

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

CASE NO. 04-21618-CIV-MARTINEZ/KLEIN

UNIVERSAL COMMUNICATION)
SYSTEMS, INC. (A Nevada Corporation),)
MICHAEL J. ZWEBNER (individually) &)
Others Similarly Situated)
Plaintiffs)

vs.)

LYCOS INC. & TERRA LYCOS, INC.)
dba THE LYCOS NETWORK)
Defendants)

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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs, Universal Communication Systems, Inc. (also "UCSY") and Michael J. Zwebner (also "ZWEBNER"), herein move for *Preliminary Injunctive* relief against the Defendants¹.

The grounds asserted in support of the Plaintiffs' Motion are as follows:

- (a) There is a likelihood of success on all of the claim of the Plaintiffs, against the Defendants, including specifically, Count I of the Complaint, by the Plaintiff, ZWEBNER for consumer fraud. The claims asserted by the Plaintiff, ZWEBNER, in his Complaint against the Defendants are derivative from the Defendants' inability to enforce the "Conditions & Restrictions On Use" (Paragraph (6)) of their Subscriber Agreement for The Lycos Network, including specifically, the Conditions & Restrictions On Use governing their RAGING BULL website. The Defendants inability to protect the Plaintiff, ZWEBNER, a subscriber to The Lycos Network, from the harassment and abuse by other authorized users of The Lycos Network, (by enforcement of user compliance with the Conditions & Restrictions On Use of their Subscriber Agreement for The Lycos Network), is manifestly evident from Composite Exhibit "2" annexed to the Complaint;

¹ The Exhibits attached to this Motion are being numbered in chronological order based upon the numbers previously assigned to the Exhibits to the Complaint.

MP

- (b) The Plaintiffs, including specifically, Plaintiff, ZWEBNER, have suffered and shall continue to suffer irreparable harm unless this Court grants the interim relief sought in the Complaint, specifically, an injunction preventing the Defendants from further hosting of a message board on the RAGING BULL web site for the Plaintiff, UCSY. The abusive subscribers on Defendants' Lycos Network have become increasingly sophisticated, reckless and malicious as result of the Defendants' inability to enforce the Conditions & Restrictions On Use of the Subscriber Agreement for The Lycos Network². The Exhibits to the Complaint establish (a) the Plaintiffs' Statutory Notice to Defendants of the Plaintiff, ZWEBNER, claim for consumer fraud, in which it identified the Plaintiff, ZWEBNER, as a claimant, specific allegations by ZWEBNER in which he characterized as Defendants' representations to him as "illusory" and "misleading", because they were at variance with the Defendants' stated ability to enforce their Subscriber Agreement, and (b) a demand for relief. These same Exhibits further document (c) a pattern of harassment of Plaintiffs, (d) of frustration of Plaintiffs' efforts to enlist the assistance of Defendants to curtail this predatory pattern of abuse and harassment of the Plaintiffs; and, (e) the Defendants inability to control the abusive subscriber/user access to their own Lycos Network.
- (c) The threatened injury to the Plaintiff, ZWEBNER, far outweighs whatever damages to the Defendants the proposed injunction may cause. The relief sought by the Plaintiff, ZWEBNER, is specific to his and the UCSY interests in being free from harassment and abuse, and does not impede or otherwise compromise the ability of the Defendants to continue to operate The Lycos Network – simply, the ability of Defendants' anonymous subscribers to perpetuate their harassment and abuse against the Plaintiff, ZWEBNER, on the Defendants' Network. Accordingly, this Motion requests the entry of an injunction restraining the Defendants from further hosting the existing UCSY message board, and the prevention of their anonymous subscribers from re-creation of a new UCSY message board, for harassment and abuse of Plaintiffs. The

² Because internet service providers (e.g. aol, msn, netzero, etc.) permit an individual to have multiple screen names for a given address, or an internet protocol address (IP Address), an individual is able to register on Defendants' Network, under different screen names or "alias" for a given IP Address. Thus, when Defendants make a token effort at enforcement of the Terms Of Service ("TOS") against a given alias, the IP Address of the User is not blocked, only one of the screen names or a given "alias" for a particular IP Address.

vulnerability of Plaintiffs to this type of harassment and abuse is more acute because of the fledgling nature of their business, and their need to attract investment capital to fund their proprietary patented water extraction technology. The virtually avalanche of invective from the Defendant anonymous posters, has and continues to prevent the Plaintiffs' business from meeting its funding goals, and thereby the further development and commercialization of its patented water extraction technology.

- (d) This Court's entry of an injunction is in the public interest because it both serves to enjoin the Defendants' from their continuation of the perpetuation of a consumer fraud; and, it curtails the illegal actions (violation of *47 USC §223* - cyber stalking; violation of Chapter 495.151, Fla. Stats. – dilution of the UCSY trade name) by the Defendants and their anonymous subscribers.

MEMORANDUM IN SUPPORT OF MOTION

I. BACKGROUND FACTS & PERSPECTIVE

A. The Plaintiffs' Business - As set forth in paragraphs 17 of the Complaint, the Plaintiff, ZWEBNER, has and continues to be involved in the management of publicly traded companies; and, is presently the CEO of the Plaintiff corporation, Universal Communication Systems, Inc. ("UCSY"). UCSY is a technology based company seeking to raise capital to advance the development and commercialization of its newly acquired patented water extraction technology. UCSY is a so-called "bulletin board" stock, that is it is listed on the "pink sheets" maintained by the NASD. In addition, one or more brokerage firms maintains a market for UCSY stock. Because UCSY is a relatively new company, with limited operating history, its stock price is highly sensitive to artificial influences and misinformation. Accordingly, where inaccurate information is posted on the RAGING BULL web site, and not promptly corrected or removed, the UCSY stock is highly susceptible to potential price swings and manipulation.

B. The Defendants' Network Of Web Sites - The Defendants' maintain a Network of web sites that are accessible over the internet. The Defendants themselves are not an internet service provider (aol, msn, CompuServe, netzereo, juno, etc.). Once logged onto the

internet, the Defendants' RAGING BULL web site may be accessed directly if an individual is aware of Defendants' RAGING BULL web site (www.RagingBull.com). Alternatively, and the more likely scenario, the Defendants' RAGING BULL web site is accessed indirectly through a link to another of the Defendants' financial sites (e.g., www.Quote.Com). This QUOTE.COM financial site has been designed by Defendants for retrieving a price (quotation) on a publicly traded stock, AND as a portal to other of the financial services advertised on Defendants' QUOTE.COM financial site. The Defendants' QUOTE.COM site also directs such individuals to other of the Defendants web sites, specifically, the RAGING BULL message board. QUOTE³. But for this "promotion" and "advertising" of the existence of the USCY message board, the individual retrieving a price quotation for a specific stock (e.g. UCSY), may have never become aware of the USCY message board on the Defendants' Raging Bull web site. The Defendants' linkage of the Raging Bull web site to the Defendants' QUOTE.COM is calculated to cloak their Raging Bull site with a degree of legitimacy and/or credibility by their association of their Raging Bull site with another site that provides objective information.

C. The Defendants' Representations To Plaintiffs - The Defendants' representations to the Plaintiffs, which they use in the solicitation of subscribers to their Network of web sites, are contained in their Subscriber Agreement, specifically, the Conditions & Restrictions On Use contained in Paragraph 2 their Subscriber Agreement, and the Member & User Conduct prohibitions contained in Paragraph 6 of their Subscriber Agreement. These paragraphs are reproduced herein, in pertinent part, for the convenience of the Court:

2. CONDITIONS AND RESTRICTIONS ON USE -You acknowledge and agree that Lycos may terminate your access to the Lycos Network or to any of the Products and Services should you fail to comply with the Terms and Conditions or any other guidelines and rules published by Lycos. Any such termination shall be in Lycos' sole discretion and may occur without prior notice, or any notice. Lycos further reserves the right to terminate any user's access to the Lycos Network or to any of the Products and Services for any conduct that Lycos, in its sole discretion, believes is or

³ The Defendants, Quote.Com, web page does not permit printing of this page with all of the of links depicted on a computer screen. Notwithstanding, such links have been copied and pasted in this footnote, and they as they appear computer screen.. These featured links are as follows: [Quote](#) | [UCSYNews](#) | [UCSY !\[\]\(bc1164625d1e7bc5b8f41cd24fa43ef2_img.jpg\)Msg Brd](#) | [UCSYChart](#) | [UCSYLiveChart](#) The icon appearing after the ticker symbol UCSY is the "Raging Bull", and directly connects/links the Quote.Com web page to the UCSY message board ("Msg Brd") on the Raging Bull web site

may be directly or indirectly harmful to other users, to Lycos or its subsidiaries, affiliates, or business contractors, or to other third parties, or for any conduct that violates any local, state, federal, or foreign laws or regulations. Lycos further reserves the right to terminate any user's access to the Lycos Network or to any of the Products and Services for any reason or for no reason at all, in Lycos' sole discretion, without prior notice, or any notice.

