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 such a 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 cyberspace. Cases dealing with jurisdiction, property, 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) the “add/drop” method, in which courts actually dispense with elements or factors that make no sense in an online context, add new factors, or develop entirely new inquiries to reconcile existing law with an environment its authors could never have envisioned.

The Article focuses mostly on cases from the earlier years of cyberlaw, before doctrines developed and legislatures acted. It attempts to serve as 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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Grappling with Online Work: Lessons from Cyberlaw

In 2003, Joan Gabel and Nancy Mansfield observed that “the new cyberspace workplace…creates legal uncertainty with regard to the ability of existing legislation to operate in an Internet-enabled environment.” Even then, “legal uncertainty” was probably an understatement. There were (and are) very few cases, and little indication in the legal literature as to how courts might approach regulation of the “cyberspace workplace.”

But it is worth remembering that courts have already grappled extensively with the general question of how to apply existing rules to cyberspace. Cases dealing with jurisdiction, property, 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) the “add/drop” method, in which courts actually dispense with elements or factors that make no sense in an online context, add new factors, or develop entirely new inquiries to reconcile existing law with an environment its authors could never have envisioned.

These are more loose groupings than defined categories. They bleed into one another, and courts may employ a mix of two or more (or something in between) to decide a case. The point of dividing them in this way is not to present a thorough or definitive catalogue, but to illustrate the variety. To that end, the Article focuses mostly on cases from the earlier years of cyberlaw, before doctrines developed and legislatures acted. It attempts to serve as 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.

The Blind Eye

In some situations, courts may make no adjustment for the transition to cyberspace. They effectively ignore the contextual shift from the real world to the internet, presuming that our time-honored and time-tested legal doctrines will thrive and govern equally robustly in the new environment. Leaving aside the fact that the law has always adjusted itself in response to historical and cultural change, 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” cases offer a fairly benign example of the blind eye approach. In Specht v. Netscape Communications Corp. and Register.com v. Verio, the Second Circuit applied straightforward, unadjusted contract law principles to determine whether users had legitimately assented to website operators’ terms and conditions. In Specht, the court considered whether the plaintiffs had reasonable notice of and had objectively manifested their assent to an arbitration agreement. 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 characterizing the parties actions online as basically indistinguishable from real-world contract making, at least as far as the standard operation of notice and consent. To the extent that the court distinguished this clickwrap case from earlier shrinkwrap cases, the distinction rested on the conspicuousness of the notice, and not the difference in environment.

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. The Second Circuit held that Verio had agreed to be bound by the terms, distinguishing Specht because of the repetitive nature of Verio’s conduct. 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.”
succinctly, the court wrote: “While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”

Turning a blind eye in online tort cases can create more troubling results. In United States v. Thomas, the Sixth Circuit applied federal obscenity statutes to hold the operators of an online bulletin board responsible for obscene images posted thereon. The Communications Decency Act (CDA) amended federal obscenity laws to include “interactive computer services,” but at the time of Thomas the question of obscenity in cyberspace remained open. The Supreme Court in Miller v. California established a three prong test for obscenity, the first prong of which asks whether “‘the average person applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest.’” 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. 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.” 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.” 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. In doing so, the court essentially pretended that the publisher had physically introduced the prohibited material directly into the user’s geographic area, rather than into an online environment that the user happened to enter from that area.

7 Id. at 403.
8 74 F.3d 701, 709 (6th Cir. 1996).
11 Id. at 30-34.
12 Thomas, 74 F.3d at 711.
We can also observe the failures of the “blind eye” approach in a pair of NLRB cases dealing with the Teamsters’ efforts to organize customer service representatives working for Technology Services Solutions (TSS). Under §9(b) of the National Labor Relations Act, workers must share a “community of interest” in order to constitute an appropriate bargaining unit. 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.

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. There were no physical worksites—everyone, including the CSMs, worked from separate locations and communicated online. TSS did, however, have regional headquarters covering multiple states and multiple CSM territories. It argued that these multi-state regions represented the smallest appropriate bargaining unit.

