
**FROM THE RAT TO THE MOUSE:
HOW SECONDARY PICKETING LAWS MAY
APPLY IN THE COMPUTER AGE**

“I know that you’re afraid . . . you’re afraid of us. You’re afraid of change. I don’t know the future. I didn’t come here to tell you how this is going to end. I came here to tell you how it’s going to begin.”
Neo, THE MATRIX (Warner Bros. Pictures 1999).

I. INTRODUCTION

As new technologies develop, necessity and creativity drive ingenuity to use these new advances in innovative ways. The Internet has woven itself into the fibers of every day life, becoming one of the most useful tools in many human endeavors. By virtue of a combination of necessity and creativity, the Internet has become a useful tool for labor unions. Websites and e-mail allow unions enhanced abilities to communicate internally, as well as to communicate with the general public when labor disputes arise. One type of labor dispute, the secondary picket, stands to benefit greatly from employing these new methods of communication.

This Note discusses the development of secondary activity by labor unions under the National Labor Relations Act (“NLRA”), and how, based on the past and current state of the law, courts and the National Labor Relations Board (“NLRB”) may handle future disputes arising from use of the Internet in these secondary activities. By analyzing the laws regarding handbilling and picketing, and their extension to banners, inflatable rats, and street theatre, this Note discusses the extension of these laws to websites and e-mail. This Note recognizes that there is a necessity for workable doctrines that will capture the intended policies of the NLRA and produce logical results, and that will be applicable to future cases involving use of cyberspace in new and innovative ways in the secondary picketing context.

II. TRADITIONAL METHODS OF SECONDARY PROTEST

Unions use handbills, pickets, and strikes to put pressure on employers when conflicts and disputes arise.¹ When the target of this pressure is a party with whom the direct employer has a business relationship, such handbilling, picketing, and striking is considered secondary activity² and is “one of the most effective weapons in labor’s economic arsenal.”³ Secondary activity is regulated by section 8(b)(4)(ii)(B)⁴ of the National Labor Relations Act.⁵ The regulation of secondary activity, commensurate with the degree to which it constitutes or incorporates speech, is tempered by the publicity proviso⁶ as well as First and Fourteenth Amendment considerations.⁷

Labor protests often rely on more than one means of appealing to

1. 2 COMM. ON THE DEV. OF THE LAW UNDER THE NAT’L LABOR RELATIONS ACT, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1741 (John E. Higgins, Jr. ed., BNA Books, 5th ed. 2007) [hereinafter THE DEVELOPING LABOR LAW].

2. *Id.*

3. *Id.* at 1746.

4. The current language of section 8(b)(4)(ii)(B) of the NLRA states:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title [section 9 of this Act]: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

Id. § 158(b)(4)(ii)(B).

5. 29 U.S.C. §§ 151-169 (2000).

6. Section 8(b)(4)(ii)(B) is interpreted with regard to be afforded to the publicity proviso, which states:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Id. § 158(b)(4)(ii)(D).

7. THE DEVELOPING LABOR LAW, *supra* note 1, at 1742.

the public.⁸ Though each method of protest may raise its own distinct issues, courts and the NLRB will often look at the protest as a whole and will not dissect the protest into its components.⁹ An analysis of the major methods of protest and how they differ from each other will serve as the foundation for further analogy to new methods of protest.

A. Pickets

Picketing,¹⁰ considered the “workingman’s means of communication,”¹¹ is distinguishable from other forms of protest because it is a combination of communication and conduct.¹² The communication element is generally an argument meant to persuade other parties to support the picketers.¹³ The conduct element in this context consists of patrolling—a physical presence involving standing or marching back and forth on or near the property belonging to the party being picketed.¹⁴ Of these two elements, the conduct is seen to be the distinguishing feature of picketing, and is determined to be the more persuasive of the two.¹⁵ A picket may be selected precisely because it is a superior method of inducing action when compared to other forms of communication, such as newspapers or circulars, which rely purely on the substance of the argument.¹⁶

There is a distinction between the “speech” and “conduct” aspects of protests. The “speech” aspect implicates awareness of policy and communicates ideas, whereas the “conduct” aspect crosses the line from merely communicating a point to doing something about it. The communication element of picketing implicates First Amendment

8. See generally *NLRB v. Retail Store Employees (Safeco)*, Local 1001, 447 U.S. 607 (1980) (involving a combination of picketing and handbilling).

9. Tzvi Mackson-Landsbuerg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?* 28 CARDOZO L. REV. 1519, 1541-42 (Dec. 2006).

10. The word “picket” has evolved over time from its military origins several hundred years ago, through Civil War-era labor protests involving violence, to today’s peaceful protests involving signs and placards. *Id.* at 1527-28.

11. *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

12. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 77 (1964) (Black, J., concurring).

13. *Id.*

14. *Id.*

15. *NLRB v. Retail Store Employees (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

16. *Hughes v. Super. Ct. of Cal.*, 339 U.S. 460, 465 (1950).

freedom of speech rights.¹⁷ Labor disputes draw attention to issues of public concern, such as wages, working conditions, and satisfactory hours.¹⁸ These issues often have narrow as well as broad effects, both geographically and temporally.¹⁹ The economy may be affected at a localized level to a widespread national level.²⁰ Also, in addition to the effects on current employees, future employees and future generations may be affected by the issues underlying these disputes.²¹

The conduct involved in picketing may itself induce action, regardless of the ideas that the picket is meant to communicate.²² Coercive conduct is the cornerstone of restrictions on picketing.²³ The “isolated evil” that flows from such coercive conduct is using a secondary employer’s customers to put economic pressure on the secondary employer.²⁴ In turn, the secondary employer would be coerced to put pressure on the primary employer.²⁵ Even peaceful pickets could produce this effect because the public will not pay attention to the message being communicated and will automatically stay away from the picketed establishment.²⁶ This activity coerces the secondary employer to act because of the injury to his business.²⁷

17. *Tree Fruits*, 377 U.S. at 77 (Black, J., concurring).

18. *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

19. *Id.*

20. *Id.*

21. *Id.* The Court relied on these policy reasons in analyzing a statute that prohibited any and all activity meant to publicize the facts of a labor dispute, including signs, pamphlets, and word of mouth. *Id.* at 104-06. The Court determined that such broad restrictions, which were not designed to combat specific “substantive evils,” were thus not a justified proscription of First Amendment rights. *Id.* at 104-05.

22. *Bakery & Pastry Drivers & Helpers Local 802 of Int’l Bhd. of Teamsters v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring).

23. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 68 (1964). A state may prohibit picketing that has a coercive effect due to violence, force, or intimidation, such as “window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings” committed at the hands of union employees. *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941). Further, the conduct involved in picketing may itself induce action, creating a coercive effect on the employer, and opening even peaceful picketing to restrictions. *Int’l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 294-95 (1957).

24. *Tree Fruits*, 377 U.S. at 63.

25. *Id.*

26. *Id.* at 71.

27. *Id.* at 72. A peaceful picket of a specific product will not be found to be coercive where the result may be a drop in sales of one of many items sold by a retailer that would cause an incidental and insubstantial drop in sales. *Id.* at 72-73. However, product picketing where the picketed product comprises almost all of the company’s business and that threatens a secondary employer with ruin or substantial loss may be restricted. *NLRB v. Retail Store Employees (Safeco)*, 447 U.S. 607, 614-15 (1980).

Picketing thus presents a situation where the First Amendment protections of communication must compete with regulation of the means of expression.²⁸ The right of free speech cannot be denied based on insubstantial facts or trivial incidents.²⁹ Further, statutes that only specify a particular manner or location in prescribing expression of views are not sufficient to justify the restrictions.³⁰ The First Amendment would offer no protection if free speech could be restricted so easily.³¹ However, free speech may be limited in the labor context.³² The restriction may focus on the union's efforts to elicit a "response to a signal, rather than a reasoned response to an idea."³³

B. Handbills

Handbills, unlike picketing, rely on the persuasive force of the idea they are attempting to convey.³⁴ The conduct element is lacking because handbilling in itself does not involve or rely on a physical presence or patrolling.³⁵ Without the conduct, there is much less basis to find the requisite coercion, threat, or restraint necessary to find a NLRA violation.³⁶

A reader's reaction to a message contained in a handbill is the result of persuasion, not intimidation.³⁷ The message convinces the reader that a certain course of conduct is appropriate.³⁸ Information conveyed by the handbills may persuade their audience to take a certain position, but that alone is not enough to establish the requisite 'coercion' to restrain the handbilling.³⁹

The union, like any other party, possesses a right to publicize and

28. See *Safeco*, 447 U.S. at 618-19 (Stevens, J., concurring) (discussing the considerations involved in First Amendment protections, as opposed to regulation of the means of expression based on its content).