6. MEMBER AND USER CONDUCT - Lycos does not pre-screen user or third party Content posted on the Lycos Network, except for certain areas where Lycos employs certain automated screening software, although Lycos reserves the right to do so. Lycos does not guarantee that any screening will be done to your satisfaction or that any screening will be done at all. Lycos reserves the right to monitor some, all, or no areas of the Products and Services for adherence to these Terms and Conditions or any other rules or guidelines posted by Lycos. (emphasis by Plaintiffs)

The Products and Services may only be used for the intended purpose for which such Products and Services are being made available. The intended purpose of site building software on the Lycos Network is to maintain, publish and produce web sites on the Lycos Network that are consistent with these terms and conditions.

Prohibited Conduct

You agree that you will not use Lycos Network Products and Services to:

- a. Upload, post, email, otherwise transmit, or post links to any Content, or select any member or user name or email address, that is unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, pornographic, libelous, invasive of privacy or publicity rights, hateful, or racially, sexually, ethnically or otherwise objectionable....
- f "Stalk" or otherwise harass another...
- aa. Upload, post, email, otherwise transmit, or post links to any material that is false, misleading, or designed to manipulate any equity, security, or other market...

The Defendants misrepresentations to potential subscribers, set forth above, are patently false because they include the statements and/or assurances, both explicitly and by implication, that the Defendants do in fact have control, and/or can exercise control, over the manner in which their Network is used by subscribers; and, therefore, as a consequence of such control, can effectively monitor and/or police violations of the Conditions & Restrictions On Use of their Network, such as when a subscriber misuses the message board to engage in Prohibited Conduct, e.g. harass and/or abuses another subscriber.

In point of fact, the Defendants simply have insufficient information, relative to the source of an anonymous postings appearing on their message boards, to effectively enforce the Conditions & Restrictions On Use of their Network. This fact is underscored in the registration form and instructions appearing on the Defendants' web site that is used by them to register subscribers on their Network. More specifically, the Defendants' on-line registration process relies exclusively upon the accuracy and completeness of subscriber supplied and information, without any means for verification of the accuracy or completeness of such information; and/or, the identity of the individual who registers as subscriber. The Defendants admonition against the provision of false or incomplete registration information or an individual's registration under multiple aliases, is, thus, unenforceable. Accordingly, the Defendants cannot control access to their Network by individuals who provide in accurate registration information, and/or adopt multiple aliases.

D. Defendants' Exposure Of Plaintiffs To Abuse & Harassment –Plaintiffs both (a) read the paragraphs entitled “Condition & Restrictions On Use” and “Member & User Conduct”, of the Defendants Subscription Agreement for the Defendants' Network of web sites (including the RAGING BULL web site), in advance of registration as an authorized user of the Defendants Network of web sites, and (b) relied upon the Defendants representations as to both their ability and willingness to monitor and police misuse of the message board dedicated to discussion of UCSY. Thereafter, the Plaintiff, ZWEBNER, completed the Defendants' on-line registration forms and became an authorized user of the Defendants Network, including the RAGING BULL web site. At least initially, the Plaintiffs believed that their access to the UCSY message board was to be limited to monitoring of the postings appearing on the posting appearing on the UCSY message board. This monitoring of UCSY message board by Plaintiff, ZWEBNER, was initially undertaken and intended to familiarize UCSY management with the types of issues of interest to shareholders, and, thus, to be better equip him to respond to shareholder email inquiries directed to the UCSY web page.

As the posting on Defendants Raging Bull web site became increasingly more irresponsible and vicious, the Plaintiff, ZWEBNER, felt compelled to monitor the postings on the UCSY message board on a regular basis; and, has repeatedly advised Defendants of the failure of compliance of such postings with the Conditions & Restrictions On Use,

specifically, the provisions of the Subscriber Agreement that prohibit offensive and illegal subscriber conduct, and demanded removal of the offensive posting. Thus, what had initially been undertaken by the Plaintiffs as a limited exercise, ostensibly to become educated and anticipate matters of UCSY stockholder interest, has now required a commitment of several hundred hours, and thousands of dollars, of unproductive executive time, to counter the misinformation and manipulative effect of such offending postings. This commitment was necessitated by the Defendants' failure/inability to effectively monitor and police their own authorized subscriber on their own Network of web sites, including the Raging Bull web site. Composite Exhibit "2" to the Complaint provides a representative sampling of the offensive postings on the UCSY message board that is hosted by the Defendants, and is uncontroversial testimony as to Defendants' failure/ineffectiveness in policing the Conditions & Restrictions On Use of their own Subscriber Agreement.

E. Defendants Were On Notice Of Plaintiffs' Claims & Demands For Relief At Least As Early As April 12, 2002 – Plaintiffs have repeatedly complained to the Defendants as to their failure to enforce the terms of service contained in their Subscriber agreement with Plaintiff, ZWEBNER, to his detriment, and to the detriment of his company; and, has demanded that the provisions of the Subscriber Agreement, designed for his protection and benefit, be vigorously enforced, ZWEBNER letter to Lycos Legal Department, Community Manager, dated April 12, 2003, annexed hereto as *Exhibit "4"*. In this same correspondence, the Plaintiff, ZWEBNER, specifically charged the Defendants with "facilitation" of the outrageous conduct of their posters by the failure to enforce the provisions of the Subscription Agreement. This letter solicits a response from the Defendants as to what if any measures they intend to take to resolve the Plaintiff, ZWEBNER, complaint; and, threatens legal action is an acceptable solution is not forthcoming.

In subsequent correspondence with the Defendants, the Plaintiff, ZWEBNER, further complained as to the ineffectiveness of the Defendants to respond to his prior complaint and demands for relief; and, attributed such failure of the Defendants as either a lack of corporate will, or an inability or deliberate indifference, to enforcement of the very terms of use designed intended for the protection of Plaintiff, ZWEBNER, from abuse and harassment by other authorized users of the Defendants;' Raging Bull web site, ZWEBNER letter to Jamie Carney, Lycos Abuse Manager, dated August 5, 2003, annexed hereto as *Exhibit "5"*.

Shortly before the decision was made to pursue legal action against the Defendants, the Plaintiff, ZWEBNER, once again complained to the Defendants about the postings of one of Defendants' authorized subscriber's, Roberto Villasenor; and, demanded that Villasenor be denied access to the Defendants message boards, ZWEBNER letter to Mr. E. Solowey, Terra Lycos Inc./Raging Bull, dated December 30, 2003, annexed hereto as **Exhibit "6"**. In this letter the Plaintiff, Zwebner, stated:

If you cannot police this one wild poster, it may mean that your supposed rules are merely illusory and perhaps misleading to the general public...

Here is another opportunity for your company to demonstrate what it considers integrity. Will you protect this poster? Do your terms of service have any meaning? I believe that you act in arbitrary and capricious ways to essentially avoid your public agreements....(emphasis added)

This letter of December 30, 2003, concluded with the warning that "You (Defendants) have been put on notice for the last time". The Defendants' response to the Plaintiff, ZWEBNER, demands, and to his notice, has been limited to deletion of some of the more offensive posting appearing on their Raging Bull web site. There has been no other effort to accommodate his legitimate complaint, nor an offer to compensate him for his distress and losses. Accordingly, absent any meaningful dialog or effort to compromise by Defendants, the Plaintiffs have been force to resort to this litigation.

II. APPLICATION OF LAW TO FACTS

A. The Factual Basis Of The Claims Against The Defendants - The graveman of Counts I is based upon the Defendants' representations, both expressed and implied, that (a) their Network of web sites operate under their "control"⁴; including their ability

- (i) to limit or restrict user access to their network⁵;
- (ii) to monitor and police the use of the Network to insure compliance with the Conditions & Restrictions On Use of their own Subscriber Agreement⁶; and

⁴ Exhibit "1" to Complaint, Subscriber Agreement, Paragraphs (2) & (6) – ability to control access & content

⁵ Exhibit "1" to Complaint, Subscriber Agreement, Paragraph (6) – ability to pre-screen user of Third Party content

⁶ Exhibit "1" to Complaint, Subscriber Agreement, Paragraph (6) – enforce restriction on "Prohibited Conduct"

- (iii) to banish subscribers from their Network who submit postings that repeatedly violate the Conditions & Restrictions On Use of their own Subscriber Agreement⁷.

All of the foregoing representation were objectively false when made, or have since proven to be objectively false.

