information was already widely known because "it is impossible to remove leaked material from the news media and cram it back into grand jury secrecy").

12. See generally Floyd Abrams & Gail Johnston, *Communications Law in the Digital Age 2009: Prior Restraints*, 986 P.L.I./Pat 247 (2009) (comprehensively listing prior restraints cases). Some of the cases involve criminal defendants. See, e.g., *Ohio v. McCaleb*, No. 05CA155, 2006 WL 2578837 (Ohio Ct. App. 2006) (defendant, convicted of violating a protection order, argued that order preventing him from mentioning victim on any website violated the First Amendment).

13. See, e.g., *Homeworx Franchising, LLC v. Meadows*, No. 2:09CV11DAK, 2009 WL 211918 (D. Utah 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) (corporate president's defamation action against posters to an Internet message board). A small handful involve traditional media organizations. See, e.g., *John Doe v. KCTV-5*, No. 04-00131-CV-W-SOW (W.D. Mo. 2004).

Beginning in the early part of this decade, thousands of people filed personal injury actions against Eli Lilly, the distributor of Zyprexa, an antipsychotic drug, alleging that as a result of inadequate warnings by Lilly, the drug caused excessive weight gain and diabetes. Many of the lawsuits were consolidated in the U.S. District Court for the Eastern District of New York.

In August, 2004, the parties agreed to a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.<sup>14</sup> As usual, the “umbrella” protective order allowed parties to designate as confidential materials produced in discovery, with the proviso that such designations could be challenged in court.

Two years after the protective order issued, a plaintiffs law firm involved in the *Zyprexa* litigation retained a consultant, Dr. David Egilman. Egilman signed an endorsement of the protective order. Shortly thereafter, he began talking to New York Times reporter Alex Berenson, who wanted to see the confidential *Zyprexa* documents.

According to Judge Weinstein's February 2007 order (and it's important to note that neither Berenson nor the New York Times gave their side of the story, because they were not parties to the subsequent proceedings), Berenson suggested that Egilman contact James Gottstein, a lawyer in Alaska who had experience in mental health issues. Egilman did so, told Gottstein that the documents "should become public," and suggested to Gottstein that he subpoena the documents. Shortly thereafter, Gottstein intervened in a pending Alaska trial court proceeding, and issued a subpoena to Egilman.

On December 12, 2006, Egilman began transferring confidential documents to Gottstein under the subpoena. (Eli Lilly, the manufacturer of Zyprexa, had been given notice of one subpoena, but not a second "amended" subpoena that advanced the date of disclosure, and was in the process of trying to keep Egilman from releasing the documents when he had already begun to do so.)

Egilman transferred the documents to Gottstein's file transfer protocol ("FTP") server. Gottstein then provided copies of the documents to Berenson, staffers on the U.S. House of Representatives Committee on Government Reform, an NPR reporter, and about a half dozen others.

Almost immediately, the Special Master in the case issued an order requiring Gottstein to return the confidential documents. Two days later, however, the Times began publishing a three-day series of front-page stories based on the documents.

The day after the New York Times series began, Judge Brian Cogen (sitting in on an emergency basis for Judge Weinstein), issued a temporary restraining order at the request of both sides in the *Zyprexa* litigation.<sup>15</sup> The TRO prohibited Gottstein from further disseminating the documents, and required him to retrieve the documents he had already distributed. It also

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14. See *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2004 WL 3520247, 1 (E.D.N.Y. 2004).

15. See *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2006 WL 3877528, 1 (E.D.N.Y. 2006).

required Gottstein to give the court a list of "all individuals and organizations to whom he had sent" the documents. Gottstein complied.

By this time, however, the information had made its way to the Internet at large. At least six different websites had posted at least part of the documents.

The parties to the litigation joined in seeking the preliminary injunction, and shortly thereafter, Judge Cogan issued a preliminary injunction. The injunction prohibited specific individuals from further disseminating documents, and ordered the removal "of any such documents posted at any website."<sup>16</sup>

One of the people specifically named in the injunction, Vera Sherav, wrote on the website for the Alliance for Human Research Protection (one of those singled out in the injunction): "See the court injunction several of us received below but the internet is an uncontrolled information superhighway. You never know where and when the court's suppressed documents might surface." Law professor William G. Childs reported on the TortsProf blog that he had found the Lilly documents, with little effort, in about 19 minutes.