The NLRB Regional Director did not agree, choosing instead to apply the Board’s “single location” presumption, under which single locations are presumed to constitute an appropriate bargaining unit. The Regional Director decided that each CSM territory should constitute a separate bargaining unit, reasoning that virtually supervised territories were analogous to “single locations.”

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 §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. The Regional Director observed an intangible sort of community, akin to a cyberspace community of interest.

But the NLRB reversed the Regional Director’s ruling, finding instead that the large multi-state regions

15 See, e.g., NLRB v. J.C. Penney Co., Inc., 559 F.2d 373, 375 (5th Cir. 1977).
16 See, e.g., id., Sundor Brands, Inc. v. NLRB, 168 F.3d 515 (D.C. Cir. 1999); Brown v. Sandimo Materials, 250 F.3d 120 (2d Cir. 2001); NLRB v. Purnell’s Pride, Inc., 609 F.2d 1153 (5th Cir. 198)
18 Id.
19 Technology Services Solutions, 1995 NLRB LEXIS 891 at *1.
20 See Malin & Perritt, supra note XX, at 23 (discussing the TSS cases).
were the smallest appropriate bargaining units because they contained physical headquarters.\textsuperscript{21} 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.\textsuperscript{22}

In 2000, the Board ruled again on the TSS organizing drive, this time addressing the question of access to employee contact information.\textsuperscript{23} Normally, under the precedent set by the Supreme Court in \textit{Lechmere v. NLRB},\textsuperscript{24} employers can bar union organizers from access to the worksite as long as the organizers have reasonable access to the employees outside the employer’s property.\textsuperscript{25} Only where there is no alternative means of accessing workers may the Board order an employer to allow access to private property in order to communicate with workers. Because the CSRs were spread out and working mostly on third-party private property, the Teamsters argued that the \textit{Lechmere} “no alternative means” test applied. But instead of demanding access to employer property, which would be impossible and irrelevant in this context, the Teamsters requested a list of employee addresses. The Board found that even though the CSRs worked all over the place, and the Teamsters had requested the worker list as a less intrusive substitute for entering private property, the NLRB General Counsel had not met its burden of actually proving that the union had “no alternative means” of access. The Board then suggested a few avenues that the union could have pursued as evidence of alternative means, including using existing contacts to approach out-of-state workers.\textsuperscript{26}

The dissenting member in the 2000 \textit{Technology Services} case argued eloquently that the Board should be willing to adjust its doctrine to fit the “unique characteristics” of a cyberspace workforce:

\begin{quote}
The structure of the bargaining unit in the present case, however, is an outgrowth of the ongoing changes in the American work force and the continuing creation of new and varied forms of workplaces in response to advances achieved by American business and technology. The unique characteristics of this bargaining unit, which largely isolate these employees and restrict them from exercising their organizational rights, call for a different result.\textsuperscript{27}
\end{quote}

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\textsuperscript{21} \textit{Technology Services Solutions}, 1995 NLRB LEXIS 891 at *1-4.
\textsuperscript{22} See Malin & Perritt, \textit{infra} note XX, at 22-23 (discussing the TSS cases).
\textsuperscript{23} Technology Services Solutions, 332 N.L.R.B. 1096 (2000).
\textsuperscript{24} 502 U.S. 527 (1992).
\textsuperscript{25} \textit{Id}. at 537-39.
\textsuperscript{26} \textit{Technology Services Solutions}, 332 N.L.R.B. at 1097-99.
\textsuperscript{27} \textit{Id}. at 1102.
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But the Board did not accept the dissent’s argument, choosing instead to adhere to the Lechmere test. In fairness to the majority, the reasoning of the decision would represent a fairly straightforward application of Lechmere. But the Lechmere test relies heavily on the balancing of employers’ real property rights against employees’ §7 rights. It is hard to see what relevance Lechmere has in a situation with no physical worksite, and thus no real property, at issue. Similarly, the Board’s treatment of bargaining units in the 1995 TSS case would represent a reasonable application of the “community of interest” test, except that the entire concept of “community of interest” effectively breaks down in cyberspace. In both these cases, the NLRB implicitly rejected the notion that transferring work into cyberspace should have any effect on the application of existing law.