29. *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

30. *Safeco*, 447 U.S. at 618 (Stevens, J., concurring).

31. *Id.*

32. *Id.* at 619.

33. *Id.*

34. *Id.*

35. See *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) (discussing the intimidation factor that accompanies the activities of picketing or patrolling, which is absent from the activity of handbilling).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 578, 580.

discuss their side of a labor controversy.⁴⁰ This right should not be abridged solely on the basis that the dispute being publicized is a labor dispute and the entity conducting the handbilling campaign is a labor union.⁴¹ In fact, such publicity furthers the social interest of openly discussing current labor issues to ensure the fostering of the current and future workforce.⁴² Restrictions of labor protests violate the First Amendment when they are grounded in the fact that a certain view is expressed.⁴³

Handbilling may theoretically be a violation of section 8(b)(4)(ii)(B) because of an element of coercion,⁴⁴ but the legislative history of section 8(b)(4)(ii)(B) shows that its supporters did not reach the conclusion that handbills would be restricted.⁴⁵ Looking to the nature of handbilling⁴⁶ and the policy concerns surrounding labor disputes,⁴⁷ handbilling receives protection rooted both in the First Amendment as well as in the publicity proviso of the NLRA.⁴⁸

C. Banners

Banners, which remain stationary in front of an establishment being protested, are compared to either handbilling⁴⁹ or picketing.⁵⁰ When

40. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 79 (1964) (Black, J., concurring).

41. See *DeBartolo*, 485 U.S. at 576.

42. See *infra* Section IV.

43. *Tree Fruits*, 377 U.S. at 79 (Black, J., concurring).

44. *DeBartolo*, 485 U.S. at 573, 582.

45. *Id.* at 583-87. The Court discusses the legislative history generally, noting that while certain opponents of the Landrum-Griffin Act argued at times that the proposal would create broad restrictions on all types of media, the supporters of the Landrum-Griffin Act did not address this issue. *Id.* at 582. Accordingly, the Court rejects this interpretation of the statutory language and looks to the intent of the sponsors of the legislation to determine its purpose. *Id.* (citing *Tree Fruits*, 377 U.S. at 66).

46. See *supra* text accompanying notes 34-43.

47. See *supra* text accompanying notes 17-27.

48. *DeBartolo*, 485 U.S. at 588. A contrary reading of the facts of *DeBartolo*, which the NLRB supported, would restrict any kind of publicity urging a consumer boycott against a secondary employer, including appeals made to the public through newspaper, radio, and television. *Id.* at 583. Further, under this reading the NLRA would be held to prohibit appeals to customers to boycott retailers because they employ nonunion contractors, but would then permit the union to request the same customers not purchase specific items the union had an issue with. *Id.* The court could not find a reason as to why Congress would intend such a result. *Id.*

49. *Overstreet v. United Bhd. of Carpenters & Joiners of Am. Local 1506*, 409 F.3d 1199, 1214 (Cal. 2005).

50. Local Union No. 1827, *United Bhd. of Carpenters & Joiners of Am.*, Case No. 28-CC-933/JD(SF)-30-03, 46 (NLRB Div. of Judges, May 9, 2003).

compared to handbilling, banners deserve greater protection, however, when banners are equated to picketing they are more susceptible to restriction. In certain instances, banners may constitute “signal picketing” because they indicate to third parties that “sympathetic action on their part is desired by the union.”⁵¹ In this context, the banner is viewed as similar to a picket line in that there is “a visual message comprehensible at a glance and notice of a labor dispute.”⁵² However, with picketing, it is the conduct, as opposed to the persuasive force of the idea being conveyed, that elicits a response from the listener.⁵³ Thus, banners face greater restrictions because of the combination of a greater focus on the conduct of the protestors and a reduced focus on the substantive message being conveyed by the banner.⁵⁴

Even with the lack of actual patrolling, banners may be considered more expressive than picketing. Labor unions erect banners on sidewalks ensuring significant exposure without blocking entrances to businesses, thus lessening physical interactions with customers and eliminating confrontations with passers-by.⁵⁵ Nevertheless, passers-by can avert their eyes from banners if they do not want to see them in the same way that they can avert their eyes from billboards or other signs on the street.⁵⁶ “[R]eliance on the physical presence of speakers in the vicinity of the individuals they seek to persuade . . . is a consideration that, standing alone, is no basis for lowering the shield of the First Amendment or turning communication into statutory ‘coercion.’”⁵⁷ Thus, while these banners do not “have any other characteristic that clearly ‘threatens, restrains, or coerces’ those who see the communication,” and although the banners may implicitly signal the presence of a dispute to third parties, they constitute neither conduct—which may be restricted—nor signal picketing.⁵⁸

51. *Local 1827*, Case No. 28-CC-933/JD(SF)-30-03 at 46.

52. *Id.*

53. *NLRB v. Retail Store Employees Union (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens J., concurring).

54. *Local 1827*, Case No. 28-CC-933/JD(SF)-30-03 at 46.

55. *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1213-14 (Cal. 2005).

56. *Id.*; see *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that the burden generally falls upon the viewer to avert his/her eyes from something he/she may find offensive)).

57. *Overstreet*, 409 F.3d at 1214-15.

58. *Id.*

D. Rats and Street Theatre

An employer who chooses to conduct its business without union involvement is considered a “rat” employer by the union.⁵⁹ The union may inflate a giant rat balloon outside of the employer’s place of business to protest the employer’s decision to circumvent union involvement.⁶⁰ Similarly, street-theatre performances, typically mock funerals, are used to dissuade prospective customers from patronizing the targeted employer. Street theatre may be considered the functional equivalent of picketing,⁶¹ and thus conduct that can be restricted, for the same reason.⁶² However, a constitutional challenge to local restrictions on activities such as the use of inflatable rats and street theatre may be avoided where the restriction pertains to the general location and manner of signs, but allows protestors alternative means of conveying their message, such as through handbills.⁶³

The display of giant rat balloons, meant to pressure neutral employers, may itself amount to the type of picketing prohibited by the secondary boycott rule.⁶⁴ Thus, the presence of protestors in the vicinity of a giant rat balloon may be found to constitute a form of picketing, allowing a court to sidestep the issue of whether the rat balloon itself is a form of picketing.⁶⁵ On the other hand, the inflatable rat may deserve First Amendment protection when erected on public property.⁶⁶ This determination is based on the unique nature of the rat balloon as a tool exclusively used in protests, typically short in duration, and not causing any danger.⁶⁷ The highly communicative aspect of the inflatable rat constitutes non-commercial speech of a labor protest and may thus be protected.⁶⁸

59. William J. Emanuel & Debra L. Schroder, *Union “Funeral Procession” Violates Secondary Boycott Law—Are Rats and Banners Next?*, INSIGHT: A LITTLER MENDELSON REPORT 1, 1 (May 2006), available at <http://www.littler.com/PressPublications/Documents/14086.pdf>.

60. *Id.*

61. “Picketing may be found to occur where a small number of persons actively engage in patrolling—back and forth movement—establishing a form of barrier at the site in question.” Laborers’ E. Region Org. Fund, 346 N.L.R.B. 1251, 1253 (2006).

62. *Kentov v. Sheet Metal Workers’ Int’l Ass’n Local 15*, AFL-CIO, 418 F.3d 1259, 1265 (11th Cir. 2005).

63. *See State v. Deangelo*, 930 A.2d 1236, 1245-46 (N.J. Super. Ct. App. Div. 2007); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

64. *See Emanuel & Schroder, supra* note 59 at 2.