Judge Weinstein subsequently granted a permanent injunction prohibiting named individuals from disseminating the documents. Notably, however, his order left websites and news outlets out. The court noted that "it is unlikely that the court can now effectively enforce an injunction against the internet in its various manifestations, and it would constitute a dubious manifestation of public policy were it to attempt to do so."<sup>17</sup>

#### **B. *Bank Julius Baer & Co. Ltd. v. Wikileaks***

On February 15, 2008, United States District Judge Jeffrey White issued a permanent injunction which purported to shut down wikileaks.org, a website that had invited people to post leaked materials online. The website's alleged offense was that it had posted information about Cayman Island bank accounts in violation of consumer banking and privacy protection laws.<sup>18</sup>

The injunction ordered Dynadot, a domain name registrar, to lock the wikileaks.org domain name, thus disabling the website. It also restrained Wikileaks or its agents from the "use or dissemination of property identified by plaintiffs as private, personal banking information of its clients."<sup>19</sup> Despite the injunction, the site itself was still accessible from "mirror sites," or copies of the original website which were produced originally to ensure against technological failures, and which were registered in Belgium, Germany and the Christmas Islands, through domain registers other than the domain register, Dynadot.<sup>20</sup>

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16. In re Zyprexa Prods. Liabl. Litig., No. MDL 1596, 2006 WL 3923180, 1 (E.D.N.Y. 2006).

17. In re Zyprexa Prods. Liabl. Litig., 07-CV-0504, 74 (E.D.N.Y. 2007).

18. See *Bank Julius Baer & Co. Ltd. v. Wikileaks*, 535 F. Supp. 2d 980, 982 (N.D. Cal. 2008); Adam Liptak & Brad Stone, Judge Shuts Down Web Site Specializing in Leaks, *New York Times*, February 20, 2008, at A14.

19. *Wikileaks*, 535 F. Supp. 2d at 983.

20. See Liptak & Stone.

The injunction provoked a strong response from U.S. news media and advocacy groups. More than a dozen publications and First Amendment advocacy groups filed court papers in support of Wikileaks' effort to lift the injunction. Furthermore, the restraining order proved to be futile, and in fact—as the court later acknowledged—"had exactly the opposite effect as was intended."<sup>21</sup> The purportedly unlawful information originally posted on the wikileaks.org site received national media attention, became the subject of an international effort by Internet activists to disseminate the information as broadly as possible, and quickly was even more readily available on the Internet than it had been before the restraining order issued.

Faced with mounting evidence that the injunction was not only entirely ineffective, but also unconstitutional, Judge White issued an order dissolving the earlier permanent injunction.<sup>22</sup> In doing so he noted, accurately if belatedly, that "in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of . . . constitutional concerns is impermissible."<sup>23</sup>

### C. *Turks Ltd., et al. v. Does*

In late 2007, a website called TCI Journal began publishing articles online discussing events in the Turks & Caicos Islands (TCI), a British territory in the Eastern Caribbean. The main purpose of the site was to try to address rampant corruption in the TCI, which had become so pervasive and oppressive that the traditional media there could no longer safely report on it. In July 2008, the Governor of the TCI appointed a commission to determine "[w]hether there is information that corruption or other serious dishonesty in relation to past and present elected members of the TCI House of Assembly . . . may have taken place in recent years."

The appointment of this commission constituted momentous news in the island community of 36,000, and TCI Journal soon began reporting information coming out of the commission's proceedings, many of which were public.

In particular, the commission looked into the relationship between a developer, Cem Kinay, interested in building resorts in the TCI and TCI's government.

During the course of its investigation, the commission obtained information relating to Kinay's dealings with the then Premier of the TCI, Michael Misick. The evidence included testimony by Chal Misick, the Premier's brother, describing a payment to the Premier of \$500,000 by Turks Limited, one of Kinay's companies, through Chal Misick's client account at a law firm, which Plaintiff Cem Kinay told Chal Misick to keep secret. The payment was purportedly a "political contribution" for Michael Misick's use, and just happened to occur during negotiations between Premier Misick and Kinay's companies for the development of a large resort. The commission's final report highlighted the suspect nature of this payment, characterizing it as a secret payment and a bribe.

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21. Wikileaks, 535 F. Supp. 2d at 985.