There are certainly situations in which existing doctrine will translate well enough into the internet context to avoid logical gaps and perverse results. This is especially true where, as in contracts, for example, the existing doctrine already focuses on intangibles and does not operate in reference to physical objects and actions, or on geographic parameters. But otherwise the “blind eye” will rarely produce just or comprehensible outcomes. At least in the work arena, the shift online fundamentally transforms the factual context in a way that all but demands some corresponding shift in legal approach.

**Analogy & Functional Equivalencies**

Often courts can use analogies and functional equivalencies to concretize the intangibles of virtual activity. Virtual property cases frequently travel this route. The proper conception of property in cyberspace has generated enormous controversy. Like employment laws, property laws developed with reference to physical spaces, tangible (or at least reducible) objects, paper copies, and a legal posture towards scarcity that helped define parties’ rights and obligations. Because many of these distinctions evaporate in cyberspace, analogies become useful.

Take *Kremen v. Online Classifieds, Inc.*, in which the Ninth Circuit held that ownership of a domain name constituted property ownership for the purposes of conversion. The court found in domain names

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28 337 F.3d 1024 (9th Cir. 2003).
both a well-defined interest (“like 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”). Both of these analogies were carefully chosen to limit the scope of inquiry and ultimately decide the issue.

Similarly, in Intel v. Hamidi the California Supreme Court ruled that the tort of trespass to chattels does not encompass mass emails that cause “no actual or threatened damage to [Plaintiff’s] computer hardware or software and no interference with its ordinary and intended operation.” The court did recognize that in other cases sufficient interference could amount to trespass to chattels, but limited its holding to personal property. It explicitly rejected a proposed extension of California trespass law to that would have made impingement on cyber “spaces” equivalent to trespass on real property. The opinion carefully notes that computing equipment is not real property, and thus trespass on cyber “space” is not trespass in the traditional sense.

A final example illustrates the less frequently exercised—but more potent—exclusionary power of direct analogies. Because third parties host so much content on the internet, questions of contributory infringement regularly arise, wherein the host has allegedly assisted an internet user in accessing infringing content. 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. If the alleged contributor provides a service instead of supplying a product, the question becomes whether the service provider directly controlled or monitored the instrumentality used by the primary infringer.

In Lockheed Martin Corp. v. Network Solutions, Inc. the Ninth Circuit held that an internet domain name registrar did not engage in sufficient monitoring to expose itself to contributory infringement liability. In doing so, the court rejected a set of real world analogies that had enabled it in a prior decision to extend

29 Id. at 1030.
31 Id. at 1360-64.
33 See Hard Rock Café Licensing Corp. v. Concession Servs., Inc., 952 F.2d 1143, 1148-49 (7th Cir. 1992); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 265 (9th Cir. 1996); Gucci America, Inc. v. Frontline Processing Corp., 2010 WL 2541367 at *11 (S.D.N.Y. June 23, 2010).
34 194 F.3d 980 (9th Cir. 1999).
contributory infringement from third party producers to service providers. In Fonovisa, Inc. v. Cherry Auction, Inc., the Ninth Circuit followed the Seventh in deciding that the common law duty of a landlord to control illegal activity on its premises implied the kind of direct control and monitoring that can give rise to contributory infringement.\(^{35}\) So landlord-tenant duties were extended into the trademark realm via a familiar real property analogy, but in Lockheed the Ninth Circuit severed the analogy before it could reach domain name registrars. “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.”\(^{36}\)

We see from the above examples that direct analogies are often used to gather a particular type of online activity under the same umbrella as other similar forms of real world activity, in order to subject all that activity to the same rules. But courts can also present an analogy that “doesn’t work” in order to carve entire species of activity (such as domain name registration) from the coverage of certain laws.