65. *Id.*

66. *Tucker v. Fairfield*, 398 F.3d 457, 462-63 (6th Cir. 2005).

67. *Id.*

68. *Int’l Union of Operating Eng’rs Local 150 v. Orlando Park*, 139 F. Supp. 2d 950, 958

III. ELECTRONIC PROTESTS AND COMMUNICATIONS IN NON-LABOR CONTEXTS

Since the 1990s the Internet has quickly provided an accessible forum for people from various backgrounds to disseminate their ideas worldwide with absolute ease.⁶⁹ Websites are often used to voice social and political views, as well as to call attention to grievances with particular organizations. One such method is the use of “sucks” sites.⁷⁰ These sites often incorporate the word “sucks” with the name of the organization against whom the grievance is directed.⁷¹ Another method employs the use of a name very similar to that of the protested party.⁷² Protesters seeking a more active method of gaining attention may employ e-mail, which includes both direct and spam e-mail.⁷³ Such methods are necessary for protesters seeking to stand out from the vast amounts of information on the Internet and are treated as an extension of leafleting and mass mailing.⁷⁴

Congress has estimated that unsolicited commercial e-mail comprises over half of all electronic mail generated.⁷⁵ These unsolicited e-mails come with added costs to recipients in the form of storage costs on their e-mail accounts, time spent accessing and reviewing these messages, and time spent discarding them once they are discovered to be nothing more than unwanted annoyances.⁷⁶ While many states enacted legislation to curb the proliferation of unsolicited e-mails, those efforts have largely failed because of their varying standards and requirements.⁷⁷ In response to this inconsistency, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), which sought to preempt many of the state regulations, except those that regulate deceptive advertising.⁷⁸

(N.D. Ill. 2001).

69. See Seth F. Kreimer, Note, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 120-21 (2001).

70. *Id.* at 152.

71. *Id.* at 152-53 (for example, “LucentSucks.com” or “walmartsucks.com”).

72. *Id.* (for example, www.peta.org was once operated by “People Eating Tasty Animals”).

73. *Id.* at 144-45.

74. *Id.* at 144.

75. 15 U.S.C. § 7701(a)(2) (2006).

76. *Id.* § 7701(a)(3).

77. *Id.* § 7701(a)(11).

78. *Id.* §§ 7701-13. The CAN-SPAM Act bans false or misleading header information, prohibits deceptive subject lines, requires that your e-mail give recipients an opt-out method, and requires that commercial e-mails be identified as an advertisement and include the sender’s physical postal address. *Id.* § 7704. The CAN-SPAM Act applies to all commercial electronic messages that

The CAN-SPAM Act prohibits messages containing false or misleading header information.⁷⁹ Under the CAN-SPAM Act, header information is defined as “the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.”⁸⁰ Thus, senders of e-mail are responsible for falsified headers.⁸¹ Additionally, if the subject line of the e-mail is deceptive, the sender will similarly be found to be in violation of section 7704(a) of the CAN-SPAM Act, which makes it unlawful for any person to:

initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.⁸²

Even if both the header and subject line of the e-mail message are accurate, a sender may still be held liable under the CAN-SPAM Act if access to the message was obtained through false or fraudulent pretenses.⁸³ Courts have begun to review this claim and are starting to form an interpretation of this particular section of the statute.⁸⁴ Such

are sent, which means “any electronic message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” *Id.* § 7702(2)(A). If the recipient does not want to receive any future e-mails from the sender, they are allowed to opt out of receiving them because the sender is required to provide the receiver with a return e-mail address or another Internet based return mechanism where the receiver can ask that the sender not send future messages. *Id.* § 7704(a)(3). The CAN-SPAM Act prohibits the sending of commercial e-mail without a functioning electronic return mail address, active for at least thirty days following the message where the receiver can send a request to not receive any further messages. *Id.*

79. *Id.* § 7704(a)(1).

80. *Id.* § 7702(8).

81. *See* U.S. v. Kilbride, 507 F. Supp. 2d 1051, 1057 (D. Ariz. 2007) (finding that defendants knowingly materially falsified header information in multiple unsolicited commercial e-mails, or spam, containing pornographic images and intentionally initiated the transmission of these e-mails, in violation of the CAN-SPAM Act).

82. 15 U.S.C. § 7704(a)(2).

83. *Id.* § 7704(a)(1)(A).

84. MySpace, Inc. v. Wallace, 498 F. Supp. 2d 1293, 1301 (C.D. Cal. 2007) (finding that Congress intended to prohibit not only sending messages with inaccurate header information, but also sending messages with accurate header information, access to which was obtained through false or fraudulent pretenses).

opinions have focused on the intent of the sender to disguise their identity from the receiver of the e-mail.⁸⁵ In *MySpace, Inc. v. Wallace*⁸⁶ the defendant was misleading people via his personal website, which falsely resembled the popular social-networking site of MySpace.com, and thus lured people into entering their own email addresses in an effort to access their MySpace.com accounts.⁸⁷ The defendant then used this information to log into the accounts of those people and send 400,000 spam messages from those accounts.⁸⁸ In this instance, there was no allegation of a false and misleading subject line or header, but the way in which the e-mail addresses were obtained was fraudulent, which was enough for a violation of the CAN-SPAM Act.⁸⁹

Courts have also begun to view the sending of unsolicited e-mails as a tortious act. In *America Online Inc. v. IMS*,⁹⁰ the common law tort of trespass was applied in the context of electronic communications.⁹¹ The court found that the defendant, an owner of a marketing company, committed trespass to chattels against an Internet Service Provider's network by sending sixty million unauthorized advertisements.⁹²

The Restatement (Second) of Torts defines, trespass to chattels as “(a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.”⁹³ *America Online's* analysis, relying on the Restatement, created a framework for trespass to chattels as applied to unsolicited e-mails, by finding that the defendant intentionally caused contact with the computer network, injured the goodwill of the plaintiff, and diminished the value of its possessor interest in its computer network.⁹⁴ Even if the unsolicited e-mail does not physically damage the receiver or Internet Service Provider's

85. *Id.* (citing S. Rep. No. 108-102, at 17 (2003) (stating that one purpose of section 7704(a)(1)(A) “is to eliminate the use of inaccurate originating e-mail addresses that disguise the identities of the senders.”)).

86. 498 F. Supp. 2d 1293 (C.D. Cal. 2007).

87. *Id.* at 1301.

88. *Id.*

89. *Id.*

90. 24 F. Supp. 2d 548 (E.D. Va. 1998).

91. *Id.* at 550; Majorie Shields, Annotation, *Applicability of Common-Law Trespass Actions to Electronic Communications*, 107 A.L.R. 5th 549, 559 (2003).

92. *America Online*, 24 F. Supp. 2d at 550.

93. RESTATEMENT (SECOND) OF TORTS § 217(a)-(b) (1965).

94. *America Online*, 24 F. Supp. 2d at 550 (citing RESTATEMENT (SECOND) OF TORTS § 218(b)); *see also* Thrifty-Tel Inc., v. Bezenek, 54 Cal. Rptr. 2d 468, 473 n.6 (Ct. App. 1996); *Indiana v. McGraw*, 480 N.E.2d 552, 554 (Ind. 1985) (rejecting defendant's distinction between the use of a hammer and the use of a computer in a trespass to chattels action); *Washington v. Riley*, 846 P.2d 1365, 1373 (Wash. 1993) (defining “computer trespass”).

property, it may still be trespass to chattels because it causes the value of the equipment to diminish.⁹⁵ Further if the service providers cannot measure the exact amount of damage that was caused by these unsolicited e-mails, they still may have a trespass to chattels cause of action if the sending of unsolicited e-mails caused substantial delays in the delivery of all Internet mail to the subscribers of that Internet service.⁹⁶

While the First Amendment is a commonly claimed defense for sending unsolicited e-mails,⁹⁷ in certain circumstances it has proved unviable.⁹⁸ For example, a private company desiring to send unsolicited e-mails will not be protected by the constitution where other forms of communication are readily available to convey the intended message.⁹⁹ Thus, if a court finds there are alternative means of communication available to the sender, the First Amendment likely will not protect the sender of bulk unsolicited e-mails.

