GRAPPLING WITH ONLINE WORK: LESSONS FROM CYBERLAW

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ABSTRACT

Employment law is currently unequipped to decide rights and obligations in many online work scenarios. We simply do not know how the courts will address the dramatic divergence between existing law and the realities of the modern online workforce. But, it is worth remembering that courts have already grappled extensively with the general question of how to apply existing rules to the Internet. Cases dealing with online property, contract, tort, and crime can help us project how courts might approach the novel and perplexing questions sure to arise in online work disputes.

This Article identifies three basic approaches: (1) the "blind eye," in which courts essentially ignore the fact that the activity is taking place online and apply existing law without adjustment; (2) analogy or functional equivalency, in which the courts look to directly or functionally analogous real-world legal scenarios to guide their decisions; and (3) "context-driven" analysis in which courts recognize at the outset the crucial differences presented by online environments, then, by disposing of certain doctrinal elements, adding others, or crafting entirely new standards, endeavor to reconcile existing law with situations its authors could never have envisioned.

This Article focuses mostly on cases from the earlier years of cyberlaw, before doctrines developed and legislatures acted. It offers something of a roadmap to practitioners, online employers, and potential employee plaintiffs, explaining how courts and administrative bodies first struggled to cope with the migration of regulable activity into a virtual environment.

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INTRODUCTION

In 2003, Joan Gabel and Nancy Mansfield observed that "[t]he new cyberspace workplace . . . creates legal uncertainty with regard to the ability of existing legislation to operate in an Internet-enabled environment."[1] "Legal uncertainty" was probably an understatement, even then. There were (and are) very few cases dealing with online work, and little indication in the legal literature as to how courts might approach regulation of the "cyberspace workplace."

What is "online work"? It does not just mean work that involves some kind of online activity, since many workers use the Internet every day in the course of their jobs and have been doing so for almost twenty years. For the purposes of this Article, "online work" is broadly defined as remote labor that takes place primarily on Internet platforms and is facilitated primarily through Internet technology.[2] It would include forms of crowd labor, in which networked pools of workers perform small tasks uniquely suited to Internet distribution (such as tagging photos, researching websites, transcribing audio files, etc.). It would also include work that takes place within online games, as well as more traditional real-time labor that has been disaggregated and decentralized to take advantage of a distributed workforce (such as networked call centers).

For a number of reasons, existing employment law is simply not equipped to handle most online work scenarios. First, much of our employment law doctrine relies on the existence of a physical worksite where the employer and the employee can connect in some way. Questions of supervision and control, employer property rights, jurisdiction, compensable time, etc. all presume that one can identify a proper worksite. In online work, that becomes difficult.

Second, the structure of online work relationships does not resemble that of real-world relationships. For example, traditional employment involves one-to-one or one-to-many relationships between employer and employee(s), whereas online work frequently involves many-to-many relationships. Also, unlike the vertical hierarchies of traditional employment structures, in which those at the top exert managerial or contractual authority down the ladder, online work models tend to operate more horizontally. In crowdsourcing and online gaming scenarios, the middlemen—crowd work platforms and gaming

1. Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 303 (2003).

2. The line between "online work" and internet-enabled work is admittedly blurry. Including "remote" in the definition helps to distinguish online work from the increasingly common scenario in which employees in a traditional corporate-style office perform their work exclusively through e-mail and online software but have a traditional employment relationship with their employer in all other respects.

companies—control and facilitate the employment relationship outwards in both directions, towards the putative employer on one end and the (usually anonymous) network of employees on the other.[3]

Third, to be frank, our employment law doctrine is built on a very twentieth century conception of space and time. Our wage laws do not contemplate the possibility that an employee might perform work for five different employers, in five different states (or countries), in the space of an hour. Employment law does not envisage the formation of 200 separate, sequential independent contracts through the use of clickwrap agreements.[4] Nor has it accounted, in any but the most general sense, for the possibility that robust remote supervision and code-based automatic feedback will replace traditional management functions. These are all products of twenty-first century online work technology.

Of course, the legislatures and administrative agencies tasked with regulating this sphere of activity could always undertake to modernize our employment law. Perhaps they will at some point. But, it is worth remembering, courts have already grappled extensively with the general question of how to apply existing rules in online contexts. In fact, courts will likely look to cyberlaw—rather than to the paltry employment case law—for guidance in resolving online work disputes. Cases dealing with property, contract, tort, and crime can help us project how courts might address the thorny problems outlined above, as well as any others that may emerge in the future.

This Article describes three basic approaches courts have already taken to adjudicate Internet disputes: (1) the "blind eye," in which courts essentially ignore the fact that the activity is taking place online and apply existing law without adjustment, (2) analogy or functional equivalency, in which the courts

3. *See* Miriam A. Cherry, *Working For (Virtually) Minimum Wage: Applying the Fair Labor Standards Act In Cyberspace*, 60 ALA. L. REV. 1077, 1088–89 (2009) (explaining how crowdsourcing companies break down tasks and distribute them to workers); Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. (forthcoming 2011) (manuscript at 5–6, 19–22) (on file with author) [hereinafter Felstiner, *Working the Crowd*] (describing the "tripartite" structure of crowd work, and detailing how vendors use participation agreements to shape the economic relationship between workers and employers); Alek Felstiner, *Sweatshop or Paper Route?: Child Labor Laws and In-Game Work*, CROWDCONF 2010, at 3, Oct. 4, 2010, http://www.crowdsourcing.org/document/sweatshop-or-paper-route-child-labor-laws-and-in-game-work/3003 [hereinafter Felstiner, *Sweatshop or Paper Route?*] (describing how gaming companies provide gamers with opportunities to earn virtual goods by performing tasks for third parties).

4. "Clickwrap agreements" refer to terms and conditions imposed on users of a software platform, usually through a pop-up window or check box on their computer screen. Users are obligated to agree to the terms and conditions before they can utilize the software. *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 464 (2002).

look to directly or functionally analogous real-world legal scenarios to guide their decisions, and (3) "context-driven" analysis, in which courts recognize at the outset the crucial differences presented by online environments, then, by disposing of certain doctrinal elements, adding others, or crafting entirely new standards, endeavor to reconcile existing law with situations its authors could never have envisioned.