That said, direct analogies can only do so much, since they require that the number of parties, their relationships, and their interests map somewhat faithfully from real space into cyberspace (e.g. owner and trespasser, or copyright holder and infringer). Where no direct analogues exist, courts may instead identify a functional equivalency—something online that operates in a similar way, for fulfills a similar purpose, as another thing in the real world.

In Cubby v. Compuserve,\(^ {37}\) a very early (1991) cyberspace defamation case, the court considered whether online service providers should be held liable for defamatory statements communicated through their networks. Section 230 of the Communications Decency Act essentially forecloses this claim: “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.”\(^ {38}\) In 1991, however, it was less clear whether online service providers should be treated as vendors or distributors, and thus exempt from defamation liability, or, because they repeat or relay information, 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

\(^{35}\) Fonovisa, 76 F.3d at 265.

\(^{36}\) Id. at 985 (quoting the District Court’s opinion, 985 F.Supp. 949, 962 (C.D. Cal. 1997))


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.” While the court’s conclusions appear rational, if not inevitable, strong counterarguments certainly existed. 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 metaphysical and technological sense responsible for “producing” the end result, beyond just distribution or sale. Instead of delving into this question, a likely hornet’s nest, reached for a functional equivalent.

United States v. Thomas, the obscenity case discussed above, offers a good example of the “blind eye” approach insofar as the Sixth Circuit rejected the concept of cyberspace community. Thomas also contains two instructive uses of functional equivalency. The Defendant contended that the federal obscenity statutes enacted by Congress did not contemplate online obscenity. But the court concluded that Congress sought to prohibit exactly this sort of activity, whether or not it explicitly stated as much in the bill. In reaching this interpretation the court seems to have treated digital images as the functional legal equivalents of hard copies, despite the enormous difference in form and transmission. The opinion relies in part on United States v. Alpers, 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 through a phonograph. But that did not stop the Supreme Court from finding phonograph transmission to be functionally equivalent to other methods of disseminating obscene material. According to the Alpers Court, the “obvious purpose” of the obscenity statute was to prevent “channels of interstate commerce from being used to disseminate” obscene material. So the Sixth Circuit, following Alpers’ rationale, surveyed the technological shifts and acknowledged new transmission vehicle as functionally equivalent to older ones, in order to preserve the aims of the statute.

30 776 F. Supp. at 140. This analogy did not release Compuserve from all liability, it 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.
40 Id. at 708.
42 Id. at 683.
That functional equivalency also helped the court dispense with a pesky distinction between intangible and tangible material. The obscenity statute had not covered obscene telephone messages in previous cases, because those messages were deemed “intangible.” Despite the fact that both digital images and voice recordings traveled as electronic impulses over telephone lines, the court labeled voice impulses as “intangible,” and digital image data as “tangible” for the purposes of the statute.43 In order to do so, the court had to conclude that a digital image is more than “an intangible string of 0’s and 1’s,” broken down by the sender and reconstituted at the endpoint.44 Converting an obscene digital image into bytes and transmitting it over state lines still constitutes “transportation of obscene material,” despite the fact that the image itself, as such, does not travel. Because the court found that digitally transmitted images more closely resemble hard copies than voice messages, a sender of obscene digital images could still fall under the statute.

Courts encountering online work disputes should find ample opportunities for analogy and functional equivalency. Janette v. American Fidelity Group,45 a recent case from the Sixth Circuit, offers a good example. The court held that a telecommuting worker (Janette) was an independent contractor under the Americans with Disabilities Act.46 Janette argued that because she used her employer’s “software, network, and programs” from her home office, the “tools and instrumentalities” factor of the ADA employment status test should weigh in favor of statutory employment.47 The court credited this assertion, but also found that Janette worked from home, on her own computer, ultimately concluding that the tools and instrumentalities factor was neutral. This represented a moderate extension of the “tools and instrumentalities” concept, which would normally describe 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. Had the court ended its inquiry there, this factor would have indicated an independent contractor relationship. Treating software and networks as analogues or functional equivalents of physical work equipment