E-mail has posed a problem for courts, which have yet to determine how the sender's and receiver's rights to privacy will be defined.¹⁰⁰ The courts struggle with the application of privacy concepts in this context because while e-mail can be seen to substitute for oral or written communication, it also possesses the characteristic of being savable and accessible to system operators or others.¹⁰¹ In addition, such e-mails can be printed or easily re-transmitted to a third party by either the sender or receiver anyone the receiver or sender chooses.¹⁰²

Due to these unique challenges, courts have attempted to clarify when privacy rights attach to e-mails.¹⁰³ The court of the United States Armed Forces, for example, decided that "[e]xpectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved

95. *CompuServe Inc. v. Cyber Promotions Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997).

96. *America Online v. Prime Data Services Inc.*, No. Civ.A. 97-1652-A, 1998 WL 34016692, at *2-3 (E.D. Va. 1998).

97. *See CompuServe Inc.*, 962 F. Supp. at 1025 (defendant argued First Amendment protected right to send unsolicited commercial e-mails to plaintiff's computer systems); *see also* Shields, *supra* note 91 at 560-61.

98. *CompuServe Inc.*, 962 F. Supp. at 1026.

99. *Id.*

100. *See* Ian Ballon, *What's in a Name: Domain Names, Trademarks and Related New Media Law Issues*, in REPRESENTING THE NEW MEDIA COMPANY 2000, at 297, 412 (PLI Intellectual Prop., Course Handbook Series, No. G-587, 2000) (discussing the mode of communication that e-mail replaces).

101. *Id.*

102. *Id.*

103. *Id.*

and the intended recipient.”¹⁰⁴ Messages that are sent to the public-at-large in chat rooms, or that are forwarded, lose their privacy rights.¹⁰⁵ The court made a strong distinction between e-mail that is sent from computer to computer, and those that are sent to an account maintained by a third party.¹⁰⁶ E-mails that are sent to an account maintained by a third party are entitled to more privacy than other messages because they are “privately stored for retrieval on [a third party’s] centralized and privately-owned computer bank.”¹⁰⁷ Thus, the e-mail sent to a third-party account is similar to a letter in that after the author sends the e-mail, it “lies sealed in the computer until the recipient opens his or her computer and retrieves the transmission.”¹⁰⁸ Conversely, e-mail messages that are sent through the Internet and pass through a “less secure system, in which messages must pass through a series of computers in order to reach the intended recipient,” do not receive as much protection under the right to privacy because they are viewed as moving through the public domain.¹⁰⁹

IV. APPLICATION OF CURRENT LAWS TO SECONDARY PROTESTS IN THE LABOR CONTEXT

The law relating to the use of the Internet in the labor context is still in the early stages of infancy. Looking to recent developments is instructive in getting a sense of how it will start to develop. The Internet is already being used to aid unions in their efforts to organize, manage affairs, and voice grievances. The following discussion presents some of the issues that unions and employers may face in the years to come.

A. Websites

Unions, like many organizations in the twenty-first century, use websites and the Internet in their regular course of business.¹¹⁰ Like any

104. *United States v. Maxwell*, 45 M.J. 406, 418-19 (U.S. Armed Forces 1996).

105. *Id.* at 419.

106. *Id.* at 417.

107. *Id.*

108. *Id.* at 418.

109. *Id.* at 417. *See* *ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996) (analogizing e-mail to sending a specified individual a first class letter).

110. *See, e.g.*, Justice at the FORUM Home Page, <http://www.justiceattheforum.com> (last visited Dec. 28, 2008); Starbucks Union Home Page, <http://www.starbucksunion.org/> (last visited Dec. 28, 2008); Communications Workers of America Home Page, <http://www.cwa-union.org/> (last visited Dec. 28, 2008); Writers Guild of America, West Home Page, <http://www.wga.org/> (last

other website, union websites may be created for various purposes and may contain a plethora of information available to the website's visitors. Beyond listing basic information about the union, such websites often discuss current issues that are important to that union as well as grievances that particular union may currently have with employers. For example, the Writers Guild of America website¹¹¹ listed the issues involved with the 2007-2008 television writers strike,¹¹² information on picketing locations, as well as any progress that was made in the dispute that gave rise to the strike.¹¹³

Websites offer labor unions major benefits. Like other protest websites, union websites attract like-minded individuals who identify with their causes and grievances without being hindered by geography, and are able to provide support to strengthen the commitments of individuals who are already members of the group.¹¹⁴ Websites allow the union to help organize their "offline activities" by providing members and sympathizers with easy access to information as to when and where to report for a protest.¹¹⁵ Websites have also been helpful in providing support for the activities of union affiliated organizations, such as Working America, a "community affiliate" of the American Federation of Labor.¹¹⁶ Additionally, unions have assisted in the establishment of "virtual unions" such as WashTech, a Communication Workers of America project that focused on Microsoft Corporation employees.¹¹⁷

Despite the benefits, union websites face a unique problem. Just as leafleting and banners seek to persuade listeners to sympathize with the

visited Dec. 28, 2008).

111. Writers Guild, *supra* note 110.

112. *Id.* See also Bonnie Goldstein, *Hollywood Bosses Go On Strike*, SLATE, Nov. 5, 2007, <http://www.slate.com/id/2177507/>.

113. Writers Guild, *supra* note 110.

114. Kreimer, *supra* note 69, at 131.

115. *Id.* at 135. For example, the Writers Guild of America West Home Page included a prominent hyperlink entitled "Picketing Locations and Schedule" for the duration of their strike. Writers Guild, *supra* note 110. Similarly, The International Alliance of Theatrical Stage Employees, Local 33, is embroiled in a lengthy dispute with the Faithful Central Bible Church, who owns the Forum, which is an arena in Inglewood, California. Justice at the FORUM, *supra* note 110. The union's website lists a schedule of picket times, contains video clips of news reports regarding the labor protest, and appeals to other unions employed by The Forum to show support. *Id.*

116. Alan Hyde, Symposium, *New Institutions For Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 389 (2005-2006); Working America Home Page, <http://www.workingamerica.org/> (last visited Dec. 28, 2008).

117. Hyde, *supra* note 116, at 390; Washington Alliance of Technology Workers Home Page, <http://www.washtech.org/> (last visited Dec. 28, 2008).

union's position, websites rely on the persuasive force of the information they contain.¹¹⁸ Unlike leafleting and banners, websites compete with several billion other websites for attention.¹¹⁹

The "cyberpicket" has emerged as an option for labor unions engaging in a protest of an employer, and certain technological methods may be employed to capitalize on the Internet's wide reach while mitigating the risk of receiving no attention, as had occurred in the Canadian case *British Columbia Automobile Association v. O.P.E.I.U., Local 378*.¹²⁰ There, the union had developed a website which used the trademarked logo of the British Columbia Automobile Association ("BCAA")¹²¹ and had employed the use of meta tags¹²² to attract the attention of Internet users.¹²³ Additionally, the union designed the website to closely resemble the BCAA's website.¹²⁴ The dispute between the union in this case related to a bargaining agreement,¹²⁵ but the court's analysis relating to the use of a website, as opposed to a leafleting campaign or a picket line, may be instructive for future cyberpicket cases in the secondary boycott context, partly because the court relied heavily on U.S. court decisions in its analysis.¹²⁶

The employer in *British Columbia Automobile Ass'n* claimed there had been three types of wrongful conduct:

- (a) copyright infringement in connection with the defendant's first and second [web]sites through the unlawful reproduction of the plaintiff's design elements, from its website;

118. Kreimer, *supra* note 69, at 144.

119. *Id.* at 143.

120. [2001] 85 B.C.L.R.3d 302 (Can.).

121. *Id.* at ¶ 2.

122. Meta tags are HTML codes that are included in the website by the creator that is meant to serve as a description of the contents of the website. *Id.* at ¶ 32; *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999). The meta tags are not visible on the website, but instead serve to attract the attention of Internet search engines when an Internet user inputs certain criteria for a search. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶ 32; *Brookfield Commc'n, Inc.*, 174 F.3d at 1045. In turn, the search engine produces results for the Internet user based on matches with meta tags, and serves to attract the attention of the Internet user to the website or websites containing the key words from the search. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶ 32; *Brookfield Commc'n, Inc.*, 174 F.3d at 104.

123. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶ 32.

124. *Id.* ¶ 43.

125. *Id.* ¶ 14.

126. See *infra* text accompanying footnotes 154-63.

(b) passing-off¹²⁷ through the unlawful reproduction of the plaintiff's registered trade-marks and certification marks, and through the makeup of its website; and

(c) depreciation of the plaintiff's goodwill in its trade-marks¹²⁸

During the course of the dispute with the employer, the union changed the website twice in response to the employer's objections,¹²⁹ presumably in an attempt to avoid legal liability.

Throughout the dispute, the website remained accessible at "www.bcaastrike.com," "www.picketline.com," and "www.bcaabacktowork.com."¹³⁰ Additionally, meta tags referencing the BCAA were employed to attract attention to the union's dispute.¹³¹ The graphic designs of the union's website, viewable to the Internet user, were purposely made to resemble the BCAA's website and contained some of BCAA's trademarked materials.¹³²

The union described its intent in employing references to BCAA in various areas relating to the website as a strategy "to make the [u]nion site popular with search engines so that it would achieve a high rank in search results," resulting in "bringing [the] internet site to the attention of the public."¹³³ Further, the use of the BCAA's name, both in the domain name and in the contents, was intended to identify who the dispute was with and what the nature of the dispute was.¹³⁴ Comparing the website to a leafleting campaign,¹³⁵ "the [u]nion argue[d] that the use of the domain names and meta tags [was] the only method by which the [u]nion [could] position itself to put its message before people visiting

127. Passing-off is a tort which "concerns misrepresentations by one party which damage the reputation and goodwill of another party." *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶ 56. The tort consists of three components: "[t]he existence of reputation or goodwill at the relevant time," "[a] misrepresentation leading the relevant public to believe there is a business association or connection between the parties," and "[d]amage or potential damage flowing to the plaintiff as a result of any misrepresentation due to loss of control its reputation is presumed." *Id.*

128. *Id.* ¶ 5.

129. *Id.* ¶ 4.

130. *Id.* ¶ 48.

131. *Id.* ¶ 62.

132. *Id.* ¶ 43. The color scheme of the first version of the union's website was identical to that of the employer. *Id.* ¶ 192. Additionally, the "website was divided into five frames," which were identical to the employer's website. *Id.* ¶ 195. The designer of the union website had used the employer's website as a reference, as he was told to create a website that was similar by a senior union representative. *Id.* ¶ 198.

133. *Id.* ¶ 62.

134. *Id.* ¶ 66.

135. *Id.* ¶ 108.

the employer's website."¹³⁶

The court determined that the first version of the website, which was nearly identical to the BCAA's website, established that the union acted to purposely deceive those who may have been searching for the BCAA website.¹³⁷ Beyond the visual likeness, the website contained a caption stating "Greetings, BCAA is on Strike" and replicated the meta tags from the BCAA website, including "references that had nothing to do with the [u]nion site."¹³⁸ In addition to tort liability, the court found the similarities to the employer's website to constitute copyright infringement,¹³⁹ rejecting the union's defense that this constituted criticism of the BCAA and parody of the BCAA website.¹⁴⁰

The second version of the union website resulted from changes in response to the employer's demand that the union stop using the employer's intellectual property.¹⁴¹ The BCAA logo was changed from uppercase lettering, which was identical to the BCAA's logo, to lowercase lettering.¹⁴² Further, the slogan "Greetings, BCAA is on strike" was moved so that it would not be visible on a typical computer screen.¹⁴³ These minor changes led the union to avoid tort liability,¹⁴⁴ but were insufficient to avoid liability for copyright infringement.¹⁴⁵

The third version of the union website contained major changes to visually distinguish the union website from the BCAA's website.¹⁴⁶ The union removed certain references to the BCAA from the meta tags and changed some of the wording to be distinctly different from the BCAA's website and more in line with the union's message.¹⁴⁷ The differences were significant enough that the employer did not assert that the third website infringed the employer's copyrights.¹⁴⁸ The changes in appearance also reduced any chance of misleading the public and thus fell outside the scope of tort liability.¹⁴⁹ Additionally, neither the third website nor the previous two versions were found to constitute a

136. *Id.* ¶ 112.

137. *Id.* ¶ 211.

138. *Id.* ¶¶ 211-12.

139. *Id.* ¶ 206.

140. *Id.* ¶¶ 204-05.

141. *Id.* ¶¶ 45-46.

142. *Id.* ¶ 46.

143. *Id.*

144. *Id.* ¶ 213.

145. *Id.* ¶ 206.

146. *Id.* ¶ 47.

147. *Id.*

148. *Id.* ¶ 50.

149. *See id.* ¶ 208.

diminution of the employer's trademarks.¹⁵⁰

In reaching these conclusions, the court sought to strike a "reasonable balance . . . between the legitimate protection of a party's intellectual property and a citizen's or a [u]nion's right of expression,"¹⁵¹ finding that the union's websites were not operated for "commercial purposes," but rather as "commercial criticism."¹⁵² The court looked to various cases for insight on how to approach the union's references to the BCAA in the domain name and meta tags.¹⁵³

Looking to the Southern District of New York's *BigStar Entertainment, Inc. v. Next Big Star, Inc.*,¹⁵⁴ the *British Columbia Automobile Ass'n* court noted that despite the fact that close similarities in domain names may exist, the drastic differences in the products or services that are being offered on the websites eliminate confusion of consumers.¹⁵⁵ The court noted, based on the District Court of New Jersey's analysis in *Jews for Jesus v. Brodsky*,¹⁵⁶ critical commentary may include a trademark as long as it is "not [being] used in a deceptive or confusing manner."¹⁵⁷ The court distinguished the use of a domain name and meta tags containing another party's trademarks for descriptive purposes, as the Southern District of California did in *Playboy Enterprises, Inc. v. Welles*,¹⁵⁸ from the use of trademarks to divert business from another party by deception.¹⁵⁹ The use of another party's trademark in meta tags may be necessary to enable Internet users to reach certain websites, as in the cases of consumer commentary.¹⁶⁰ Consumers would be unable to access websites containing consumer commentary if the use of all trademarks were prohibited.¹⁶¹ Without the trademarks in a domain name or meta tag, Internet searches would lack the requisite code to find the websites containing consumer commentary;

150. *Id.* ¶ 168.

151. *Id.* ¶ 130.

152. *Id.* ¶ 70.

153. *Id.* ¶ 68.

154. 105 F. Supp. 2d 185 (S.D.N.Y. 2000).

155. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶¶ 82-83 (citing *BigStar Entm't, Inc.*, 105 F. Supp. 2d at 209-10).

156. 993 F. Supp. 282 (D. N.J.), *aff'd*, 159 F.3d 1351 (3d Cir. 1998).

157. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶¶ 84-86 (citing *Jews for Jesus*, 993 F. Supp. at 301).

158. 7 F. Supp. 2d 1098 (S.D. Cal.), *aff'd*, 162 F.3d 1169 (9th Cir. 1998).

159. *B.C. Auto. Ass'n*, 85 B.C.L.R.3d ¶¶ 97-100 (citing *Welles*, 7 F. Supp. 2d at 1103-04; *Playboy Enters., Inc. v. AsiaFocus Int'l, Inc.*, 1998 U.S. Dist. LEXIS 10359, at *16-18 (E.D. Va. 1998)).

160. *Id.* ¶ 106 (citing *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998)).