B. The Misrepresentations Made By Defendants In Solicitation Of Subscribers To Their Network Are “Deceptive” And Thus Actionable Under Massachusetts law (“MGLA”). Under MGLA 93A, the Defendants conduct is actionable if its is “unfair or deceptive “, (emphasis added) Section 2, MGLA 93A⁸

(a) Pre-Subscription Deception - The Defendants’ representations to potential subscribers, including the Plaintiff, ZWEBNER, relating to their ability to enforce the Conditions & Restrictions On Use of their own Subscriber Agreement, including specifically, monitoring and policing the Prohibited Conduct on their Network, are objectively false, and, are actionable because such representations are deceptive and have been calculated to induce an unsuspecting public, including the Plaintiffs, to subscribe to the Defendants’ Network and services, *Commonwealth v. AmCan Enterprises, Inc.*, 47 Mass.App.Ct. 330, 712 N.E.2d 1205 (1999) – deception shown if representation is “likelihood to deceive”. Clearly, under the facts of this case, neither the Plaintiff, ZWEBNER, nor, for that matter, any other member of an unsuspecting public, were able know or discover the truth as to Defendants lack of control over their Network, without first subscribing, and then experiencing their abandonment by the Defendants’ subscribers to the abuse and harassment, at the hands of anonymous posters.

(b) Pre-Subscription Deception -The Defendants’ representations, by implication, that they had the ability to control individual access to their Network, by limiting registration

⁷ Exhibit “1” to Complaint, Subscriber Agreement, Paragraph (2) & (6) – ability to control access & content

⁸ Since the Massachusetts Act provides that Massachusetts courts in c. 93A cases should be guided by the interpretations of the Federal Act made by the Commission and the Federal courts, attention must be given to the legal standards for deception developed under the Federal Act. More important, however, are the decisions of the Massachusetts courts actually determining the meaning of “deceptive act or practice” under c. 93A. It is important to know that to show deception under c. 93A, the elements of common law fraud need not be proved; on the other hand, negligent conduct by a defendant does not by itself establish deception. Also, regulations of the Attorney General must be taken into account, some of which specifically classify particular business conduct as deceptive. FN11, MASSACHUSETTS PRACTICE SERIES, VOLUME 35. CONSUMER LAW, CHAPTER 4. UNFAIR OR DECEPTIVE ACTS OR PRACTICES: CHAPTER 93A,C. GENERAL PRINCIPLES: UNFAIRNESS AND DECEPTION(3) DECEPTION,§ 4:24 Generally; See also § 4:27 Massachusetts Standards--Generally

by “individuals” to a single alias was also objectively false. In the registration of subscribers to the Defendants Network of web sites, the Defendants did not elicit sufficient information from a potential subscriber to later identify the individual subscriber, to the extent necessary to enforce the Terms & Restrictions Of Use contained in the Subscriber Agreements against such individual. Accordingly, the Defendants were unable to effectively protect a subscriber, who became a target of abuse and harassment, from another of its subscribers to their Network., because of their inability to identify the individual responsible and, thereafter, block his access to their own Network.

(c) Post Subscription Deception - Defendants’ representations, by implication, to the Plaintiff, ZWEBNER, after he became a subscriber, that it was taking affirmative steps, to protect the Plaintiff, ZWEBNER, from recurrence of the Prohibited Conduct on their Network, was under the circumstances of this case, further misleading and deceptive because there was nothing the Defendants could do to deny any posters access to their Network, *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, (1st Cir. 1998) - the giving of repeated assurances to honor a contractual obligation with no intention of doing so is actionable under 93A MGLA. Accordingly, the Defendants were unable to comport their conduct with their representations to the Plaintiff, ZWEBNER.

C. The Plaintiffs Claims Comport In Scope With The Plaintiffs’ Notices & Demands On Defendants Under MGLA 93A - The Plaintiffs have repeatedly complained to the Defendants as to the Defendants’ inability or unwillingness or deliberate indifference to the enforcement of their Subscriber Agreement with the Plaintiffs.

Without belaboring the point, Plaintiffs’ contend that virtually all of the Defendants’ representations, contained in their Subscriber Agreement with the Plaintiff, ZWEBNER, with respect to their ability and willingness to monitor and police abuses on their network (Prohibited Conduct), have proven to be objectively false, were known to have been false at the time they were made, or shortly after the time they were first made by the Defendants. The Defendants, thereafter, compounded the deception, first with token compliance with Plaintiffs’ demands for relief, and with disingenuous assurances that they had addressed the Plaintiffs’ concerns and complaints. As is evident from Composite Exhibit “2” to the Complaint, the postings referenced therein clearly fall within the Prohibited Conduct of the Defendants’ Subscriber Agreement, AND appear to have originated primarily from a single

individual, Robert Villasenor, who had registered as a subscriber to Defendants' Network of web sites (including the RAGING BULL web site) under the following aliases: THE WORM, THE WORM_06, THE WORM_06A, SCRI_852, NO_INSIDERS, 65175R, HENRY_JOHNSON123, TOBIAS95, JACOBLEHMAN. The Defendants' failure of verification of subscriber information, has permitted, if not encouraged, the use of multiple aliases by a given individual; and, consequently, the inability for Defendants to enforce their Subscriber Agreement of the protection of Plaintiffs.

D. The Plaintiffs Have Been Injured As A Result Of The Defendants Misrepresentations -

(a) The Plaintiff, ZWEBNER, Has Suffered Emotional Distress As A Result Of Defendants Failure To Enforce Its Subscriber Agreement – The Plaintiff, ZWEBNER, has over a period of several years, unsuccessfully endeavored to have the Defendants enforce their Subscriber Agreement, specifically, those provisions intended for his protection from abuse and harassment by other of Defendants' authorized, anonymous subscribers. Not only has this not occurred, but the failure of the Defendants, in this regard, has simply contributed to the both the volume and rancor invective by the individuals who have made a sport out of stalking the Plaintiff, ZWEBNER. As a direct and proximate result of the Defendants' misrepresentations, specifically, misrepresentations that are documented in Paragraphs (2) & (6) of the Defendants' Subscriber Agreement, the Plaintiff, ZWEBNER, has suffered both monetary losses and severe emotional distress, for which the Defendants are liable, *Haddad v. Gonzalez*, 410 Mass. 855, 576 N.E.2d 658 (1991) allowing an aggrieved party to recover multiple damages for emotional distress under MGLA 93A, Sec. 9, citing *Maillet v. ATF-Davidson Co., Inc.*, 407 Mass. 185, 552 N.E.2d 95 (1990).

(b) Losses Of Shareholder Value - Both the Plaintiff, ZWEBNER and the Plaintiff, UCSY, have had no choice but to respond to investor concerns. This response necessarily required, in this case, that the Plaintiff, ZWEBNER, subscribe to, and diligently monitor the UCSY "message boards" on Defendants' sites. Accordingly, it was not optional for a company and/or its managers to dedicate substantial amounts of executive time to affirmatively respond to allegations of misconduct and mismanagement posted on the UCSY message board. The failure to respond by the Plaintiff, ZWEBNER, to false and misleading posting relating to him and to UCSY, would have unfortunately lent credibility to such

postings, no matter how outrageous. Notwithstanding, the sheer volume of such misinformation posted on Defendants message boards, over an extended period of time, has consequently taken a heavy toll, both upon ZWEBNER, personally, and upon UCSY, including severely depressing the UCSY stock. Had the Defendants been more effective in the protection of the Plaintiff, Zwebner, by enforcement of their Subscription Agreement, as they are attempting to do as of today, this campaign of personal destruction, launched by anonymous posters, against ZWEBNER on Defendants Raging Bull web site would have been abated. The Plaintiff, ZWEBNER, is a major stockholder in UCSY, and the value in his interest in UCSY had also been diminished substantially.

(c) Interference With Business Opportunities The postings by Defendants' subscribers have caused investment bankers and qualified investors to lose interest in investment in UCSY as a result of the baseless accusation of criminal wrongdoing and attacks levied against the Plaintiffs on the Defendants' Raging Bull web site. The out-of-pocket cost, associated with the Plaintiffs investor related investment banking activities, include the attorney fees associated with the preparation of investment memorandum, and the expenses incident to the presentation and courting of such investors. The frustration of Plaintiffs' ability to adequately capitalize the development of their patented proprietary water extraction technology, has also cost the company, and its shareholders, millions of dollars in value of the company's stock, and lost opportunities to capitalize upon the market for their products.

III. THE PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

I. There Is A Substantial Likelihood Of Success Of Plaintiffs' Claims Against The Defendants – The Plaintiffs have sued the Defendants for consumer fraud, Count I, under Massachusetts General Law (*MGLA 93A*); for Cyber Stalking, Count II, under federal law, *47 USC 223* (based upon their maintenance of an instrumentality used to repeatedly harass and abuse the Plaintiffs); and for dilution of the trade name of the Plaintiff, UCSY, Count III, under *F.S. § 495.151. et seq.* There is a substantial likelihood of success on all of these claims.