43 Id. at 707.
44 Id. at 706.
46 Id. at 477.
47 Id. at 476.
neutralized the factor and influenced the analysis.

Similarly, the courts could view remote monitoring technology, constantly becoming more robust and interactive, as the functional equivalent of on-site supervision. In union organizing situations, or where workers constitutional rights and dignitary interests are at stake, courts could treat the employer’s virtual property as analogous to its real property. Finally, as more and more forms of work move into the social gaming environment, courts could treat virtual currency (gamers’ compensation of choice) as equivalent to wages. This sort of analysis requires flexibility, and a willingness to tolerate some inconsistencies and uncertainties in outcome, but the trade-off would be an employment law regime that acknowledges and embraces the ways in which internet technology has transformed the modern workplace.

Add/Drop

Sometimes, the problem isn’t so much finding an analogue of functional equivalent as it is dealing with some aspect of the online environment that is simply incompatible with the assumptions that underlie existing law. Elements or factors with great relevance offline may prove essentially null or moot online. Or the online environment can 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. When faced with the former, courts may prudentely choose to ignore elements or factors that create nullities. When faced with the latter, they may actually add new elements, or craft entirely new inquiries or rules, just to close the gaps.

Sometimes the courts engage in this sort of “add/drop” process in order to enable the court to apply an existing rule that it considers just and appropriate despite the internet context. For example, in *Perfect 10 v. Amazon.com*48 the Ninth Circuit decided an online fair use issue based on the role of search engines and the intricate realities of image-sharing on the internet. The court held that a search engine (1) “transforms the image into a pointer directing the user to a source of information,” and (2) “provides social benefit by

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48 487 F.3d 701 (9th Cir. 2007).
incorporating an original work into a new work, namely, an electronic reference tool.”\(^{49}\) The court specially noted “the importance of analyzing fair use flexibly in light of new circumstances,” and cautioned against “freezing the doctrine in the statute, especially during a period of rapid technological change.”\(^{50}\)

In one sense, \textit{Perfect 10} represents no real deviation from fair use doctrine because fair use inquiries almost always require an in-depth and technologically-sensitive consideration of the allegedly copied work. But \textit{Perfect 10} also changes the meaning of an “image” in the context of hyperlinked web surfing, and it does so in order to accommodate the reality of navigating online content—a certain amount of otherwise impermissible copying simply must take place. As Professors Johnson and Post observed as far back as 1996, “any simple-minded attempt to map traditional notions of ‘copying’ onto Cyberspace transactions will have perverse results.”\(^{51}\)

Other times, rules and reality diverge so significantly that courts must develop a separate legal standard for online activity. \textit{Zippo Manufacturing Co. v. Zippo.com,}\(^{52}\) an early internet jurisdiction case, models this approach. Instead of struggling vainly to shoehorn internet “contacts” into existing personal jurisdiction precedent, \textit{Zippo} articulated a new “sliding scale” of interactivity for determining jurisdiction in internet cases.\(^{53}\) The court stated 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.”\(^{54}\) On one side of the scale sit e-commerce website operators, who clearly establish sufficient contacts to satisfy jurisdiction. On the other sit passive websites, which simply post information that becomes available in another jurisdiction by nature of the internet. “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 and commercial nature of the exchange of information that occurs on the Web site.”\(^{55}\)

\(^{49}\) \textit{Id.} at 721.

\(^{50}\) \textit{Id.} at 722 (internal citations omitted).


\(^{53}\) \textit{Id.} at 1124.

\(^{54}\) \textit{Id.}

\(^{55}\) \textit{Id.}
Obviously, the “add/drop” approach presents limitless possibilities. Whether or not a court adopts such an approach might depend on whether the court is interpreting statute or common law. For example, in the union organizing context, the courts and the NLRB could follow Zippo by establishing a new set of “community of interest” factors, thereby redefining what constitutes a community of employees in cyberspace. However, because they would be interpreting a federal statute 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 concept of a “permanent” employment relationship, let alone one in which the parties actually know each other, makes very little sense. Accordingly, the courts could dispense with that factor in the employment classification analysis. They could even go further, building a new employment status test tailored to new online labor models—perhaps de-emphasizing managerial control and focusing more on the environment in which the work is performed.