161. *Bally Total Fitness*, 29 F. Supp. 2d at 1165.

thus, cutting off those websites from everyone except the “most savvy of Internet users.”¹⁶² In effect, the use of trademarks may be necessary to identify the target of the consumer commentary while engaging in speech that enjoys First Amendment protection.¹⁶³

Moving forward, courts and the NLRB may consider some of these factors when addressing the use of websites in the context of secondary picketing, as the Supreme Court of British Columbia did in the context of a union protest with a primary employer. Though a website may be compared to handbilling,¹⁶⁴ or may be intended as “the virtual equivalent of a picket line,”¹⁶⁵ a direct analogy cannot be made. Rather, a website may be determined to combine elements of both picketing and handbilling, as well as elements of banners used by unions. Once a determination is made as to the qualities a website possesses, the next step is to determine whether the website falls within the publicity proviso of the NLRA’s provision regarding unfair labor practices committed by unions and similar organizations.¹⁶⁶

Similar to handbilling, a website’s effectiveness depends on the persuasive force of the message it contains.¹⁶⁷ This parallel to handbilling may help guide a court, or the NLRB, towards finding that a website is a permissible secondary protest. The policy behind permitting handbills,¹⁶⁸ likewise, supports a permissible disposition towards websites, as websites may also present a means of bringing a current labor dispute to light in the public eye and help promote protections of present and future workers. Additionally, there does not appear to be an element of conduct that is readily ascertainable with websites. Any conduct associated with the creation of the website could similarly be attributed to the creation of a handbill, picket sign, or banner. Despite a court’s willingness to curtail impermissible conduct, a court would be hard pressed to define conduct in such a manner that would not also apply to handbills. Though there are differences in the manner in which a handbill is created and how a website is created by virtue of the differences in the choice of media, these distinctions should not be used

162. *Id.*

163. *Id.* at 1167.

164. *B.C. Auto. Ass’n*, 85 B.C.L.R.3d ¶ 108.

165. *Id.* ¶ 204.

166. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2000).

167. See generally *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (noting that the effectiveness of handbills relies on their power of persuasion); *B.C. Auto. Ass’n*, 85 B.C.L.R.3d ¶ 164 (“[The union was] attempting to persuade members of the public not to do business with [the employer]”).

168. See *supra* text accompanying notes 40-43.

to justify impeding the use of websites.

Unlike handbills, websites may offer unions options relating to content that are only limited by the website designer's imagination. In addition to text, a website can offer the ability to include pictures, graphics, audio, and video relating to the matters in dispute. These elements may open the door for courts and the NLRB to find characteristics that allow more leeway in characterizing certain elements of the website as impermissible. For example, the posting of pictures or videos of employees who are not involved in an actual protest may be determined to be a method of intimidation or harassment.¹⁶⁹ Though the NLRB has held that such activity is not necessarily a violation of the NLRA,¹⁷⁰ future cases may result in the NLRB finding this activity is outside the permissible bounds of the NLRA and thus, may be restricted.

Websites differ from other forms of protest in yet another way. All websites in cyberspace are equally accessible, and all compete for the attention of Internet users.¹⁷¹ The distinguishing element is that users access the Internet to seek information, at which point websites compete to attract the user's attention.¹⁷² Thus, the initial decision to access the Internet is attributable to the Internet user. This distinguishing feature may be a factor courts and the NLRB weigh when determining whether the union engaged in reprehensible conduct. The conduct involved in the Internet user accessing the website, regardless of the act of designing the website, may be attributable to the Internet user, not to the union. Under this type of analysis, the website may be viewed as no more than a source of information made available to those who seek it, as opposed to an active attempt to attract attention, and thus, deserving protection under *Thornhill*.¹⁷³ Other websites may be designed to be more proactive in seeking the attention of Internet users, as was the website in *British Columbia Automobile Ass'n*. Capitalizing on the name recognition of an employer or secondary employer, using meta tags, or posting links on other prominent sites, union websites may be analogized to an aggressive picket in which strategic choices are made to

169. Metro. Reg'l Council of Philadelphia & Vicinity, United Bhd. Of Carpenters & Joiners of Am., 335 N.L.R.B. 814, 825 (2001), *enforced*, 50 Fed. App'x 88 (3d Cir. 2002).

170. *Id.*

171. Kreimer, *supra* note 69, at 142-43.

172. *See id.* at 148.

173. *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (finding a statute that prohibited any and all activity meant to publicize the facts of a labor dispute, including signs, pamphlets, and word of mouth, unconstitutional because such broad restrictions, which were not designed to combat specific "substantive evils," were thus not a justified proscription of First Amendment rights).

divert and capture the public's attention.¹⁷⁴ Courts and the NLRB may rely on this approach to find that the conduct element is satisfied because using employers' names and meta tags causes union protest sites to be thrust upon Internet users. This type of analysis may result in the determination that such methods are analogous to the union impermissibly delivering protest information in place of the services or information that was requested from the employer by a customer.

In the context of secondary picketing, the publicity proviso of the NLRA may be used to determine the issue of whether and to what extent a website may be used by a union. A website may be limited to the extent that it may "threaten, coerce, or restrain"¹⁷⁵ a party, but may be protected to the extent that the website is used for the "purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer."¹⁷⁶ Looking to this language, a court or the NLRB may determine that an informational website is a method of reaching the public that should be protected, barring content on the website that would indicate coercion or threats.

To the extent that neither courts nor the NLRB have decided how to treat websites involved in secondary picketing, employers have little guidance on how to proceed in the event that they are involved in such a protest. Additionally, any analysis will depend on factual evidence surrounding the design of the website, the content of the website, and the technical characteristics of the website. Looking to *British Columbia Automobile Ass'n*, employers may have limited options when dealing with a website that contains the equivalent of consumer commentary meant to apprise the general public of a labor dispute. Use of trademarks and copyrighted information may be limited to some degree, but the use of an employer's name and other factual information may prove to be difficult to curtail.¹⁷⁷ Accordingly, employers may find it difficult to limit the use of websites used in a secondary protest.

Policies surrounding secondary protests will likely induce courts and the NLRB to fashion rules that will be permissive of websites employed in such a context. As long as websites are not found to amount to coercion, harassment, or threats, and are truthful with regards

174. See Kreimer, *supra* note 69, at 148-49.

175. National Labor Relations Act § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii) (2000).

176. *Id.* § 158(b)(4).

177. See Kreimer, *supra* note 69, at 154-55.

to the facts that are presented, courts and the NLRB would find it difficult to justify limiting use of websites. Websites will likely prove to be an extremely valuable tool to unions seeking to publicize secondary grievances because they are likely to be protected by the NLRA, and because they allow the union to reach a much greater audience.

B. E-mail

Like handbilling, e-mail is a method of distributing information to audience members deserving more protection. Both are vehicles for ideas to be communicated, and it has been established that the means to facilitate the flow of ideas is not as important in light of constitutional free speech considerations as discussed in *Thornhill*.¹⁷⁸ The ideas being communicated are the focus of the constitutional analysis, despite the physical or electronic means employed to communicate these ideas.¹⁷⁹ Accordingly, the courts may look to the coerciveness of the communicated ideas themselves, or may focus on the protection afforded by the publicity clause.

Different types of e-mail, such as spam e-mail, may be subject to distinct treatment by the NLRB or courts.¹⁸⁰ Spam e-mail is not directed at any particular recipient, but essentially is a mass mailing into cyberspace, which is comparable to dropping several hundred thousand handbills over a city.¹⁸¹ In light of legislation to regulate spam¹⁸² there is a strong possibility a court or the NLRB may find spam e-mails to be a violation of the NLRA or another statute meant to curb the use of e-mail in advertising campaigns that result in a nuisance to anyone with an e-mail inbox.¹⁸³

Another possible distinction may arise from the inclusion of a hyperlink in an e-mail that otherwise contains general information.¹⁸⁴ Although, similar to a handbill, where a message is delivered to a recipient, the e-mail requires the recipient to expend energy to

178. See *Thornhill*, 310 U.S. at 104-05.

179. See *id.* at 102 (citations omitted).

180. See, e.g., *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1039 (N.D. Cal. 2004) (discussing spam e-mail); *Guard Publ'g Co. (Register Guard)*, 351 N.L.R.B. No. 70, slip op. at 5 (Dec. 16, 2007) (discussing whether employees are afforded the right to utilize workplace e-mail for activity covered by section 7 of the NLRA).