A. COUNT I - CONSUMER FRAUD UNDER MGLA 93A

1. Massachusetts General Law (*MGLA*) Chapter 93A provides, in pertinent part, **§ 9. Civil actions and remedies; class action; demand for relief;**

damages; costs; exhausting administrative remedies

(1) Any person, other than a person entitled to bring an action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued there under or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper. (emphasis added)

§ 2. Unfair practices; legislative intent; rules and regulations

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

2. Judicial Interpretation Of Chapter 93A, Section 2, MGLA

Acts and practices which have been declared to constitute an actionable offense under Chapter 93A, Massachusetts law, and which are relevant to the facts of this case, include fraudulent inducement to enter into an agreement, *Jurgens v. Abraham*, 616 F. Supp. 1381 (DC Mass 1985); the failure to disclose any fact, the disclosure of which may have influenced persons not to enter into a transaction, *Grossman v. Waltham Chemical Co.*, 463 N.E. 2d 1243 (Mass. App. 1982); conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party, *Tufankjian v. Rockland Trust Co.*, 782 N.E. 2d 1 (Mass. App. 2000); and, the giving of repeated assurances to honor a contractual obligation with no intention of doing so, *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, (1st Cir. 1998).

3. Plaintiffs Have Made Repeated Demands Upon The Defendants For Relief

The Plaintiffs have previously advised the Defendants that certain of the representations contained in their Subscriber Agreement, including their representations as to ability to enforce their own “rules”, were illusory and misleading, **Exhibit “6”**. Accordingly, the Defendants were on notice that their solicitation of subscribers, pursuant to such Agreement, and its so-called “rules”, was actionable under MGLA 93. All that the Plaintiffs had requested in their complaints and notices to the Defendants, in terms of relief, was that they enforce the Conditions & Restrictions On Use contained in Paragraph 2 their Subscriber Agreement, and the Member & User Conduct prohibitions contained in Paragraph 6 of their Subscriber Agreement with the Plaintiffs, Composite Exhibit “2” to Complaint.

The injunctive relief sought by the Plaintiffs, in the instant Complaint, and in this Motion, requests the Court enjoin Defendants from continuing to make the foregoing misrepresentations, to compel effective enforcement of the Defendants’ Subscriber Agreement, and, alternatively, where effective enforcement is not possible, to prevent the Defendants from further hosting of a UCSY message board on any of their Network of web sites.

4. Defendants’ Belated Efforts At Monitoring & Policing The Misuse Of The “UCSY” Message Board

After about three (3) years of abuse and harassment of the Plaintiffs, and the receipt of literally hundreds of letters and emails from the Plaintiffs complaining of abuse and harassment by posters on the Defendants Raging Bull web site, the Defendants have now begun to take their responsibilities seriously, by (a) periodically reviewing the “UCSY” message board on their Raging Bull web site, and (b) deletion of offensive postings which violated the Conditions & Restrictions On Use contained in Paragraph 2 their Subscriber Agreement. Virtually all of the Defendants’ monitoring and policing of the postings to the UCSY message board on their Raging Bull web site has occurred subsequent to the filing of the instant litigation. Notwithstanding, the Defendants’ recent efforts, the offensive and abusive postings by the same individuals, who relish in this practice, have by no means disappeared. Accordingly, the Defendants efforts in policing their own Network remains ineffective. The intrinsic flaws in the construct of the Defendants Network (based upon the inadequacy of their subscriber registration process) apparently continue to prevent effective

enforcement of the Subscriber Agreement by denial of such abusive individuals a platform for their illegal conduct. It is these intrinsic flaws in the Defendants' Network which necessitates intervention by this Court.

B. COUNT II - CYBER STALKING IN VIOLATION OF 47 USC §223⁹

1. The Actions Of Defendants Are In Clear Violation Of 47 USC §223

47 USC §223 Entitled "Obscene or harassing telephone calls in the District Of Columbia or in interstate or foreign communications", provides, in pertinent part, that whoever "knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1)¹⁰ "...shall be fined under Title 18 or imprisoned not more than two years or both.". (emphasis added) 47 USC §223 is applicable to internet "communications", *Reno v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997), 117 S.Ct. 2239

These activities (communications) on the Defendants' Network are documented in Composite Exhibit "2" to the Complaint, and in the postings referenced in the letters appearing in Composite Exhibit "2" to the Complaint. These postings are but representative of a vast library of viscous invective that have bombarded the Plaintiff for a period of about three (3) years. Moreover, most, if not all, of these "anonymous" postings apparently originate from a common source¹¹, who has been repeatedly "tossed" from the Defendants' Network by Defendants, only to return under some other alias. Thus, notwithstanding, that the Defendants know the identity of this individual, they have been "ineffective" at enforcement of the Conditions & Restrictions On Use contained in Paragraph 2 their

⁹ On-line stalking, harassment and threats is also potentially subject to federal criminal sanction under 18 USC §875 (requires an element of extortion). Another federal statutes which criminalize "stalking", includes 18 USC 2261A (requiring a person be placed in fear of death or serious bodily injury). Because of the lack of vigilant enforcement on the federal level, stalking over the internet (cyber stalking) has becoming increasingly subject to state regulation. www.haltabuse.org/resources/laws/index.shtml provides an unofficial compilation of the Anti-cyber stalking laws on the books of the other countries This State legislation is, however, limited in its application to intrastate conduct.

¹⁰ Paragraph (1) defines the prohibited "activity" as the use of a telecommunication device by one who

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with the intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications; (emphasis by Plaintiffs)

¹¹ Plaintiffs have reason to believe that virtually all of these offensive posting were either from the same source, Mr. Roberto Villasenor, or have been instigated by Roberto Villasenor.

Subscriber Agreement. It has apparently been easier for the Defendants to ignore the Plaintiffs' repeated demands for relief, rather than for the Defendants to implement reasonable measures to enforce their Subscriber Agreement, and thereby protect Plaintiffs, and others similarly situated, from further harassment and abuse.

To establish the requisite intent under this statute, the Defendants need only "knowingly permit" the use of Defendants' computer server for an illegal purpose. Under the record before this Court, the Defendants themselves have defined, within their Subscriber Agreement, the activities that comprise the misuse of their message boards as "Prohibited Conduct". The Prohibited Conduct¹² referenced in Defendants' Subscriber Agreement with the Plaintiff, ZWEBNER, comports with the same conduct which violates this statute, e.g. harassment and stalking. Accordingly, the Defendants were manifestly aware that their failure to enforce their Subscriber Agreement constitute a criminal violation of this statute. Notwithstanding, the Defendants will likely disclaim any responsibility for the "content" of these postings. This defense is unavailing because the Defendants were most assuredly aware of the prohibited nature of these posting; knowingly permitted these posters to continue to access their Network of web sites; AND, further compounded the injury caused by such poster through promoting/advertising of the availability of these unlawful communications on their web site. More specifically, the Defendants actively promote electronic links to their RAGING BULL web site from other pages it hosts on their Network (computer server), most notably, their principle financial site, QUOTE.COM¹³. The QUOTE.COM site is used by the Defendants, as the primary financial portal of their server, for linking the public, and/or a subscriber, to their Network of web sites, including specifically, to the Raging Bull site, which is at the focus of the instant litigation. When an individual requests a quotation for UCSY stock on Defendants' QUOTE.COM site, not only is the price of the UCSY stock retrieved, but also the link to the UCSY Raging Bull message board. Under the facts of this case, the Defendants linkage of UCSY message board, to the stock quote for UCSY, is calculated to promote the dissemination of information about UCSY which is known to Defendants to be abusive, false and harmful to the UCSY business.

¹² Reproduced on pages 4 to 5, inclusive, of this Memorandum

¹³ See Footnote (2) infra

Accordingly, the Defendants have clearly violated *47 USC §223*, which prohibits their knowing involvement in the dissemination of materials, through the use of a telecommunication facility, under their control, that is calculated to “...annoy, abuse, threaten, or harass...” the Plaintiffs.

2. The Plaintiffs Are Entitled To Enforce *47 USC §223* – Plaintiffs’ assertion of a private/implicit right of action under *47 USC §223* is based upon the language of the statute, the unique injuries cause to victims of the statute and Congressional purpose in its enactment of *47 USC §223*. In determining the existence of a private/implicit right of action, it is undisputed that (a) the Plaintiffs are explicitly within the class of persons for whose special benefit the statute was intended to protect; (b) the statute explicitly contains “duty creating language” that is directed to an entity in the position of the Defendants and (c) the assertion of a private right of action is consistent with the underlying purpose of the legislative scheme – specifically, according the Plaintiffs multiple avenues for relief from stalking, including a private remedy. Thus, the Plaintiffs’ assertion of their claims for cyber stalking under *47 USC §223* comports with both an analysis for determination of such private rights, See *Shotz v. City Of Plantation, et al.*, 344 F.3d 1161, 1167-68 (11th Cir. 2003), citing *Love v. Delta Air Lines*, 310 F. 3d 1347 (11th Cir. 2002); and, the recognition of a private remedy to victims of cyber stalking, within this Judicial District, under State Law.