These are loose groupings, not rigidly defined categories. They bleed into one another, and courts may employ a mix of two or more approaches (or something in between) to decide a case. The point of dividing them in this way is not to create definitive groupings, but simply to illustrate some crucial distinctions.

This Article focuses mostly on cases from the earlier years of cyberlaw, before doctrines developed and legislatures acted. It offers a roadmap to scholars, practitioners, online employers, and potential employee plaintiffs, explaining how courts and administrative bodies first struggled to cope with the migration of regulable activity into a virtual environment. A brief discussion of potential employment law applications follows the discussion of each of the three approaches. There are so many facets of online work and so many labor models still in development, that to undertake a complete examination of how cyberlaw might apply would be beyond this Article's scope. This is intended only as an opening foray.

Also, though informed by cyberlaw discourse, this Article does not directly engage with the substantial body of legal scholarship[5] generated around the question—in some ways the most important question in Internet law—of what law means in cyberspace. The focus remains on the Internet cases themselves and on the rationales that connect them. The goal of this Article is to give a sense of how these approaches operate, from the inside out, so that employment law scholars and practitioners will understand their potency in cyberlaw jurisprudence and will be encouraged to apply or contest them in the manner suggested below.

I. THE BLIND EYE

In some situations, courts may make no real adjustment for the transition online. They effectively ignore the contextual shift from the real world to the Internet, presuming that our time-honored and time-tested legal doctrines will

5. *See, e.g.*, Joshua A.T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823 (2009) (discussing the application of real-world law to virtual worlds); Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003) (describing how Internet law can be viewed from either a virtual perspective or real-world perspective and discussing its implications); Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 23–24 (2007) (surveying cyberproperty doctrine and challenging dominant assumptions underlying the doctrine). This is just a small sampling.

thrive and govern equally well in the new environment.[6] Leaving aside the fact that the law has always adjusted itself in response to historical and cultural change,[7] the folly of this "blind eye" approach should be apparent. Online activity tends to resemble its real-world counterpart in only the crudest ways, and employment law (like most law) lives in the details.

Early clickwrap contract cases offer a fairly benign example of the "blind eye" approach. In *Specht v. Netscape Communications Corp.* and *Register.com, Inc. v. Verio*, the Second Circuit applied straightforward, unadjusted contract law principles to determine whether users had legitimately assented to website operators' terms and conditions.[8] In *Specht*, the court considered whether the plaintiffs had reasonable notice of and had objectively manifested their assent to an arbitration agreement.[9] Though the court recognized that contracting had taken place in a different environment (online), it did not alter or abandon any aspects of contract law to decide the dispute. Instead, it characterized the parties' online actions as basically indistinguishable from real-world contract making, at least as far as the standard operation of notice and consent are concerned.[10] To the extent that the court distinguished this clickwrap case from earlier shrinkwrap cases, the distinction rested on the conspicuousness of the notice, not the difference in environment.[11]

Register.com follows a similar pattern. Verio, the user in *Register.com*, repeatedly violated Register.com's terms of use, despite receiving a notice of the terms each time.[12] The Second Circuit held that Verio agreed to be bound by the terms, distinguishing *Specht* because of the repetitive nature of Verio's conduct.[13] Responding to Verio's argument that he had never checked a box reading "I Agree" or something similar, and thus had not accepted the terms, the court declared that taking the benefit of an agreement with knowledge of the terms constitutes acceptance, according to "standard contract doctrine."[14] Putting it succinctly, the court wrote: "While new commerce on the Internet

6. *See, e.g.*, Register.com, Inc. v. Verio, 356 F.3d 393, 402–03 (2d Cir. 2004) (using standard contract principles to determine whether a website's terms of use were violated); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31 (2d Cir. 2002) (applying contract principles to a clickwrap agreement).

7. *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 46 (2001) (explaining that the law is shaped by cultural change).

8. *Specht*, 306 F.3d at 31; *Register.com*, 356 F.3d at 402–03.

9. *Specht*, 306 F.3d at 28–32.

10. *Id.* at 31.

11. *Id.* at 33.

12. *Register.com*, 356 F.3d at 401–02.

13. *Id.* at 402.

14. *Id.* at 402–03.

has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[15]

Turning a blind eye in online criminal cases can create more dramatic results. In *United States v. Thomas*, the Sixth Circuit applied federal obscenity statutes to hold operators of an online bulletin board responsible for obscene images posted thereon.[16] The Communications Decency Act of 1996 ("CDA") later amended federal obscenity laws to include "interactive computer service[s],"[17] making this issue essentially moot, but at the time of *Thomas* certain issues around the liability of Internet service providers remained open.[18]

The general three-prong obscenity test, established in *Miller v. California*, asks first whether "'the average person applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest."[19] Where obscene materials allegedly traveled interstate, i.e., from one community to another, the jury generally applies the "community standard" of the area to which the materials were sent.[20] But the defendants in *Thomas* argued that the court should instead adopt a new definition of community, "based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial."[21] They contended that applying the traditional rule in the Internet context would produce an "impermissible chill on protected speech" by forcing operators of online fora "to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards."[22]

The court rejected these arguments, applying the traditional geographic test and declining to decide the broader question of whether cyberspace communities could possess legally cognizable community standards.[23] In doing so, the court essentially pretended that the publisher had physically introduced the prohibited material directly into the user's geographic area,

15. *Id.* at 403.

16. United States v. Thomas, 74 F.3d 701, 705, 709 (6th Cir. 1996).

17. Communications Decency Act of 1996, Pub. L. No. 104-104, § 507, 110 Stat. 133, 137 (1996) (codified at 18 U.S.C. § 1462 (2006)).

18. *See* John F McGuire, Note, *When Speech is Heard Around the World: Internet Consent Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 759–60 (1999) (explaining that *Thomas* was the first case applying general obscenity laws to the Internet context and that Congress responded, in part, by passing the CDA to apply the laws to the Internet context).