181. See *Optinrealbig.com*, 323 F. Supp. 2d at 1039.

182. See CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701-13 (2006).

183. See *Optinrealbig.com*, 323 F. Supp. 2d at 1039-40.

184. See Dictionary.com, <http://dictionary.reference.com/browse/hyperlink> (last visited Oct. 13, 2008).

investigate further to obtain more information. This distinction may prove to be fruitless because a handbill could also contain contact information, a web address, or other instructions on how to access additional information. Though the hyperlink itself may be another link in the communication chain that may induce conduct, it may be considered information that deserves First Amendment protection. A contrary analysis would produce a strange result in that the actual information at issue would be protected, but the method of accessing would amount to a violation of the law.

Employees belonging to a union should regularly communicate in order to remain informed about union business and activities, and to improve productivity and performance.¹⁸⁵ However, there are many employers who have incorporated company-wide Internet-usage policies preventing the use of e-mail for non-business-related purposes.¹⁸⁶ In December 2007, the NLRB, for the first time, analyzed whether an employer e-mail policy, which prevented employees from conducting union business, violated the NLRA.¹⁸⁷

Under section 7 of the NLRA,

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment¹⁸⁸

The Supreme Court has interpreted this section broadly to cover many different activities that employees are protected in performing.¹⁸⁹

185. See AFL-CIO, Unions are Good for Business, Productivity and the Economy, http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff8.cfm#_ftn5 (last visited Jan. 1, 2009) (citing Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197, 197 (1999)); North Shore Labor Council, Young Union Leaders Attend Massachusetts AFL-CIO Inaugural Futures Convention, <http://nslaborcouncil.org/young-union-leaders-attend-massachusetts-afl-cio-inaugural-futures-convention> (last visited Jan. 1, 2009).

186. See *Guard Publ'g Co. (Register Guard)*, 351 N.L.R.B. No. 70, slip op. at 1 (Dec. 16, 2007).

187. *Id.*, slip op. at 5.

188. National Labor Relations Act § 7, 29 U.S.C. § 157 (2000).

189. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-57 (1975) (ruling that employees are allowed to request union representation at an investigatory interview when the employee believes the end result will be a decision to discipline the employee and the employer's refusal to allow such

Section 8(a)(1) of the NLRA, for example, states that it is “an unfair labor practice for an employer to . . . interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]”¹⁹⁰ In *Register Guard*,¹⁹¹ the NLRB took this section into consideration in determining the issue of using company e-mail to conduct “union business.”¹⁹² There, the employer created a company-wide Internet communications policy which disallowed the use of “[c]ompany communication systems . . . to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.”¹⁹³ Suzi Prozanski, an employee and the union president, sent out three e-mails including one that requested each employee “to wear green to support the [u]nion’s position in [the upcoming] negotiations.”¹⁹⁴ The company then reprimanded her for the non-work usage of the company e-mail system.¹⁹⁵

The union filed a claim with the NLRB and the judge found that there was no violation of section 8(a)(1) of the NLRA by maintaining a company-wide e-mail usage policy, but the employer did violate this section by discriminatorily allowing other types of e-mail that were not associated with work.¹⁹⁶ On appeal, the NLRB dismissed the allegations that the employer’s application of the policy was discriminatory.¹⁹⁷ The NLRB went on to analyze the NLRA, specifically section 7 and section 8(a)(1), finding that there was “no statutory right [for the employees] to use the [employer’s] e-mail system for [s]ection 7 matters.”¹⁹⁸ As previously determined, an employer has a basic property right to “regulate and restrict employee use of company property.”¹⁹⁹ Thus, the employer was able to keep the employee from using the e-mail system maintained and operated by the employer.²⁰⁰

In other cases, the NLRB has held that there is “no statutory right . . . to use an employer’s equipment or media,’ as long as the restrictions

a request runs afoul of the NLRA).

190. 29 U.S.C. § 158(a)(1).

191. 351 N.L.R.B. No. 70 (Dec. 16, 2007).

192. *See id.*, slip op. at 1.

193. *Id.*, slip op. at 2.

194. *Id.*, slip op. at 3.

195. *Id.*, slip op. at 2.

196. *Id.*, slip op. at 3.

197. *Id.*, slip op. at 5.

198. *Id.*

199. *Id.*, slip op. at 7 (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983)).

200. *Id.*

are nondiscriminatory.”²⁰¹ The NLRB went further to state that the employer’s rule did not entirely deprive the employees of their right to communicate with each other in the workplace or on their own time.²⁰² Thus, the employer’s policy was held to be nondiscriminatory because there was no proof that the employer permitted the employees to “use e-mail to solicit support for or [participate] in any outside cause or organization[s].”²⁰³ If the employer allowed employees to use the e-mail system or other communications systems for non-work-related purposes, “it may not ‘validly discriminate against notice of union meetings.’”²⁰⁴ However, there is nothing in the NLRA that prohibits the employer from drawing distinctions “between invitations for an organization and invitations of a personal nature, . . . and between business-related use and non-business-related use.”²⁰⁵ The NLRB adopted a new definition of what unlawful discrimination would be comprised of, reasoning that it would be “disparate treatment of activities or communications of a similar character because of their union or other [section] 7-protected status”²⁰⁶ Under this new definition, the denial of the use of the company e-mail system to solicit union membership and participation is not considered unlawful discrimination.²⁰⁷

In reaching this conclusion, the NLRB compared e-mails to telephone calls, as they both constitute “instant communication[s] regardless of the distance, both are transmitted electronically, usually through wires . . . over complex networks, and both require specialized electronic devices for their transmission.”²⁰⁸ The NLRB then noted that it “has never found that employees have a general right to use their employer’s telephone system for [s]ection 7 communications.”²⁰⁹

201. *Id.*, slip op. at 5 (quoting *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000), *enforced*, 11 Fed. App’x 372 (4th Cir. 2001)); *see, e.g.*, *Champion Int’l Corp.*, 303 N.L.R.B. 102, 109 (1991) (“[Employer] does have a basic right to regulate and restrict employee use of company property.”); *Union Carbide Corp. Nuclear Div.*, 259 N.L.R.B. 974, 980 (1981) (“[Employer] could unquestionably bar its telephones to any personal use by employees.”), *enforced*, 714 F.2d 657 (6th Cir. 1983).

202. *Register Guard*, 351 N.L.R.B. No. 70, slip op. at 6 (noting that face-to-face solicitation remained unregulated in the workplace, and that “employees . . . have the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas”).

203. *Id.*, slip op. at 8.

204. *Honeywell, Inc.*, 262 N.L.R.B. 1402, 1402 (1982) (citations omitted), *enforced*, 722 F.2d 405 (8th Cir. 1983).

205. *Register Guard*, 351 N.L.R.B. No. 70, slip op. at 9.

206. *Id.*, slip op. at 10.

207. *Id.*, slip op. at 10 n. 24.

208. *Id.*, slip op. at 7.

209. *Id.*

The dissent in *Register Guard*, on the other hand, determined that e-mails are not akin to telephone calls and focused on NLRB decisions holding that an employer may limit an employee's utilization of an employer's equipment provided it does so in a nondiscriminatory manner with regard to uses that are not related to work.²¹⁰ These previous cases did not involve "sophisticated networks designed to accommodate thousands of multiple, simultaneous, interactive exchanges."²¹¹ Unlike e-mail, when an employee was on the telephone doing union business, the phone lines became unavailable for use by other employees.²¹² An "overriding consideration has always been that an employee should not tie up phone lines' for personal use."²¹³ However, in this particular situation, the e-mail system used by the employees did not inhibit e-mail usage by other employees.²¹⁴

Nevertheless, the majority in *Register Guard* determined that e-mails should be treated analogously to telephone calls,²¹⁵ providing courts with a stepping stone on how to view e-mail protests. Although *Register Guard* did not involve secondary picketing, the NLRB did not allow solicitation by a union of the union's own members at the company where the members worked.²¹⁶ For secondary picketing determinations, coercive conduct is the key to the analysis.²¹⁷ As the NLRB analogizes e-mails to telephone calls, the court should focus on their coercive effects on secondary employers. Much like the e-mail in *Register Guard*, if employees at one workplace e-mail or call a secondary workplace to garner support for a labor dispute in which the secondary workplace has no involvement, this e-mail or call should be restricted.²¹⁸

In *Printing Specialties & Paper Converters Union v. Le Baron*,²¹⁹ the court found that the union picket of a secondary company's trucks carrying the primary company's cargo constituted an illegal secondary

210. *Id.*, slip op. at 16 (dissenting opinion).