(a) Plaintiffs Are Within The Class Of Persons The Statute Was Intended To Benefit – It is clear from the explicit language of *47 USC §223*, that Congress expressly intended to protect “any person” who receives an anonymous threatening or abusive communication, *47 USC §223(a)(C)*. More specifically, such anonymous communication is actionable if it is “...intended to annoy, abuse, threaten, or a harass any person...who receives the communications.”, *Id* In this case the threatening, abusive, anonymous communications were routinely directed to¹⁴ the Plaintiff, ZWEBNER, at the UCSY message board hosted by the Defendants on their Raging Bull web site

Virtually all of the communications that are posted by a subscriber to the “UCSY” message board, chat room, forum, etc, are attributable to an “alias” or a “screen name”.

¹⁴ The highly personal nature of the violation, and the injuries which are unique to an individual who is the target of such communication, strongly favor the empowerment of the victim to permit him to protect himself. . The Plaintiff, Zwebner, should thus not be required to await the availability of a federal prosecutor, to secure him relief from an unending violation of his rights.

Thus, the Plaintiffs rarely, if ever, learn of the identity of the sender, and is, otherwise defenseless to combat such harassment and abuse, because notwithstanding that he is the target of such abuse, he is not in control of access to the message board that bears his company's name. Only the Defendants have the ability, in the design of their software, and in the monitoring of their Subscriber activities on their web sites, to control abuses and to prevent a poster that violates their Terms & Restrictions Of Use ("TOS"), from repeatedly gaining access to their site and engaging in Prohibited Conduct against the Plaintiffs.

(b) The Plaintiffs' Assertion Of A Private Right Of Action, Under 47 USC §223, Is Consistent With The Underlying Enforcement Scheme Of 47 USC §223, because (i) the statutory enforcement scheme adopted by Congress explicitly recognizes the exposure of violators to both criminal and civil penalties, 47 USC §223(f)(1); (ii) the statutory scheme adopted by Congress contemplates the recognition and enactment of State laws that are not inconsistent with this federal statute, 47 USC §223(f)(2); and, (iii) the enactment of this statute is not to "...be construed to affect or limit the application of enforcement of other Federal law.", 47 USC §223(g). Accordingly, Congress did not intend to pre-empt the field with this legislation, nor did it otherwise circumscribe judicial application and/or enforcement of 47 USC §223 by a private litigant. Clearly, the judicial recognition of a private remedy to enforce an anti-cyber stalking statute is consistent with the purpose of this legislation; and, such private enforcement, on a state level, readily available to a private citizen, within the Southern District Of Florida, whose personal interests are threatened by such criminal conduct, Chapter 784.048, Fla. Stats., See also *Huch v. Marrs*, 858 So.2d 1202 (3rd DCA Fla. 2003)

(c) 47 USC §223 Imposes Affirmative Duties Upon The Defendants That Are Intended For The Protection Of Individuals Who Are Exposed To Abuse & Harassment. The language of 47 USC §223 is unmistakable that where an individual or an entity, such as Defendants, "...knowingly permit any telecommunications facility under their control to be used for any activity prohibited by paragraph (1)¹⁵ with the intent that it be used for such activity..." such entity or individual is subject to certain criminal and civil penalties, 47 USC §223(a)(2); See also 47 USC §223(b)(1)(B) Prohibited Acts for commercial purposes.

¹⁵ This provision is inclusive of the activity prohibited by 47 USC §232(a)(1)(C) – making of anonymous threatening and abusive communications.

Under the facts of this case, the Plaintiffs have repeatedly advised, requested, admonished and/or demanded that the Defendants cease the illegal activities that have and continue to occur on their Network. It is undisputed that the Defendants are both manifestly aware of the abuse and harassment of the Plaintiffs on their Raging Bull web site, and have represented to Plaintiffs, and to all others who have subscribed to their Network of web sites, that they have and do in fact control access to their Network. By ignoring the Plaintiffs demands that Defendants enforce their Subscriber Agreement, the Defendants have (a) emboldened the Plaintiffs' abusers and (b) continue to facilitate such abuser's illegal conduct against the Plaintiffs on the Defendants' Network, in violation of 47 USC §223.

(d) Congress Intended 47 USC §223 To Operate As One Of The Available Tools For Dealing With Internet Abuse – Up to now, enforcement of federal legislation, and federal prosecution of individuals for violation of such federal anti-cyber stalking legislation, has been both limited and constrained because of constitutional limits upon government action, that may implicate First Amendment rights. Private litigant enforcement is less constrained because of (a) the legally recognized competing rights; and, (b) the greater financial resources that can be brought to bare for the protection of the professional and business interests of the parties, that are targets of such abuse and harassment. Moreover, where State laws have been enacted, such as in Florida¹⁶, private litigants have been empowered by the Courts as having standing to enforce a criminal anti-cyber stalking statute through the application to the Court for an injunction against the stalker. In their suit against the Defendants, the Plaintiffs request that this Court permit similar relief, on a national scale, by recognition of a private right of action for injunctive relief and for damages, specifically, compensatory, consequential and punitive damages against the private interests, such as the Defendants, that have both enabled and profited by abuse and harassment of the Plaintiffs' professional and business interests.

(e) Judicial Recognition Of A Private Right Of Action Is Permissible Under The Facts Of This Case Insofar As A Private Right Of Action For Interstate Cyber Stalking Is Not A Cause Of Action That Is Traditionally Relegated To State Law – The magnitude of the cyber stalking epidemic has yet to be fully realized. Because of the expanse

¹⁶ Florida has recently enacted legislation which amends the existing criminal stalking laws to include cyber stalking, amendments to F.S. 784.048, which permits private citizen enforcement of its prohibitions, *Huch v. Marrs*, 858 So.2d 1202 (3rd DCA Fla. 2003)

of the reach of the internet, cyber stalking has and continues to extend its reach beyond both state and national boundaries.

The federal government, acting alone, lacks the resources to effectively deal with this threat to ordered liberty; and, only private litigants, (who have both the interest and resources), need to be empowered to effectively police this “interstate” threat to their, personal, professional and business interests. Moreover, it is evident from this case, that private vested interests, such as the Defendants, have been ineffective, or otherwise lack the incentive to police themselves to curtail this illegal conduct. Accordingly, the Plaintiffs have, through their lawsuit sought to enlist this Court to empower them to protect themselves against both the cyber stalker and the private vested interests, such as Defendants, which knowingly facilitate such cyber stalking. The cyber stalkers who have and continue to relentlessly pursue the Plaintiffs, would have long since been silenced, but for the assistance and complicity, of the Defendants, whose economic interests have been given paramount consideration to the rights of the Plaintiffs, and other targets of abuse on the Defendants’ Raging Bull web site.

Thus, there is no logical reason, nor judicial constraint, for this Court to not also recognize/empower a private citizen to seek injunctive relief and damages from the stalker and from the Defendants, who have facilitated such misconduct. Such empowerment would be recognition of the unique personal injury suffered by the Plaintiffs, and be in furtherance of the limited assistance provided to victims by the State Of Florida within this judicial district, from what has come to be recognized - a compelling need for effective deterrence to illegal interstate cyber stalking. The absence of a private remedy under *47 U.S.C 223* does not prevent this Court from fashioning one, particularly, where the statute clearly contemplates “complimentary” relief being afforded to cyber stalking victims. In Florida, such complimentary legislation would permit private enforcement by the citizens in the Southern District Of Florida of anti-cyber stalking legislation. Because of the uniquely personal nature of the injury sustained by the Plaintiffs by such violation, the Plaintiffs would urge this Court to fashion an appropriate remedy, which is implicitly present and available to victims in the federal anti-cyber stalking statute before this Court.

In summary, only a federally recognized private right, redressable in a federal court, can effectively protect individuals who become the targets of cyber stalkers, because of the interstate nature of this cyber crime. In this case, the Defendants are resident in both

Massachusetts and in Florida (Terra Lycos, Inc.); and, the cyber stalkers, who subscriber to their Network, are located in California, Connecticut, and elsewhere. Thus, even if the State of Florida desired to attack this interstate problem, the interstate scope of the cyber stalking activity and federal law constrains it from doing so, *47 U.S.C 223(f)(2)* – Federal law limiting States to “complimentary oversight” of “intrastate services”, not inconsistent with federal law. In the case before this Court, the abusive conduct involve interstate telecommunications and, thus, more appropriately, the private right of action must to be derivative from federal law.