19. *Thomas*, 74 F.3d at 710 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

20. *Id.* at 710–11 (citing *Miller*, 413 U.S. at 30–34).

21. *Id.* at 711.

22. *Id.*

23. *Id.* at 711–12; *see also* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 70 (2004) ("the rejection of separate legal rules for cyberspace seemed based in part on the absence of the recognition of any genuine community online").

rather than into an online environment that the user happened to enter from that area.[24]

Thomas is not the only example of a court rejecting the idea of a legally cognizable Internet community. Despite the demonstrated capacity of Internet users to create functional, thriving communities online and the centrality of community in many forms of online activity,[25] courts have proven hesitant to embrace the online community as such—and not only in the criminal context. Take one union's efforts during the 1990s to organize customer service representatives at Technology Services Solutions ("TSS").[26] Pursuant to Section 9(b) of the National Labor Relations Act,[27] workers must share a "community of interest" in order to constitute an appropriate bargaining unit.[28] The traditional factors involved in the "community of interest" inquiry include employees' wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; bargaining history; operational integration; and geographic proximity.[29]

TSS structured its customer service workforce in large geographic territories, with a group of customer service representatives ("CSRs") supervised by a customer service manager ("CSM") in each territory.[30] There were no physical worksites—everyone, including the CSMs, worked from separate locations and communicated through a network.[31] TSS did, however, have regional headquarters covering multiple states and multiple CSM territories.[32] It argued that each multi-state region represented the smallest appropriate bargaining unit.[33]

24. *See Thomas*, 74 F.3d at 711–12; *see also* Lastowka & Hunter, *supra* note 23, at 70 (explaining that the *Thomas* court ignored the cyberspace community).

25. *See* Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. Kan. L. Rev. 1, 18–19 (2000) (discussing the creation and strength of virtual communities).

26. *See* Tech. Servs. Solutions, No. 27-RC-7557, 1995 NLRB LEXIS 891 (1995).

27. 29 U.S.C. § 159(b) (2006) (providing the National Labor Relations Board with the authority to determine "the unit appropriate for the purposes of collective bargaining").

28. *See, e.g.*, NLRB v. J.C. Penney Co., 559 F.2d 373, 375 (5th Cir. 1977) (quoting NLRB v. Belcher Towing Co., 284 F.2d 118, 121 (5th Cir. 1960)) (describing the test applied to determine the bargaining unit).

29. *See, e.g.*, Brown v. Sandimo Materials, 250 F.3d 120, 128 n.2 (2d Cir. 2001) (citation omitted); Sundor Brands, Inc. v. NLRB, 168 F.3d 515, 518 (D.C. Cir. 1999) (citation omitted); NLRB v. Purnell's Pride, Inc., 609 F.2d 1153, 1156 (5th Cir. 1980) (citation omitted); J.C. Penney Co., Inc., 559 F.2d at 375 (citation omitted).

30. Malin & Perritt, *supra* note 25, at 22.

31. *Id.*

32. *Id.*

33. Tech. Servs. Solutions, No. 27-RC-7557, 1995 NLRB LEXIS 891 (1995).

The NLRB Regional Director did not agree, choosing instead to apply the Board's "single facility" presumption,[34] under which single locations are presumed to constitute an appropriate bargaining unit.[35] The Regional Director decided that each CSM territory should constitute a separate bargaining unit, reasoning that virtually supervised territories were analogous to "single facilities."[36]

Effectively, the Regional Director embraced the proposition that a group of CSRs sharing a single supervisor would have sufficient community of interest to satisfy the Section 9(b) requirements. Though this was not strictly an Internet case in the sense of work being performed on the web, the situation did require the Board to analyze a technology-enabled remote workforce.[37] The Regional Director observed and recognized an intangible sort of community, akin to a cyberspace community of interest.[38]

But the NLRB reversed the Regional Director's ruling, finding instead that the large multi-state regions were the smallest appropriate bargaining units because they contained physical headquarters.[39] The Board seems to have privileged the "organizational integration" prong over the others, especially the "commonality of supervision" prong. It emphasized the fact that CSRs shared no actual physical worksite.[40]

The "blind eye" approach can be anything from benign to transformative, depending on the context. There are certainly situations in which existing doctrine will translate well enough into the online sphere to avoid logical gaps and perverse results. This is especially true where, as in many contracts, the existing doctrine already focuses on certain intangibles (e.g., assent or consideration) and the relationships track clearly from the real world to the online context. But in the employment arena, moving work online can fundamentally transform the factual matrix in a way that all but demands some corresponding shift in legal approach.

II. FORMS OF ANALOGY

Even the "blind eye" method is not devoid of analogy or antithetical to analogical reasoning. Analogy is central to the legal reasoning process in nearly every case, especially where adjudicative bodies are faced with an issue

34. *Id.*

35. Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962).

36. *Tech. Servs. Solutions, Inc.*, 1995 NLRB LEXIS 891, at *1; *see* Malin & Perritt, *supra* note 25, at 22.

37. *See Tech. Servs. Solutions, Inc.*, 1995 NLRB LEXIS 891, at *3 (describing the computerized dispatch system used to assign the CSRs).

38. Malin & Perritt, *supra* note 25, at 22.

39. *Tech. Servs. Solutions, Inc.*, 1995 NLRB LEXIS 891, at *4–5.