22. Id.

23. Id.



Testimony before the commission also showed that Kinay's company purchased land on Dellis Cay for a price significantly below its appraised value, and obtained the approval of Premier Misick for the development of the property despite the fact that the development had previously been rejected by planning officials. Finally, the testimony indicated that Kinay's companies had employed officials of the TCI, paying them lavish compensation for relatively minor efforts.

TCI Journal reported it all—at least briefly. In response to TCI Journal's reporting on the Commission and its fallout, Kinay and his companies retained attorneys and pursued extensive efforts to suppress TCI Journal. In addition to threatening letters to TCI Journal's editors, they contacted the hosts for the TCI Journal's website in an effort to uncover the identities of TCI Journal's contributors and shut down the TCI Journal website. As a result, TCI Journal was shut down several times, and was forced to find new hosting services on several occasions.

When Plaintiffs' efforts to shut down TCI Journal ultimately proved unsuccessful, Kinay and his companies filed a "Doe" complaint in California state court. Two days later they issued a subpoena to Google, seeking identifying information regarding the people who created and used TCI Journal's Google e-mail account. As people known or suspected to have been contributors to TCI Journal had received numerous threats, including threats on their lives, the prospect of the disclosure of this information was daunting indeed.

Although it came close to being obliterated, TCI Journal's story has a happy ending—at least for TCI Journal. It obtained counsel and was preparing to file a motion to quash and a motion to strike the complaint when the information was inadvertently disclosed by Google. However, Google promptly sought to rectify the situation, and Kinay's counsel stipulated that the inadvertently disclosed information would be destroyed and not used. Subsequently, one of Kinay's companies went into receivership, his counsel withdrew, and his failure to respond to a cross-complaint resulted in the entry of a default against him.

#### **D. *DVD Copy Control Assn., Inc. v. Bunner***

The *Bunner* case is primarily a trade secret case, but the law of prior restraints permeates the court's discussion. We discuss *Bunner* because it is, perhaps, the earliest case illustrating the central issues that have animated cases involving prior restraints and the Internet. Specifically, it illustrates that, in the Internet age, judicial restraints may be obsolete when enough people decide they should be.

In December 1999, an entertainment trade association sued Andrew Bunner and others, alleging that the defendants had published on the Internet computer code that permitted the copying and playing of encrypted DVDs, allegedly in violation of trade secret law.<sup>24</sup> Plaintiffs sued "every infringing Web site it could identify."

The trial court granted a preliminary injunction against the defendants, concluding that the information was a trade secret and that although the information had been published widely on the Internet, trade secret status was not destroyed. The California Court of Appeal reversed. The California Supreme Court upheld the injunction, holding that it did not violate the First

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24. *DVD Copy Control Assn., Inc. v. Bunner*, 116 Cal. App. 4th 241, 245-249 (Cal. Ct. App. 2004).

Amendment, "assuming the trial court properly issued the injunction under California's trade secret law."<sup>25</sup> The California high court remanded to the Court of Appeal to determine whether the evidence in the record supported factual findings necessary to establish that a preliminary injunction was warranted under California trade secret law.

The Court of Appeal concluded that a preliminary injunction was not warranted, and therefore reversed. In doing so, the court noted that the encryption technology at issue "was quickly and widely republished to an eager audience so that [it] and the trade secrets it obtained rapidly became available to anyone interested in obtaining them."<sup>26</sup> In doing so, the court noted that it was troubled by the apparent evasion of trade secret law by mere publication, but also noted that "that which is in the public domain cannot be removed by action of the states under the guise of trade secret protection."<sup>27</sup>

The factual background of the *Bunner* case provides an early illustration of the impact of the Internet on efforts to restrain the dissemination of information. Starting on November 4, 1999, lawyers for the motion picture industry began sending letters to website operators and Internet service providers who had published the allegedly offending decryption technology, demanding that they take it down. Lawyers sent 66 letters during November, 1999.<sup>28</sup> About 25 letter recipients complied.

Meanwhile, news that DVD encryption technology had been penetrated spread across the globe. When the trade association filed suit in December, "a campaign of civil disobedience arose by which [proponents of the decryption code] tried to spread the code as widely as possible before trial." The result was that, in short order, the code had been displayed on "at least 118 Web pages in 11 states and 11 countries throughout the world."<sup>29</sup> The Court of Appeal noted:

Some of the defendants simply refused to take their postings down. Some people appeared at the courthouse on December 28, 1999, to pass out diskettes and written fliers that supposedly contained the [decryption code]. They made and distributed T-shirts with parts of the code distributed on the back. There were even contests encouraging people to submit ideas about how to disseminate the information as widely as possible.