C. COUNT III - LIKLIHOOD OF INJURY TO BUSINESS REPUTATION IN VIOLATOIN OF CHAPTER 495.151, FLA. STATS.

1. The “UCSY” Trade Name Is Proprietary & Distinctive

There is no doubt or issue as to the Plaintiff company’s ownership of the “UCSY” trade name! The “UCSY” trade name is both proprietary and inherently distinctive, thus, exclusively identified with the Plaintiffs’ company, *Investacorp, Inc. v. Arabian Investment Banking Corp., dba Investacorp.*, 931 F.3d 1519, 1522 (11th Cir. 1991) – business obtains rights in mark upon first use of such mark where such mark inherently distinctive; *Chassis Master Corp. v. Borrego*, 610 F.Supp 473 (D.SD Fla. 1985) – both inherently distinctive trade name and abbreviation of trade name, entitled to protection against infringer.

UCSY is also the ticker symbol by which the corporate Plaintiff is identified by NASD on the public securities markets in which the UCSY stock is traded. The Defendants have adopted, without authorization, or approval by the Plaintiffs, the Plaintiffs trade name, “UCSY” as the name of the library into which they compile the false and malicious postings on their message boards relating to the Plaintiffs. Insofar as the Defendants suggest that the creator a message board on their Network utilize the UCSY trade name, as the name of the message board appearing on the Defendants Raging Bull web site, the Defendants have induced an unauthorized use of the Plaintiff, UCSY, trade name, by the subscriber who created the UCSY message board Insofar as the Defendants themselves utilized the UCSY message board to compile the postings relating to the Plaintiffs, Defendants also use the Plaintiffs’ trade name without its authorization.

2. The Actions Of Defendants Are In Clear Violation Of F.S. 495.151 By Virtue Of Their Association Of Defamatory Materials With Plaintiff's UCSY Trade Name

Chapter 495.151, Florida Statutes, entitled "Injury To business reputation; dilution" provides in pertinent part that:

Every person, association...adopting and using a mark, (or) trade name ...may proceed by suit, and all courts having jurisdiction thereof shall grant injunctions, to enjoin subsequent use by another of the same or any similar mark, (or) trade name ...if it appears to the court that there exists a likelihood of injury to business reputation, or dilution of the distinctive quality of the mark (or) trade namenotwithstanding the absence of competition between the parties or of confusion as to the source of goods or services. (emphasis added)

The Defendants' conduct, as more fully described above in Paragraph III.C.1, thus, comprises an impermissible use of the Defendants trade name, and, within the context of this case, and is calculated to injure the Plaintiff corporation's business reputation.

3. There Is No Doubt Or Issue As To Likelihood Of Harm Such Posting Cause To Plaintiffs Company Business Reputation

These postings on the UCSY message board by Roberto Villasenor, and possibly others instigated by him, include: false and malicious accusations against PLAINTIFF, ZWEBNER, relating to criminal misconduct - suborning perjury of a witness in litigation, (August 4, 2003, Post No. 18025); money laundering, (August 4, 2003, Post No. 18025); manipulation of securities markets, (August 4, 2003, Post No. 18028); illegal arms trading, May 20, 2003, Post No. 169,803); affiliation with international terrorists (August 13, 2003, Post No.169327; August 13, 2003, Post No. 169312; August 13, 2003, Post No. 169,311),

The likelihood of harm to Plaintiffs business reputation from the above posting, which are defamatory *per se*, is not seriously in doubt or otherwise disputed. These offensive postings repeatedly reference herein, and in the Complaint, do not purport to simply convey an expressions of opinion, but rather claim to be factual in nature, *LRX, Inc. v. Horizon Associates Joint Venture, et al.*, 842 So.2d 881 (Fla. 4th DCA 2003). Moreover, the extent of re-posting of the same defamatory materials, even after they have been deleted by Defendants, clearly manifests a reckless disregard for the truth and/or actual malice, *Flotech, Inc.v. E.I.duPont deNemours & Co.*, 814 F.2d 775 (1st Cir. 1987) – discussing the factors involved in the assertion and loss of a "conditional" privilege. Whatever privilege the Defendants may have enjoyed as a "publisher" of such defamatory materials has long since been forfeited in

both this federal circuit and in the federal circuit in which such postings have been repeatedly re-published.

In summary, the Defendants' complicity, in the first instance, in the compiling of offensive posting under the UCSY message board, and thereafter, in allowing the re-posting of these offensive materials to continue and/or their indifference to such activities, is anything but innocent. Defendants have and continue to favor their own commercial interests in the maintaining of its compilation of such postings, rather than the protection of the Plaintiffs from further abusive materials. The duplicity of the Defendants conduct is further manifest where they continue to profess diligent adherence to their Subscriber Agreement, when it is apparent to any objective observer, that they has lost control over the subscribers who have and continue to avail themselves of the UCSY message board. The likelihood of injury to Plaintiff, UCSY, business reputation is manifestly apparent on this record, and only the interim relief requested in this Motoin can prevent a further tarnishment of the UCSY trade name.

IV. THERE IS A SUBSTANTIAL RISK OF IRREPARABLE HARM SHOULD THE COURT DENY THE PLAINTIFFS THE INJUNCTIVE RELIEF SOUGHT IN THIS MOTION

A. The Defendants Failure And/Or Inability To Monitor And Police Their Network To Prevent The Cyber Stalking Of The Plaintiffs & The Dilution Of The Plaintiff, UCSY, Trade Name, Shall Continue To Cause Each Of The Plaintiffs Irreparable Harm Unless Enjoined By This Court - The frustration experienced by the Plaintiff, Zwebner, in seeking an amicable, private resolution of this matter, specifically, the enforcement of the Defendants' Subscriber Agreement, (Exhibits 2 to the Complaint), to protect him, his company, and ultimately his shareholders, from the adverse effects of the abuse and harassment from "anonymous" individuals, is not in dispute. Additionally, it is not in dispute that the Defendants have either been indifferent to the Plaintiffs legitimate demands for relief/protection, or alternatively, ineffective in providing such relief and/or protection from cyber stalkers. The continued and unabated cyber stalking of the Plaintiff, ZWEBNER, has resulted in personal, professional and business injury, by demeaning of the Plaintiff, ZWEBNER, resulting in emotional distress, and consequently, tarnishment of the Plaintiff,

UCSY, trade name and business. Clearly, this injury to the Plaintiff, ZWEBNER, and to the Plaintiff, UCSY, necessarily spills over onto shareholders of UCSY. The Plaintiff, ZWEBNER, simply seek to be free from the vicious attacks upon his person by nameless, mindless, embittered individuals, that hide in the cloud of internet milieu, waiting to pounce upon or target an individual who is not to their liking, or does not pay for “protection” to insulate himself from such anonymous assaults.

The Defendants have been ineffective in their token efforts to both identify the IP addresses of the cyber stalkers who frequent their Network, and/or to filter/block postings originating from any of these cyber stalkers’ IP address that make reference to the Plaintiffs. The Plaintiffs, thus, have sought intervention by this Court, pending the conclusion of this litigation, to prevent any further injury and disruption to the operation of the Plaintiffs business, and injury to the stockholders that have invested in Plaintiffs’ business. To be effective such Preliminary Injunctive relief need enjoin the Defendants from further maintaining a compilation of postings on their Network that make reference to either of the Plaintiffs.

B. ZWEBNER Affidavit Of Irreparable Harm - The Plaintiffs shall file an affidavit by the Plaintiff, ZWEBNER, in which he sets forth in greater detail than permitted herein, the nature and extent of the personal, professional and business injury caused by the Defendants, to him and to his company. Mr. ZWEBNER was unavailable at the time of the preparation of the instant Motion, and, thus, could not assist in its preparation.

V. THE THREATENED INJURY TO PLAINTIFFS FAR OUTWEIGHS WHATEVER DAMAGE THE PROPOSED INJUNCTION MAY CAUSE THE DEFENDANTS

A. The Court Is Requested To Take Judicial Notice Of The Published Literature That Documents The Scope & Pernicious Nature Of Cyber Stalking – The Plaintiffs have annexed to this Complaint, a law review article (review of cyber stalking & legislative response), which provide the Court with both an objective perspective, the inadequacy of the private and the limited ability of law enforcement, annexed hereto as Composite *Exhibit “7”*

B. The Issuance Of An Injunction Shall Not Impede The Defendants From The Continued Operation Of Their Network Of Web Sites – The issuance of an injunction

restraining the Defendants from further exaggeration of their ability to control access to their Network does not impede the Defendants from continuing to conduct their business, only from further misleading prospective subscribers. Similarly, an injunction restraining the Defendants from further maintaining a message board devoted to UCSY, will simply require those interested in continuing a dialogue relative to UCSY to go elsewhere to satisfy their perverse appetites. The other 39,999 public companies shall still be fair game, and possible provide a diversity of diet that will once again stimulate traffic on Defendants' Network.