40. *Id.* at 1302.

of first impression or a gap in the law. In *Thomas* and *TSS*, the losing parties certainly proposed an analogy: they attempted to compare the kinds of real-world communities recognized by obscenity and labor law to the Internet communities at issue. In both cases, their analogies just failed to gain much purchase.[41]

The use of analogy to concretize aspects of virtual activity is quite common among cyberlaw cases, and should be understood as only a particular instance of legal analogizing. To understand the use of analogy in the cyberlaw context, it may be useful to first explore how legal analogies actually function. Any analogy involves an association (or "mapping") between a source, the familiar domain, and a target, the unfamiliar.[42] Dan Hunter suggests that we ought to understand legal analogy through the lens of cognitive science, according to a "multiple-constraint" model.[43] This model assesses how we construct and perceive analogies according to three constraints: surface similarity, structural similarity, and the purpose of the analogy.[44] At the surface level, direct similarity between surface-level elements prompts us to associate the source and the target.[45] Structural similarities go beyond the surface, to the relation between elements in the source and target.[46] We search for "consistent structural parallels" between source and target in order to understand why an analogy is appropriate.[47] Finally, purposive pressures encourage us to view analogies in light of the purpose for which they are proposed.[48]

We can see now why the analogies failed in the "blind eye" cases described above. *Thomas* and *TSS* rejected analogies between Internet and real-world communities because, in the adjudicators' view, surface similarities were not sufficiently present.[49] In fact, a structural analysis that evaluated the relationship between the TSS workers and their employer, or the relationship among participants in an online message board, might have produced a different result.

41. *See id.*; United States v. Thomas, 74 F.3d 701, 706–09 (6th Cir. 1996).

42. Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1212 (2001).

43. *Id.* at 1214.

44. *Id.* at 1214–15.

45. *Id.* at 1215.

46. *Id.* at 1220–21.

47. Hunter, *supra* note 42, at 1220.

48. *Id.* at 1224.

49. *See* United States v. Thomas, 74 F.3d 701, 707 (6th Cir. 1996) (noting that pre-recorded sexually suggestive comments and electronically transmitted, computer-generated material are "inherently different"); Tech. Servs. Solutions, Inc., No. 27-RC-7557, 1995 NLRB LEXIS 891 (1995) (discussing the differences in geography, office structure, and employer supervision for CSRs compared with single facility units).

Virtual property cases frequently rely on analogy. Conceptions of property in cyberspace have generated enormous controversy, and the "blind eye" approach is essentially unworkable. Like employment laws, property laws developed in reference to physical spaces, tangible (or at least reducible) objects, paper documents, and a legal treatment of scarcity that helped define parties' rights and obligations.[50] Many of these notions evaporate in cyberspace, making analogies useful, if not necessary.

Take *Kremen v. Cohen*, in which the Ninth Circuit held that ownership of an Internet domain name constituted property ownership for the purposes of conversion.[51] The court found in domain names both a well-defined interest—"[l]ike a share of corporate stock or a plot of land"—and a legitimate claim to exclusivity—"like staking a claim to a plot of land at the title office."[52] These are evocative analogies. They conjure up the image of a pioneer, roaming the online landscape and planting a stake. *Kremen* actually departed from precedent, insofar as intangible property previously could not form the basis of a conversion claim in California.[53] This departure, and the analogies used to accomplish it, has had profound implications for our concept of ownership and exclusivity in virtual property disputes.[54]

Tangibility also played a significant role in the *United States v. Thomas* obscenity analysis. Before the *Thomas* court could address which community standard to use, it first had to determine whether federal obscenity laws even applied to digital images.[55] The defendant argued that obscenity laws only cover the distribution of "tangible" items.[56] Accordingly, pre-recorded, obscene telephone messages had previously fallen outside the statutes because they were deemed "intangible."[57] The defendant quite reasonably sought to draw an analogy between voice recordings and digital images, in that both traveled as electronic impulses.[58] Despite that fact, the court concluded that a

50. *See* Noah M. Schottenstein, *Of Process and Product:* Kremen v. Cohen *and the Consequences of Recognizing Property Rights in Domain Names*, 14 VA. J. L. & TECH. 1, 5 (2009), http://www.vjolt.net/vol14/issue1/v14i1_a1%20-%20Schottenstein.pdf (describing how only tangible property was given property rights in the past).

51. Kremen v. Cohen, 337 F.3d 1024, 1029–30 (9th Cir. 2003).

52. *Id.* at 1030.

53. *See id.* at 1030–31 (noting that conversion originally only applied to tangible property and referencing Olschewski v. Hudson, 262 P. 43 (1927), where the California Court of Appeal held that an intangible laundry route was not subject to conversion).

54. *See* Schottenstein, *supra* note 50, at 3 (noting that under *Kremen* "the putative class of currently non-proprietary intangible interests that would be re-classified as property is too broad to measure").

55. United States v. Thomas, 74 F.3d 701, 706–07 (6th Cir. 1996).

56. *Id.*

57. *Id.* at 706 (citing United States v. Carlin Commc'ns., Inc., 815 F.2d 1367, 1371 (10th Cir. 1987)).

58. *Id.* at 706–07.

digital image is more than "an intangible string of 0's and 1's" broken down by the sender and reconstituted at the endpoint.[59] The court reasoned that the image itself does not travel, but its distribution still constitutes "transportation of obscene material" for statutory purposes.[60] In other words, the court accepted the plaintiff's analogy—of a digital image to a hard copy—rather than the defendant's.

The *Thomas* court then considered whether Congress intended the statute to cover the Internet as a transmission vehicle for digital images, which is a slightly different inquiry.[61] The defendant argued that Congress had not contemplated Internet distribution in enacting the statute, but the court concluded that Congress sought to prohibit exactly this sort of activity, whether explicitly stated in the statute or not.[62] In reaching this conclusion, the court again treated digital images as analogous to hard copies, despite differences in form and transmission.[63] The opinion relies in part on *United States v. Alpers*,[64] an oddly similar case from 1950. At the time of *Alpers*, the phonograph was considered novel technology, and thus the text of the then-current federal obscenity laws did not account for the possibility of transmitting obscene material by phonograph.[65] But that did not stop the Supreme Court from finding the phonograph transmission to be functionally equivalent to other methods of dissemination.[66] According to the *Alpers* Court, the "obvious purpose" of the obscenity statute "was to prevent the channels of interstate commerce from being used to disseminate" obscene material.[67] In *Thomas*, the Sixth Circuit followed the *Alpers* lead. It surveyed the technological shifts and acknowledged the Internet as functionally equivalent to older transmission vehicles, in order to preserve the aims of the statute.