211. *Id.*

212. *Id.*

213. *Id.* (quoting *Churchill's Supermarkets, Inc.*, 8-CA-13944-1; -13944-2; -14243 (A.L.J. Aug. 18, 1981), reprinted in 185 N.L.R.B. 138, 147 (1987), enforced, 857 F.2d 1474 (6th Cir. 1988)).

214. *Id.*, slip op. at 17.

215. *Id.*, slip op. at 7 (majority opinion).

216. *See id.*, slip op. at 1.

217. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 68 (1964).

218. *See id.* at 72.

219. 171 F.2d 331 (9th Cir. 1948).

picket and could be restricted.²²⁰ Union representatives informed the employees of the secondary company that the trucks contained “hot cargo,” and requested that they not load or unload them, thereby causing the employees to refuse to handle the cargo of the company the union was picketing.²²¹ The purpose of the in-person comments were to induce action by the secondary employees, namely, that they not handle the primary employer’s products.²²² Thus, *LeBaron* is similar to *Register Guard*, where a form of instant communication was used to induce action by members of their own company to wear green in order to promote the union.²²³

The message itself does not have to be coercive, but if the conduct was meant to have a coercive effect on the secondary employer, then it is considered prohibited secondary picketing.²²⁴ Telephone conversations, in-person solicitation, and e-mail would arguably produce the same amount of pressure and coercion. If an e-mail like that in *Register Guard* would have been sent to a secondary employer, not only would the employees violate the employer’s internal e-mail policies, but it could be viewed as a secondary picketing violation as well. Asking other employees in the secondary employer’s company to wear green or in any other way show their support for the union may amount to unlawful signal picketing.²²⁵ If the e-mails in *Register Guard* had been sent to a secondary employer, the court might also have found them in violation of the NLRA’s publicity proviso.²²⁶ The message to wear green and the message to take part in the union’s entry into a local parade both called for employees to take action in support of the union.²²⁷ This would likely fall under the publicity proviso because such activities would be “inducing [other] individual[s] employed by any person other than the primary employer . . . not to perform any services.”²²⁸ Any employee who received the e-mails and followed their directions to support the union, would be inclined not to perform any

220. *Id.* at 334.

221. *Id.* at 333.

222. *Le Baron*, 171 F.2d at 334.

223. *Guard Publ’g Co. (Register Guard)*, 351 N.L.R.B. No. 70, slip op. at 3, 7 (Dec. 16, 2007).

224. *Int’l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 294-95 (1957).

225. *See* Local Union No. 1827, *United Bhd. of Carpenters & Joiners of America*, Case No. 28-CC-933/JD(SF)-30-03, 46-47 (NLRB Div. of Judges, May 9, 2003) (quoting *IBEW, Local 98*, 327 N.L.R.B. 593, 593 n.3 (1999)) (additional citations omitted) (discussing activity signaled to “neutrals that ‘sympathetic action on their part is desirable by the union.’”).

226. *See supra* notes 4-6 and accompanying text.

227. *Register Guard*, 351 N.L.R.B. No. 70, slip op. at 3.

228. National Labor Relations Act § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii) (2000).

services for the primary company and would put pressure on his or her own employer to keep them from doing business with the primary company, which is what the secondary picketing provision of the NLRA was designed to prohibit.²²⁹

C. Unions Using Spam E-mails as a Communication Tool

In order for an e-mail to be considered spam, it must be, among many things, commercial in nature.²³⁰ An e-mail is commercial in nature if it “‘proposes a commercial transaction’ or promotes specific products or services.”²³¹ The Supreme Court has found that labor-related speech may indeed be commercial in nature.²³² It is from this decision, that labor-related speech in electronic format can now be seen to have overcome one of the elements of being considered spam e-mail.

In 2007, the *Aitken*²³³ Court stated that unions “perform[] economically valuable services for members in exchange for fees, namely union dues.”²³⁴ The court categorized the unsolicited e-mails sent by the union to promote membership as a commercial transaction.²³⁵ The court went on to decide that solicitation to join a union encourages commercial activity that would fall within the purview of the CAN-SPAM Act.²³⁶ The e-mail, according to the court, does not have to solicit money or bring about an instant transaction, but may promote a future transaction.²³⁷

Thus, mass e-mail sent to a secondary employer for the purposes of soliciting support may also be considered a commercial transaction as well as a commercial e-mail under the CAN-SPAM Act since the definition includes “any electronic message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for

229. See THE DEVELOPING LABOR LAW, *supra* note 1, at 1750.

230. CAN-SPAM Act of 2003, 15 U.S.C. §§ 7702(2)(A), 7704(a)(1)-(2), (5) (2006).

231. *Aitken v. Commc’ns Workers of Am.*, 496 F. Supp. 2d 653, 664 (E.D. Va. 2007) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989)) (citing *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980)).

232. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988).

233. 496 F. Supp. 2d 653 (E.D. Va. 2007).

234. *Id.* at 665.

235. *Id.*

236. *Id.*

237. *Id.* at 666.

a commercial purpose).”²³⁸ Further, mass e-mails sent to other employees soliciting membership or support might be seen as a secondary picket if they put economic pressure on a secondary employer to stop doing business with a primary employer,²³⁹ or if the intended effect was inducing individuals employed by others to not perform services for a primary employer.²⁴⁰

D. Inserting a Hyperlink into the E-mail Message

E-mail communication allows the sender to insert hyperlinks, or “electronic link[s] providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document.”²⁴¹ A hyperlink would allow the sender of the e-mail to bypass the direct inclusion of text meant to solicit members or to gain support for the union. This may mean that the e-mail is not commercial in nature or may not have as much coercive effect because the e-mail requires the viewer to take additional steps to see the message. However, if the link is to a website, then the website analysis must be done by the courts, as previously discussed, to determine if the communication could be considered secondary picketing.²⁴²

The e-mail may be considered unlawful secondary picketing if the conduct involved by the message in the e-mail or in the document attached to the hyperlink, was meant to have a coercive effect on the employer.²⁴³ The court, or NLRB, should also analyze the e-mail under the publicity proviso in the NLRA and determine whether the underlying message was to prevent the secondary employers from performing services for the primary employer.²⁴⁴

238. CAN-SPAM Act of 2003, 15 U.S.C. § 7702(2)(A) (2006).

239. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 63 (1964).

240. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2000).

241. Merriam-Webster Online, Dictionary, <http://www.merriam-webster.com/dictionary/hyperlink> (last visited Sept. 22, 2008); see also Julia Alpert Gladstone, *Finding What You Need in the World of Information* in WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET: POWERFUL STRATEGIES AND PRACTICAL USES 1998, at 33 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. G-525, 1998)

242. See *supra* text accompanying notes 178-182.

243. See Int’l Bhd. of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 294-95 (1957).

244. See 29 U.S.C. § 158(b)(4).

V. CONCLUSION

The future of protests is likely to move online and towards Internet-based activities. The NLRB and the courts need to determine the permissible parameters of how and if certain forms of electronic methods of protest may be used through comparison with more established media. Courts will likely continue to analyze protests through the goggles of picketing versus non-picketing to decide what can and cannot be limited.

Using this analysis, the determination should be made considering all relevant technological aspects of these new methods of protest to guide employers and unions in their actions. Recent NLRB decisions have shed some light onto how Internet-based activities will be treated—comparable to telephone calls, in the case of e-mails. This comparison remains to be held an appropriate one. Consequently, actors in today's labor disputes engage in Internet activity with the risk of running afoul of the NLRA.

In order to make appropriate determinations, a clear understanding of the intricate technicalities associated with the technology involved is essential. There may be no easy solution in light of the unique aspects involved with websites, e-mails, and hyperlinks. Building on the foundations established by case law and the policies meant to be furthered by legislative acts, a solution is likely viable. Secondary protests will thus soon see a transition, both legal and practical, from the use of traditional methods of protest, such as an inflatable rat, to the use of the mouse in a cyber-protest.

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