C. An Injunction Is The Only Means For Protection Of Plaintiffs From The Cyber Stalker – Because of the construct of the Defendants' Network of web sites, there is no effective control, nor any interest in effective control, over the use and/or misuse of the electronic message boards created and maintained by the Defendants on their Raging Bull web site. The only means for protection of Plaintiffs from further exposure to abuse and harassment, on the Defendants' Network, is to de-list the message board devoted to UCSY, and to install whatever filter/block is needed to prevent its re-establishment.

VI. THE ENTRY OF AN INJUNCTION WOULD NOT ADVERSELY EFFECT THE PUBLIC INTEREST

The public interest in the enjoining false and misleading representations, such as those made by Defendants to prospective subscribers to the Defendants Network, and in the prevention and facilitation of cyber stalking on such Network, is paramount to maintenance of an environment conducive to ordered liberty. Presently, private interests such as Defendants, profit from reckless and malicious statements by individuals, who are insulated from attribution by these same private interests. Under the controls in place on the Defendants Network, these same individuals are free to commit lawless acts, and the Defendants powerless to prevent them, or alternatively, to assist law enforcement to identify these individuals, so that they can be held to account for such lawless behavior.

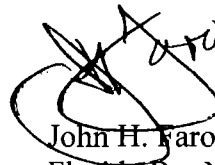
The deletion of the UCSY message board from the Raging Bull web sites, and the imposition of an electronic filter/block to its re-establishment, is necessary to achieve this objective. Nothing is lost by such injunction, and the Defendants Network can continue to host message board for other public companies. This removal of UCSY from this mix is indeed inconsequential to Defendants, while permitting a fledgling company to promote its

business unimpeded from anonymous and malicious extortionists, which is in everyone's interest

VII. SUMMARY & CONCLUSION

The Plaintiff, ZWEBNER, has established herein a substantial likelihood of success upon the merits of his claims against the Defendants for consumer fraud & cyber stalking; and, the Plaintiff, UCSY, for violation of the Florida Anti-Dilution statute. The irreparable harm caused to him and to his company, is to be further supplemented by Affidavit, which shall be filed in the immediate future. Insofar as the balancing of the equities favors the entry of an injunction and such injunction is in the public interest, it is respectfully, requested that their Motion be granted.

Respectfully,

A handwritten signature in black ink, appearing to read "John H. Faro", is written over a circular stamp or seal.

John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiffs

Faro & Associates
44 West Flagler Street, Suite 1100
Miami, Florida 33130-1808
phone (305) 424-1112
fax (305) 424-1114

EXHIBIT “4”

From the desk of Michael J Zwebner
Suite 12F
407 Lincoln Road
Miami Florida 33139
Tel 305 672 6344
Email: MJZwebner@Sprynet.com

April 12th 2002

Legal Department
Community Manager
Lycos, Inc.
100 5th Ave
Waltham, MA 02451

Letter sent by Mail, Fax and Email to :
communities@lycos.com

Dear Sir / Madam,

I write to you once again regarding several posters on the UCSY web chat line on Raging Bull.

Over the past year, I have had occasion to write to you on many occasions complaining about certain posters that are both defaming me, libeling me, making false and accusatory statements, and generally acting against the Raging Bull Terms Of Service. My Complaints seem to go unanswered, and your organization seems more intent in protecting the anonymity and continuity of the posters, with total disregard to the victim here (myself)

I have told you several times in then past that I will take legal action, and file suit against YOUR organization if you continue to ignore me, and continue to allow this unabated onslaught of slander and libel.

Page 2

The two main aliases that I am bringing to your attention this time, are: **“Tobias95”, and “CrawleySmith”**. I suggest you look at their postings and see for yourself the vulgarity, evilness, and defamatory nature of their posts. For your information, “CrawleySmith” is none other than Mr Roberto G Villasenor, who has used some 15 other aliases already on Raging Bull, and one that you have deleted many times over. He seems to return with absolute impunity, and your company seem totally uninterested in enforcing your own terms of service.

I have now again written to you, and expect to see your dealing with this matter soonest. I again here repeat some of the facts previously brought to your attention.

On Raging Bull, I have been attacked on line, accused of being a criminal, accused of everything from being a member of the Mafia, Running a Criminal Gang, Murder to Money Laundering, to Stock Manipulation, Fraud, acting illegally etc. I have also been accused on line of being a homosexual, and as a result of all these outrageous postings, I have suffered severe pain, both emotional and physical, and my general health has suffered badly.

I have and also suffer from accusations that have severely impeded my business activities, and I believe that the shareholder base of my companies have suffered too as a result of these posts. I have lost substantial sums of Money as a result of these posts.

For the record, (other than for driving offenses) I HAVE NEVER BEEN ARRESTED, INDICTED OR CONVICTED NOR EVEN INVESTIGATED BY ANY LAW ENFORCEMENT, SEC, FBI, DEA, OR ANY GOVERNMENT AGENCY for any crime, WHATSOEVER.

I am not going to re-post his postings here in this letter, as you are well able to access the UCSY and TVCP chat lines, and see for your self the level and ferocity of his blatant lies and false postings. I request you do take a serious look at his postings, and then decide what action you wish to take.

Page 3.

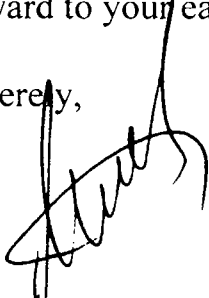
I would like to hear from you soonest as to what action you propose to take to stop these personal attacks. Nothing less than a complete ban on this type of posting is acceptable. **THIS FALLS UNDER YOUR RULES.**

Depending on your responses, and the actions you decide to take, I will decide with my legal advisors the next action we will have to take to stop this outrageous behavior. If necessary, we may have NO choice but to file a law suit against LYCOS for the unending facilitation of the Raging Bull medium for these attacks.

I trust you will work with me on this matter to help resolve this situation.

I look forward to your early response.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael Zwebner", written over the "Yours sincerely," text.

Michael Zwebner.

EXHIBIT "5"

From the desk of Michael J Zwebner
Appt 3801, Blue Diamond Building
4779 Collins Avenue
Miami Beach FL 33140
Tel / Fax 305 535 1525
Email mjzwebner@sprynet.com

August 5, 2003

Mr. Jamie Carney
Raging Bull
Lycos Network Abuse Manager
100 5TH Street
Waltham
MA 02451

LETTER BY FAX // OFFICIAL WARNING AND NOTICE.

Dear Mr. Jamie Carney,

I have reached the end of the tether with regards your company's ability to comply with your own stated "terms of use" and conditions of posting.

I have in the past few days TOS'ed several posters, and demanded that you delete both the posts and the posters aliases. You have not complied with these requests, nor have you acted in accordance with your contractual obligations. In the latest TOS's I brought your attention to poster **"65175R"** who I have identified is poster (Roberto Villasenor) who is now using this new alias.

He has previously posted under alias "theworm_06" (as well as several others) This poster is Roberto Villasenor Jr, of Sherman Oaks Los Angeles Ca.

The terms of service of LYCOS for posters includes the following sentence :

Multiple aliases

Posting under more than one member name, this includes creating a new member name after a suspension or deletion.

This is only ONE of the terms of use that this poster is in transgression. In my view, he is acting in direct disregard of almost ALL YOUR RULES.

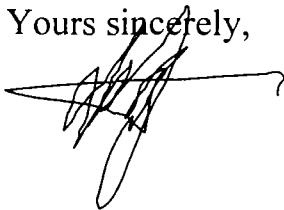
It seems your company / organization is either incapable or unwilling or deliberately failing to enforce the very terms of use and conditions of posting that YOU yourselves contract all your registered users to. You are therefore guilty of "Breach of Contract" in this regard, and I am suffering as a result of your actions or inactions.

I have now written to you too many times, and yet you fail to deal with this matter. Therefore, I will have to resort to other actions to stop this nonsense, and your indifference to what is transpiring on your web/chat sites.

If you have any questions or comments or wish to discuss this matter with me, you may call me at any time to my home number above 305 535 1525, or you may reach me on my cell phone to 617 513 2529. This the last time I plan to write to you on this matter.

You have now been put on notice !.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael J Zwebner", with a long horizontal line extending to the right.