A similar rationale motivated the district court in *Cubby, Inc. v. CompuServe Inc.*,[68] a very early (1991) cyberspace defamation case. At issue was whether online service providers should be held liable for defamatory statements communicated through their networks.[69] Now, Section 230 of the

59. *Id.*

60. *Thomas*, 74 F.3d at 707.

61. *Id.* at 708.

62. *Id.* at 708–09.

63. *Id.* at 707 (noting that "[t]he manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location").

64. 338 U.S. 680 (1950).

65. *Thomas*, 74 F.3d at 708; *see Alpers*, 338 U.S. at 682 (noting that the words of the statute only reference "book, pamphlet, picture, motion-picture film, paper, letter, writing, print").

66. *Alpers*, 338 U.S. at 684–85.

67. *Id.* at 683.

68. 776 F. Supp. 135 (S.D.N.Y. 1991).

69. *Id.* at 137.

CDA essentially forecloses this claim.[70] In 1991, however, it was less clear whether online service providers should be treated as distributors, and thus exempted from defamation liability, or as publishers, subject to liability. Presaging the CDA, the court in *Cubby* held that:

> [a] computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.[71]

While the court's conclusions appear rational, if not inevitable, strong counterarguments certainly existed at the time. There was no precise definition of "publication" that could be applied to CompuServe's product in *Cubby*. Though third parties uploaded materials to a forum and moderated it, CompuServe was in some technological and metaphysical sense responsible for "producing" the end result, beyond just distribution or sale.[72] Instead of delving into this question, a likely hornet's nest, the court reached for and found a familiar analogy.[73]

Kremen, *Thomas*, and *Cubby* all exemplify how courts use analogy to gather online activity under the same umbrella as real-world activity. Though some surface similarity exists, the cases were all decided primarily on structural similarities. *Kremen* identified structural similarity between staking a claim in cyberspace and real space.[74] *Thomas* recognized that digital images, while perhaps intangible in form (i.e., on the surface), were structurally identical to hard copies in terms of their everyday use.[75] *Cubby* simply gathered online databases into the larger category of content distributors

70. 47 U.S.C. § 230(c)(1) (2006) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

71. *Cubby, Inc.*, 776 F. Supp. at 140. This analogy did not release CompuServe from all liability; the analogy just helped the court determine that CompuServe's standard of liability should be that of a distributor, not a publisher—specifically, whether CompuServe knew or had reason to know of the allegedly defamatory statements. *Id.* at 140–41.

72. *See also* Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1005–06 (1994) ("the policies behind relieving 'real space' intermediaries of defamation liability are not clearly applicable in cyberspace").

73. *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 474 (2003) (gathering cases, including *Cubby*, in which courts used "physical-world analogies" to connect internet service providers to telecommunications carriers, landlords of loud dance halls, and illegal radio stations).

74. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003).

75. *See* United States v. Thomas, 78 F.3d 701, 707 (6th Cir. 1996) (explaining that the electronic manner of submission of digital images does not affect their ability to be printed out in hard copy).

because of how they dispersed information and interacted with consumers.[76] These cases demonstrate the inherent inclusive power of structural similarity analogies: once we determine that *A* is analogous to *B*, not only are *A* and *B* treated the same, but we expect anything else with the same structural features as *A* and *B* to fall into the same group. The consequences of adopting such analogies, consciously, unconsciously, or by default, should not be underestimated. At the risk of making an obvious point, how practitioners, courts, and scholars frame legal questions will profoundly influence the resolution of online disputes.[77]

By contrast, *Lockheed Martin Corp. v. Network Solutions, Inc.*[78] demonstrates how courts can create decisive, sweeping precedent by rejecting an analogy. *Lockheed* is chiefly a Lanham Act contributory infringement case.[79] Because third parties host so much content on the Internet, or direct users toward content hosted by someone else, trademark and copyright holders often allege that the third-party service provider has assisted an Internet user in accessing infringing content.[80] Contributory infringement occurs when the alleged contributor either intentionally induces another to infringe or continues to supply a product to one whom it knows or has reason to know is engaging in infringement.[81]

In decisions prior to *Lockheed*, the Ninth Circuit had employed a string of real-world analogies to extend contributory infringement liability from third-party producers (the common defendant in such cases) to third-party service providers. *Fonovisa, Inc. v. Cherry Auction, Inc.*, decided in 1996, held that a landlord's common law responsibility for illegal activity on its premises implied the kind of direct control and monitoring that could also give rise to contributory infringement.[82] *Fonovisa* involved proprietors of flea markets and swap meets who knowingly permitted vendors to offer infringing goods.[83] If, in the course of providing a service to the primary infringer, a third party directly controlled or monitored the instrumentality used by the primary

76. *Cubby*, 776 F. Supp. at 140.

77. *See* Hunter, *supra* note 73, at 475 ("use of the CYBERSPACE AS PLACE metaphor within law leads to a view of cyberspace as land that may be fenced off and privatized").

78. 194 F.3d 980 (9th Cir. 1999).

79. *Id.* at 981.

80. *See, e.g.*, Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 103 (2d Cir. 2010); Bird v. Parsons, 289 F.3d 865, 877 (6th Cir. 2002); Petroliam Nasional Berhad v. GoDaddy.com, Inc., No. C 09-5939 PJH, 2010 WL 3619780 at *4 (N.D. Cal. Sept. 9, 2010); Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., 591 F. Supp. 2d 1098, 1109–10 (N.D. Cal. 2008).

81. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 854 (1982).