In the face of this onslaught, the Court of Appeal concluded, the technology "may have lost its trade secret status," and the fact that Plaintiffs presented no evidence to the contrary, combined with its failure to show further harm if the preliminary injunction did not issue, meant that the preliminary injunction could not issue. Moreover, the court concluded, the preliminary injunction "burdens more speech than necessary to protect [Plaintiff's] property interest and was an unlawful prior restraint on Bunner's right to free speech."<sup>30</sup>

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25. DVD Copy Control Assn. Inc. v. Bunner, 31 Cal. 4th 864, 889 (2003).

26. Bunner, 116 Cal. App. 4th at 253.

27. Id. at 255.

28. Id. at 248.

29. Id.

30. Id. at 256.

#### IV. Unringing The Bell: Why Injunctions Don't Work Like They Used To

"[A] court. . . cannot lawfully enjoin the world at large." Judge Learned Hand, *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

The Internet makes possible the rapid dissemination of content across geographic and technical boundaries. Even large amounts of content can, and often are, reproduced through the use of “mirror” sites in multiple locations. Simply identifying all of the locations where content resides may be virtually impossible, let alone effectively enforcing any restrictions that a court may impose on its dissemination.

The Internet’s ability to resist prior restraints is reflected in the *Zyprexa*, *Wikileaks* and *Brunner* decisions. Judge Weinstien, grudgingly bowed to the realities of the Internet in recognizing that he could not “enjoin the world at large,” and vacated the prior injunction against Internet websites that obtained the documents at issue. Judge White recognized the futility—and indeed the perverse effect—of his restraining order.

The extent to which the inefficacy of a restraining order can be asserted as a justification for vacating or refusing to grant a prior restraint is not clear. *Nebraska Press* held that, at least in the context of a criminal defendant's right to a fair trial, a court must evaluate the "probable efficacy" of the prior restraint on protecting the defendant's right to a fair trial.<sup>31</sup> The *Nebraska Press* court strongly suggested that the inefficacy of a prior restraint will call its viability into question.<sup>32</sup> There are courts and commentators who have assumed that the efficacy prong of the *Nebraska Press* analysis applies outside the context of a criminal defendant’s right to a fair trial, but we have been unable to find a case applying, or discussing at any length, the efficacy prong outside the criminal context. For example, the California Court of Appeal in the non-criminal case *Evans v. Evans*, noted that *Nebraska Press* requires that the proponent of a restraint show that the restraint “is necessary and would be effective.”<sup>33</sup> Unfortunately for the purposes of this discussion, *Evans* does not explicitly apply this rule.<sup>34</sup>

As a general matter, in determining whether to grant relief courts must consider whether the requested order will be effective in securing the relief requested.<sup>35</sup> However, whether or not it provides an effective barrier to prior restraints, the practical ability of the Internet to defeat judicial restraints on speech has changed the rules.

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31. *Nebraska Press Assn.*, 427 U.S. at 565 (1976).

32. *Id.*

33. *Evans v. Evans*, 162 Cal. App. 4th 1157, 1167 (Cal. Ct. App. 2008).

34. See also David Greene, Trade Secrets, the First Amendment and the Challenges of the Internet Age, 23 *Hastings Comm. & Ent. L.J.* 537, 559-560 (2001) (discussing the *Nebraska Press* efficacy prong).

35. See, e.g., *American Casualty Co. v. Baker*, 22 F.3d 880, 896 (9th Cir. 1994) (a case is moot if there is no “present controversy as to which effective relief can be granted”); *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986) (in context of issuing injunction to restore status quo, courts have broad discretion in shaping equitable remedies and that “the question is not whether the precise relief sought at the time the application for an injunction was filed is still available,” but rather “whether there can be any effective relief”).

## V. Stifle Yourself: Private Restraints On Speech

Even in the absence of judicial restraints on speech, the availability of the Internet as a platform for speech is not unrestricted. Most of those who use the Internet to disseminate information do not have the resources to establish and maintain their own connection to it. Instead, they depend on Internet service providers (web-hosting companies, typically) to maintain their websites and make those sites available to the world.