*JustMed, Inc. v. Byce* offers an instructive example. It possesses a fact pattern common to hybrid copyright and employment cases, in which a copyright dispute ultimately rests on a determination of whether the author of the work was an independent contractor, and thus the presumptive owner, or an employee, in which case ownership would transfer to the employer under the work for hire doctrine. JustMed, a medical device startup, hired Byce to write software code for an artificial larynx device. Though JustMed was located in Oregon, Byce worked from his home in Idaho, using his own computer. He set his own hours, worked without regular supervision, and periodically submitted drafts of the code over email to JustMed. The parties did not execute any employment agreement. JustMed did not issue W-2s, pay payroll tax, request an I-9 employment verification form, or in any other way treat Byce as an employee for tax purposes.

Yet the Ninth Circuit affirmed the district court’s holding that Byce was an employee, not an independent contractor. The court emphasized the fact that JustMed hired Byce indefinitely, with no specific

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56 600 F.3d 1118 (9th Cir. 2010).
57 Id. at 1121-22.
end product in mind, paid him a regular monthly salary (rather than a fee for services). \(^\text{58}\) None of these conclusions are particularly controversial. But the court deliberately de-emphasized other factors, including the crucial “right to control” factor, on the basis of JustMed’s identity as a technology start-up, rather than an established company. The court wrote:

> It is true…that [JustMed] did not exercise much control over the manner and means by which Byce created the source code. However, this is not as important to a technology startup as it might be to an established company. Byce was an inventive computer programmer expected to work independently…the business model and Byce’s duties do not require that the project be completed in a particular manner or that [JustMed] continuously oversee Byce’s work, so long as JustMed eventually found itself with a marketable product. \(^\text{59}\)

The court’s maneuvering did not end there. It attributed the IRS lapses to the informal nature of technology startups, rather than any intention to create a contractual relationship, and also concluded 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 and from any place without significant impairment to its quality or his ability to meet JustMed’s needs.” \(^\text{60}\) Overall, the court seems to have created a separate formulation of the common law agency test, applicable to technology startups because the “conduct [their] business more informally than an established enterprise might.” \(^\text{61}\) This is slightly different from the sort of in-depth enterprise analysis that courts often perform when determining employment status.

To be sure, an infant enterprise in another industry, without internet technology or remote workers, might enjoy the same deference under the employment status rationale expressed by the JustMed court. But the court’s unanimous readiness to all but abandon the “right to control” factor appears to have been driven by a core recognition of the incongruence between traditional employment law and modern online work arrangements. This is a telecommuting case, but it will resonate beyond that narrow sector of employment. It may not transform crowd workers or gamers into statutory employees, but it seems to radically demote the “right to control,” commonly understood until this point as the primary factor in agency and employment status determinations.

\(^{58}\) \textit{Id.} at 1126-27.
\(^{59}\) \textit{Id.} at 1127.
\(^{60}\) \textit{Id.}
\(^{61}\) \textit{Id.} at 1128.
JustMed represents a fairly conservative adjustment. Courts will undoubtedly become more bold as they begin to hear more and more cases involving online work. They may add internet-specific questions to the employment status test, such as those designed to give force to or disable clickwrap terms of use. They may focus on the online work platform itself, using interface design as a window into the kinds of supervision employers can perform, and the degree of independent judgment workers can exercise. As I have argued elsewhere, they may also broaden the definition of joint employer to include crowd labor vendors and game developers.

The point is that in order to protect interests as they migrate into cyberspace, courts have proven willing to analogize, adjust, or abandon existing doctrine.

Conclusion

Prospective plaintiffs cannot necessarily predict which of the above approaches a court will take. Since Congress and state legislatures do not usually consider the application of employment-related statutes to online work, 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.

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