82. Fonovisa, Inc., v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996).

83. *Id.* at 260.

infringer, that third-party service provider can be held liable for contributory infringement.[84]

Lockheed presented the question of whether contributory infringement law should treat domain name registrars[85] (third-party service providers) in the same way it treats swap meet proprietors.[86] The Ninth Circuit proved unwilling to extend the analogy that far. In holding that the domain name registrar had not engaged in sufficient monitoring to expose itself to contributory infringement liability, the court observed: "While the landlord of a flea market might reasonably be expected to monitor the merchandise sold on his premises, [Defendant] cannot reasonably be expected to monitor the Internet."[87] This language concerning reasonable expectations and monitoring the Internet has echoed through subsequent contributory infringement cases, even after the 1999 Anticybersquatting Consumer Protection Act ("ACPA")[88] established statutory guidelines for the analysis of domain name trademarks.[89] Perhaps in response to *Lockheed* and similar decisions, the ACPA actually inserted a "bad faith intent" element not normally required in infringement cases.[90]

Intel Corp. v. Hamidi[91] offers another example of how, in rejecting an Internet-related analogy, courts can shape the law beyond a particular fact pattern or line of cases. In *Hamidi*, the California Supreme Court ruled that the tort of trespass to chattels does not encompass mass e-mails that cause "no actual or threatened damage to [Plaintiff's] computer hardware or software and no interference with its ordinary and intended operation."[92] The court also explicitly rejected a proposed extension of California trespass law that would have made impingement on cyber "spaces" equivalent to trespass on real

84. *See id.* at 263, 265; Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1148–49 (7th Cir. 1992); Gucci Am., Inc. v. Frontline Processing Corp., 721 F. Supp. 2d 228, 248 (S.D.N.Y. 2010).

85. Domain name registrars are accredited organizations authorized to register and manage domain names on behalf of owners.

86. Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984–85 (9th Cir. 1999).

87. *Id.* at 985 (quoting Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 962 (C.D. Cal. 1997)).

88. Pub. L. No. 106–113 app. I, § 3002, 113 Stat. 1501A–545, 545–48 (1999) (codified at 15 U.S.C. § 1125(d) (2006)) (establishing analytical structure for domain name trademark infringement claims).

89. *See, e.g.*, Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 807 (9th Cir. 2007); Solid Host, NL v. Namecheap, Inc., 652 F. Supp. 2d 1092, 1113 (C.D. Cal. 2009).

90. 15 U.S.C. § 1125(d)(1)(A) ("A person shall be liable in a civil action by the owner of a mark . . . if . . . that person has a bad faith intent to profit from that mark . . . .").

91. 71 P.3d 296 (Cal. 2003).

92. *Id.* at 303.

property.[93] Observing that "[m]etaphor is a two-edged sword," the court noted that the Internet has been characterized in terms of physical space (e.g., a web "address"), but also in chattel-evoking terms (e.g., the "web" or the "net").[94] Because computing equipment itself is not real property, trespass on cyber "space" was found not to be trespass in the traditional sense.[95]

Obviously, the impact of the *Hamidi* court's rejection of cyberspace as real property has expanded beyond conversion and trespass cases. Post *Hamidi*, a person seeking to invoke real property law in an Internet dispute must contend in some way with the court's categorical denial. That includes first amendment issues, privacy issues, and any law related to or relying upon real property doctrine.

This brings us to the question of Internet-based analogy in online work disputes. In fact, such analogies are already at work in telecommuting cases. *Janette v. American Fidelity Group, Ltd.*, in which the Sixth Circuit found that a telecommuting worker was an independent contractor under the Americans with Disabilities Act ("ADA"), [96] offers a good example. Janette's employer argued that since Janette worked from home, on her own computer, the "tools and instrumentalities" factor of the ADA employment status test should weigh in favor of independent contractor status.[97] Janette responded by asserting that her use of the employer's "software, network, and programs" from her home office should counteract and weigh in favor of employee status.[98] The "tools and instrumentalities" concept normally describes physical equipment or proprietary technology—the sort of equipment that an employer would provide to statutory employees but would expect an independent contractor to supply.

In Janette's case, the obvious tools or instrumentalities were the computer and home office that she owned.[99] Had the court ended its inquiry there, this factor would have indicated an independent contractor relationship. But the court credited Janette's argument, and ultimately deemed the "tools and instrumentalities" neutral.[100] One neutral factor out of many may seem innocuous, especially when the others pointed towards independent contractor status. But it is important to remember that the "tools and instrumentalities" factor is one key way for adjudicators to measure the nature of a remote work situation. It basically asks how, and with what, the alleged contractor performs

93. *Id.* at 309, 311.

94. *Id.* at 309.

95. *Id.* at 309–10.

96. Janette v. Am. Fid. Grp., Ltd., 298 F. App'x 467, 477 (6th Cir. 2008).

97. *See* Appellees' Brief at 31–32, Janette v. Am. Fid. Grp. Ltd., 298 F. App'x 467 (6th Cir. 2008) (No. 07-2214), 2008 WL 2743799 at *31–32.

98. *Janette*, 298 F. App'x at 476; Final Brief of the Appellant at 36–37, Janette v. Am. Fid. Grp. Ltd., 298 F. App'x 467 (6th Cir. 2008) (No. 07-2214), 2008 WL 2743800 at *36–37.

99. *See Janette*, 298 F. App'x at 476.

100. *Id.*

his or her work. Without the analogy accepted by the court in *Janette*, this factor could tip the scales. By accepting the analogy, the court was able to remove that factor from the equation and focus on the more important question of whether the employer had the right and capacity to use those tools and instrumentalities in exerting control.[101]

In *Janette*, we see a functional equivalence between physical equipment and more intangible Internet resources such as network technology and bandwidth. Courts could discover a similar functional equivalence between remote monitoring technology, which is constantly becoming more robust and interactive, and on-site supervision. oDesk, an online crowd work company, has filed a patent application for a "Virtual Office Environment," described as "[a] system and method for monitoring remote employees, having a computer for a user perform job related tasks, wherein the computer is enabled to record various data regarding the user's use of the computer; and a network to transmit the various data to a storage unit, to allow the data to be accessed by an employer."[102] This system would include keystroke and click monitoring as well as still and video recording of the workers screen *and of the worker herself*.[103] The more robust and interactive these systems become, the more important (and, one hopes, easier) it will be to make a comparison to on-site supervision.