Relationships with these service providers are governed by contracts—terms of service users are required to agree to as a condition of availing themselves of their services. Those terms of service uniformly give the service provider the right to remove content or at least disable access to it if anything the service provider deems objectionable appears on a website. If they do so, they are generally within their contractual rights. Moreover, their restrictions on speech do not constitute “state action” necessary to trigger the application of free speech rights under the First Amendment (although they may implicate state law constitutional or statutory free speech rights).

As a rule, of course, the objections do not originate with the service provider. Rather, they come from those who are unhappy—legitimately or not—with the information someone else is making available on the Internet. These folks know that Internet service providers generally have the right to remove content at their discretion. Outside the United States, service providers are not protected by the Communications Decency Act (47 U.S.C. § 230), and may be subject to liability if they fail to remove content as to which an objection has been asserted. Even within the U.S., some service providers are either ignorant of their rights under the CDA or simply want to avoid being dragged into a conflict—which they may be if a complaining party goes to court seeking an injunction requiring them to remove or disable access to content.

As a result, Internet publishers may find that the soapbox has suddenly been pulled out from under their feet. And if this action is taken by a service provider pursuant to the terms of the terms of service, the publisher has no recourse against the service provider. Those who are sufficiently determined and well-heeled may be able to find another service provider and begin publishing again. As the experience of TCI Journal shows, however, this can be a time consuming and difficult process, as the opponent pursues each new service provider, shutting down a site every time it moves to a new location. Publishers less hardy than TCI Journal may be shut down altogether.

Another possible means of escape is provide by notoriety of the kind that Wikileaks attracted. An Internet firestorm may arise, carrying the threatened information away to blaze out in innumerable new locations on the Internet, defying any effort to stamp it out. However, most suppressions of speech never attract this level of attention.

Furthermore, the Wikileaks and TCI cases demonstrate what blunt instruments prior restraints of Internet speech can be. Those seeking to restrain speech may not seek merely the removal of certain content, but the complete elimination of a website. This can be accomplished in a variety of ways, including “turning off” the website’s Internet domain—the “address” reflected in the name you use to access the site (e.g., <http://www.salon.com>)—so that anyone looking for the site will no longer be able to find it. This results not only in the elimination of the offending content, but of everything else the publisher has put on its website as well.

(It's worth noting that even if the domain name host turns off an Internet address, the website can still be accessed if you know the IP address of the server. You simply type it in to your browser instead of the domain name. This feature of the Internet helped to avoid the restraining order initially entered against Wikileaks. Supporters posted the IP address of Wikileaks' primary server on numerous websites.)

The challenges presented by private restraints are primarily practical, rather than legal. Because terms of service generally protect Internet service providers, there is no legal basis for compelling them to provide content. Less risk-averse service providers may be persuaded to leave content online until there is a judicial determination as to whether it should be removed, particularly in the United States where the CDA protects them from liability unrelated to the infringement of intellectual property rights. Content may be rapidly shifted to multiple content providers, but this can be costly and time-consuming.

## **VI. Tentative Conclusions**

It is much too soon to draw any conclusions about the long-term impact of the Internet on prior restraints—judicial or private. But who can resist a little speculation?

The First Amendment now protects the publication of truthful information about matters of public concern that has been lawfully acquired—even if it was originally obtained by another in violation of the law.<sup>36</sup> Will this protection vanish as the distinctions between the professional news media and the legendary blogger in pajamas erode, and as prior restraints are consistently defeated through the deliberate, broadcast dissemination of information that was originally obtained or disclosed in violation of the law?

Sophisticated search tools now permit automated searches of the Internet to identify and address targeted content with a high degree of accuracy and efficiency. Such tools are already being employed to enforce intellectual property rights. It's inevitable that they will be pressed into use by private parties to suppress Internet content for other reasons—if they are not already being used for that purpose. Will we also see the advent of special masters appointed to use such tools to enforce judicial prior restraints? Don't rule it out.

While it's impossible to predict the impact that the Internet will have on the traditional legal limitations on prior restraints, it is already apparent that the Internet is—in the vernacular of venture capitalists—a disruptive technology. Its impact on the law of prior restraints is likely to be profound.

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36. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).