In union organizing situations, or where workers' constitutional rights and dignitary interests are at stake, courts could disregard or distinguish *Hamidi* and treat the employer's virtual property as analogous to real property. At minimum, the NLRB and the courts will need to grapple with *Hamidi* when they begin to establish rules for union organizing in virtual environments. The same goes for courts tasked with enforcing state wrongful discharge laws, like California's, that prohibit employers from terminating employees for "lawful conduct occurring during non-working hours away from the employer's premises."[104] Employers of crowd workers and in-game workers may well feel the need to terminate employees for conduct on the game/work platform. But who exactly is the employer, and, more important, what constitutes the premises?[105] Courts are quite likely to draw property-based analogies in order to figure out when exactly an online worker has moved sufficiently far away from an employer's "premises" to qualify for the protection of such laws.

101. *See id.* at 472–73 (discussing the "important and decisive" control factor).

102. U.S. Patent Application No. 06/22,734 (filed June 12, 2006).

103. *Id.*

104. CAL. LAB. CODE § 96(k) (West 2011).

105. *See* Venkat Balasubramani, *Private Employers and Employee Facebook Gaffes [Revisited]*, ERIC GOLDMAN: TECH. & MARKETING L. BLOG (Jan. 30, 2011), http://blog.ericgoldman.org/archives/2011/01/private_employe_1.htm ("Interestingly, both the California and Colorado statutes are tied to activity not on 'the premises' of the employer, a concept that has become amorphous, as companies engage in activities online.").

Finally, and critically, as more and more forms of work move onto social gaming platforms, courts must consider whether to treat payment in virtual currency (gamers' compensation of choice) as functionally equivalent to wages.[106] The temptation to analogize to real-world bank accounts—especially when gamers use real currency to purchase virtual assets, and currency markets exist to establish exchange rates—will prove quite strong.

We can expect courts to continue to rely on analogies and functional equivalencies as they grapple with online work. Some decisions may go the way of *Hamidi* and *Lockheed*, using analogies to avoid extending or altering employment law, and thus likely leaving online workers without the protections their counterparts enjoy. Others may follow *Cubby* and *Kremen*, employing analogy to gather online work amongst the other employment relationships that courts have found legible and coherent. The second approach requires a certain flexibility, a willingness to tolerate inconsistencies, holes in the analogical reasoning, and uncertainties in outcome. But, in exchange, we would get an employment law regime that acknowledges and embraces the ways in which Internet technology has transformed the modern workplace.

III. CONTEXT-DRIVEN ANALYSIS[107]

Most, if not all, legal questions require some consideration of the context in which they arise. This is a familiar proposition. Yet, since the spread of the Internet, a debate has raged among legal scholars over the degree to which the law ought to view online environments as exceptional.[108] Courts participate in and shape this debate through their approach to particular problems. When they turn a blind eye, they reinforce conceptions of the Internet as simply another setting for legal disputes. In *Register.com*, the court applied "standard contract doctrine" to an Internet transaction, never considering whether the online context might affect not just the facts but the very notion of what constitutes a contract.[109] When courts adopt analogies and functional

106. For a quite preliminary treatment of virtual currency as wages and of in-game work generally, see Felstiner, *Sweatshop or Paper Route?*, *supra* note 3, at 4.

107. The phrase is borrowed from a software testing method that emphasizes eschewing "best practices" in favor of a context-driven approach. There is no real similarity between the software testing method and the approach to legal analysis advocated here, beyond the fact that both value adaptability and awareness of how shifts in context can completely alter our notion of the "correct" process. *See* Cem Kaner & James Bach, *The Seven Basic Principles of the Context-Driven School*, CONTEXT-DRIVEN TESTING, http://www.context-driven-testing.com/ (last visited Oct. 6, 2011).

108. *See, e.g.*, David R. Johnson & David Post, *Law & Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006).

109. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 402–03 (2d Cir. 2004).

equivalencies, they frame Internet conduct as familiar and workable, an extension of routine scenarios the law has already mastered. Think of the *Kremen* court comparing websites to plots of land,[110] or the *Thomas* court placing digital sound transfer on a continuum of technological innovation that included the phonograph.[111] These analogies imagine the Internet as new, yet still comprehensible within the old, existing legal framework.

Sometimes such acts of imagination are perhaps less fruitful. Courts will find themselves faced with an aspect of the online environment that is simply incompatible with the assumptions that underlie existing law. Legal elements with great real-world relevance may prove essentially moot online. Or, the online environment may alter the context so fundamentally, or expand the scope of regulated activity so massively, that even analogies and fundamental equivalencies cannot save the existing law from falling miserably short. In such situations, some courts begin instead (if only implicitly) from the proposition that online activity *will* be different, by necessity. This is context-driven analysis and could prove a vital tool in ensuring that online workers receive the same scope of protection as their counterparts in traditional labor markets.

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,[112] an early Internet jurisdiction case, offers a prototypical model of the context-driven approach. *Zippo* concerned the question of when the operators of a website have sufficient contact with a state to justify personal jurisdiction.[113] Instead of struggling vainly to shoehorn Internet "contacts" into existing personal jurisdiction precedent,[114] *Zippo* articulated a new "sliding scale" of interactivity for determining jurisdiction in Internet cases.[115] The court held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[116] On one side of the scale sit e-commerce website operators, who clearly establish sufficient contacts to satisfy jurisdiction.[117] On the other sit passive websites, which simply post information that becomes available in another jurisdiction by nature of the Internet.[118] "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity

110. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003).
111. United States v. Thomas, 74 F.3d 701, 708 (6th Cir. 1996).
112. 952 F. Supp. 1119 (W.D. Pa. 1997).
113. *Id.* at 1121.
114. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
115. *Zippo Mfg.*, 952 F. Supp. at 1124.
116. *Id.*
117. *Id.*
118. *Id.*

and commercial nature of the exchange of information that occurs on the Web site."[119]

Notably, the court in *Zippo* did not simply analyze the transactions and decide, in a vacuum, so to speak, whether they would satisfy the "minimum contacts" standard. Nor did the court rely on analogies between e-commerce and the kinds of economic activities—retail outlets, catalogue advertisements, etc.—often cited to support or reject personal jurisdiction. Instead, after surveying the "scant" case history available at the time, the court developed its sliding scale of interactivity.[120] The sliding scale was premised on an implicit recognition that websites, in their instantaneous ubiquity and their degrees of interaction, are simply different than other kinds of contacts.

More recently, the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*[121] engaged in a similar context-driven analysis to decide an online fair use dispute. *Perfect 10* concerned the role of online search engines in image sharing.[122] Evaluating the defendant's fair use defense, the court held that a search engine (1) "transforms the image into a pointer directing a user to a source of information," and (2) "provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool."[123] The court specially noted "the importance of analyzing fair use flexibly in light of new circumstances,"[124] and cautioned against "freez[ing] the doctrine in the statute, especially during a period of rapid technological change."[125]

In one sense, *Perfect 10* represents no real deviation from fair use doctrine, insofar as fair use inquiries are naturally context-driven, almost always requiring an in-depth and technologically sensitive consideration of the allegedly copied work. But *Perfect 10* also shows the court's recognition that the Internet has accomplished a deep reconfiguration of the meaning of images, for the purposes of copyright law. Hyperlinking permits images, without any other adornment or alteration, to function as "pointers," and, in doing so, their character changes sufficiently to avoid infringement.[126] Unlike in *Zippo*, the court in *Perfect 10* did not create a new, improved test for online fair use. Rather it applied the existing law in a way that accounted for—and in fact seemed almost to arise from—the sea change brought about by hyperlinked information.

119. *Id.*

120. *Zippo Mfg.*, 952 F. Supp. at 1123–24.

121. 487 F.3d 701 (9th Cir. 2007).

122. *Id.* at 713, 719.

123. *Id.* at 721.

124. *Id.* at 723.

125. *Id.* (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984)).

126. *Perfect 10*, 487 F.3d at 716–17.

It should be self-evident that the "context-driven" approach offers myriad possibilities. Whether or not a court adopts such an approach in deciding online work disputes might depend on whether it is interpreting statutory or common law. For example, in the union organizing context, the courts and the NLRB could follow *Zippo* (and reject *Thomas* et al.) by recognizing online communities and establishing a new set of "community of interest" factors. However, because they would be interpreting a federal statute,[127] it is unlikely that they would dispense with the community of interest concept altogether, or replace it with some other method of determining an appropriate bargaining unit. They might simply de-emphasize or eliminate the factors implicating geographic proximity.

Similarly, in some online work contexts, such as crowdsourcing, the traditional concept of an employment relationship has undergone surprising transformations. Instead of ignoring those shifts, or analogizing back to inapposite forms of industrial production, courts and administrative agencies might undertake a context-driven readjustment of the tests they use to distinguish covered from exempt employees. For example, in online work, the notion of a "permanent" employment relationship (let alone one in which the parties actually know each other) makes less sense. Much of online work is structured to prevent workers and employers from forming an indefinite, and thus cumbersome, bond.[128] Accordingly, the courts could dispense with the "permanence" or "duration of the relationship" factor used to distinguish statutory employees from independent contractors.[129]

Courts might also downgrade the importance of the "right to control," an agency-based test that dominates analysis of statutory coverage under many employment statutes.[130] Examining the context could lead courts to acknowledge that in online work, the right to control employees themselves (many of whom will be anonymous and fleeting) is less important than the right to control the online environment in which the work is performed. For example, in *JustMed, Inc. v. Byce*, the Ninth Circuit held that a telecommuter was a statutory employee, despite circumstances that would normally indicate independent contractor status.[131] The court noted that "Byce's ability to set his own hours and the fact that he worked from home are not particularly relevant" because "[a]s a programmer, Byce could, in essence, ply his craft at any time

127. 29 U.S.C. § 159(b) (2006).

128. Felstiner, *Working the Crowd*, *supra* note 3 (manuscript at 5–6).

129. *See id.* (manuscript at 32); *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. (July 2009), www.dol.gov/whd/regs/compliance/whdfs13.pdf (listing factors used by the DOL).

130. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

131. 600 F.3d 1118, 1128 (9th Cir. 2010).

and from any place without significant impairment to its quality or his ability to meet JustMed's needs."[132]

Courts will probably become bolder as they begin to hear more cases involving online work. They may well build a new employment status test tailored to emerging online labor models—perhaps de-emphasizing managerial control, delving into the power dynamics of adhesion contracts and clickwrap agreements, and focusing on certain interactive aspects of the work platform in order to understand how supervision and independent judgment operate in this new arena. If, as seems likely, courts and administrative agencies discover that online workers will have trouble recovering wages or benefits from any single employer, they may broaden the definition of joint employer to include powerful intermediaries such as crowd labor vendors and game developers.[133]

In order to protect interests as they migrate online, courts have proven willing to embrace a context-driven analysis. They have analogized, adjusted, or abandoned existing doctrine where necessary to achieve a just result. There is no reason why they should not do the same in adjudicating online work cases.

CONCLUSION

Prospective plaintiffs cannot necessarily predict which of the above approaches a court will take. Since Congress and state legislatures do not usually consider online work when crafting employment-related statutes, we also cannot predict how a changing statutory landscape may affect the legal position of online workers and their employers. With respect to certain forms of online work, we do not even know at this point whether courts or legislatures truly consider that work to be within the scope of employment law, or whether they consider it to be regulable at all.

But we can rely to some degree on the dogged attachment of the courts to precedent. Courts right now have very little in the way of online work cases upon which to rely. What they do have is around fifteen years of tort, property, and contract cases dealing with Internet activity. And since that is what they have, it is probably what they will use. These early cyberlaw cases contain crucial lessons that we cannot afford to disregard.

132. *Id.* at 1127–28. Ultimately, the court's decision to classify the plaintiff as an employee rested more on the nature of the enterprise—a technology start-up—than on the fact that Byce worked remotely. *Id.* at 1128. But the court's willingness to largely disregard the "right to control" factor seems to have stemmed at least in part from a core sensitivity to the differences between traditional employment and online work arrangements.

133. *See* Felstiner, *Working the Crowd*, *supra* note 3 (manuscript at 43–54); Felstiner, *Sweatshop or Paper Route?*, *supra* note 3, at 4.