Michael J Zwebner

CC Mark Van Wagoner - Attorney

EXHIBIT "6"

From the desk of Michael Zwebner
Suite 12K, 407 Lincoln Road
Miami beach FL 33139
Tel 305 672 6344
Fax 305 672 1965
Email: mjzwebner@sprynet.com

Mr. E. Solowey, - Attorney
Terra Lycos Inc / Raging Bull
100 Fifth Avenue
Waltham MA 02451

December 30th 2003

Letter by FAX and Overnight Mail

Dear Mr. Solowey,

I draw your attention to Poster alias: **“quondo1”** who is posting on Raging Bull UCSY chat line.

As you must certainly know, this is the most recent alias of Roberto G. Villasenor, Jr., who has used, among others, the following aliases: **“the_worm06”**; **“no_insiders”** ; **“SCRI_852”**; **“The Worm_06A”**; **“65175R”**; **“Henry_Johnson123”**. He has now again reposted several times a defamatory article from the Mail on Sunday. Before I was aware that he was essentially “judgment proof,” I previously sued him over the publication of these canards. In addition to this republication of foul defamation, his other recent posts are outrageous, harassing and transgresses your own terms of service.

I have brought Mr. Villasenor to the attention of Raging Bull / Lycos on numerous occasions, (letters, faxes and emails to Jamie Charney) and you have previously determined that he would not be permitted to use your service. Let me remind you that the terms of service of LYCOS for posters includes the following sentence :

Multiple aliases

Posting under more than one member name, this includes creating a new member name after a suspension or deletion.

If your terms of service mean anything, Mr. Villasenor should have no access to your boards. If you cannot police this one wild poster, it may mean that your supposed rules are merely illusory and, perhaps, misleading to the general public. Even if Mr. Villasenor's current posts were not defamatory, harassing and in plain violation of your published rules, those posts should be deleted and the poster's ISP or other addresses should be blocked because of prior violations. It is outrageous that you have and continue to allow this poster to continue to return to RB, and post the lies and false insinuations that he does, with total impunity.

Others of your clients have defamed me and I have attempted merely to find a real name so I can confront these cyber-cowards in Federal Court. Despite your published statements to the contrary, you have interfered with legal processes to protect these posters who violate your terms of service.

Here, then is another clear opportunity for your company to demonstrate what it considers to be integrity. Will you protect this poster? Do your terms of service have meaning? I believe that you act in arbitrary and capricious ways to essentially void your public agreements and to act as a publisher as that term is defined in Internet law.

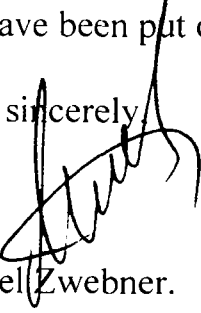
I DEMAND YOU IMMEDIATELY STOP THESE POSTS, DELETE THEM AND BLOCK THE POSTER PERMANENTLY.

I have now written to your organization on many, many occasions. You seem totally either unable or unwilling to take action, and enforce YOUR own terms of service. You seem to want to leave me no option but to resort to legal action against your company.

Page 3

You have been put on notice for the last time.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Zwebner". The signature is written in a cursive style with a large, sweeping initial "M".

Michael Zwebner.

EXHIBIT "7"

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 es to existing conditions."¹⁸⁹
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 nd active roles that women
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The Dilemma of the Gendered
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 l (1986).

THE DARK SIDE OF THE WEB: CYBERSTALKING AND THE NEED FOR CONTEMPORARY LEGISLATION

JOSEPH C. MERSCHMAN

INTRODUCTION

Each morning I wake up wondering, is this the day I will die? I spend most of my day looking over my shoulder . . . I can't sleep at night listening for noises that he is in my house. When I do sleep my dreams are about being stalked and killed. There isn't a moment, awake or asleep that I can escape the fear.¹

Unfortunately, the terror expressed in this statement is not an anomaly. Although the widespread media attention afforded celebrity stalking² cases gives the impression that the crime is uncommon and only involves high-profile people, in reality it is committed everyday against scores of untold victims.³ For instance, in her recent book, Linden Gross tells the story of Lee Gilman, a young art director who sparked the interest of one of her neighbors. While Lee was away from home one day, her faceless admirer left two dozen flowers at her doorstep with a message that read, "I've been admiring you. You're beautiful."⁴ The note was signed with the name "Stanley" and ended with a happy face.⁵ Stanley wrote rambling letters to Lee over the next month—many of them containing pages

¹ J.D. candidate, University of Connecticut School of Law, 2001. I would like to thank my parents, Ed and Georgia, for their unwavering love and support. I also thank Professor Paul Berman for his continued guidance and encouragement throughout this endeavor.

² *Violence Against Women Act of 1999, Stalking Prevention and Victim Protection Act of 1999: Hearings on H.R. 1869 and H.R. 1248 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 99 (1999) [hereinafter *Hearings*] (statement of David Beatty, Director of Public Policy, National Center For Victims of Crime, quoting a victim he spoke with over the Center's toll-free hotline).

³ The U.S. Department of Justice defines stalking as "harassing or threatening behavior that an individual engages in repeatedly." U.S. DEP'T OF JUSTICE, *STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 5* (1998) [hereinafter *STALKING AND DOMESTIC VIOLENCE*]. This behavior may or may not be accompanied by a credible threat and it may or may not be a precursor to violence. *Id.*

⁴ *Id.* at 1.

⁵ LINDEN GROSS, *SURVIVING A STALKER: EVERYTHING YOU NEED TO KNOW TO KEEP YOURSELF SAFE 98* (2000).

⁶ *Id.*

of unintelligible poetry-- that often appeared at her doorstep during the short time it took her to walk to the nearby market and back.⁸ Stanley's letters all contained the same line: "If you want to meet me, leave a note under the left rear tire of your MG."⁹ Lee became increasingly frightened and began having trouble sleeping.⁸ She started to worry that someone was watching her every move.⁹ Lee had become so afraid that during the evenings "she would sit in her tiny house with the lights off and look up at the apartment complexes that rose high above her on either side to see if she could spot a silhouette of someone looking down."¹⁰

After a while, Stanley stopped writing. His final note to Lee read, "I guess you are not going to respond," his signature happy face sliced with a dotted line.¹¹ Lee never received another letter from Stanley.¹² However, a few weeks after the letters stopped, Lee's cat disappeared.¹³ Later that day, Lee found her cat's mangled collar in her mailbox.¹⁴ Since the identification tags on the collar listed only the cat's name and Lee's phone number, whoever placed it in the mailbox knew exactly to whom the cat belonged.¹⁵

In another case, a University of San Diego honors graduate terrorized five female university students by bombarding them with hundreds of violent and threatening e-mails.¹⁶ One such e-mail warned, "REPLY TO MY E-MAIL OR YOU WILL DIE."¹⁷ Another stated, "I'll give you until this Friday to answer my e-mail or I'll show up at your cell physiology class or go to your house."¹⁸ The five female victims were forced to endure this terror for nearly a year.¹⁹

In 1998, a California man posted personal ads on the Internet under the guise of a woman he met at church who had rejected his romantic advances.²⁰ The ads, which included the woman's home address and tele-

⁸ *Id.* at 99.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See REPORT FROM THE ATTORNEY GENERAL TO THE VICE PRESIDENT, CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY 5 (Aug. 1999) [hereinafter CYBERSTALKING: A NEW CHALLENGE]. "E-mail" is an abbreviation for electronic mail. For a discussion of the Internet generally and e-mail specifically, see discussion *infra* Part III.

¹⁸ Suzanne Choney, *Stalking in Cyber Space, Cases Start to Grow, Along With Computer Use*, SAN DIEGO UNION-TRIB., June 22, 1999, at 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ [North] Hollywood Man Charged in 1st Cyber-Stalking Case, L.A. TIMES, Jan. 22, 1999, at A1.

phone number, stated that she harbored fantasies of being raped.²¹ Six different men visited the woman's apartment over a five-month period, willing to fulfill her rape fantasies.²² The terrified woman did not even own a computer.²³

The United States is currently plagued by the problem of stalking. While the victims, like those in the examples above, have suffered from the effects of stalking for years, it was not until a mere decade ago that this longstanding problem became widely recognized.²⁴ In 1990, California acknowledged the seriousness of stalking when it became the first state to enact a statute criminalizing the behavior.²⁵ By 1995, all fifty states and the District of Columbia had statutes in place that outlawed stalking.²⁶ But now, legislators and law enforcement officials are being confronted with a new problem. Growing ever more savvy, stalkers are utilizing the Internet in increasing numbers to commit their crimes.²⁷ This method of stalking, known as "cyberstalking," is proving to be beyond the scope of conduct criminalized by many stalking statutes. In addition, criminals are likely to avoid arrest and prosecution even in states with contemporary stalking statutes because of a systemic lack of understanding among judges and law enforcement officials about the nature of stalking and its harmful effects. This lack of understanding about stalking generally, and cyberstalking in particular, is caused, at least in part, by a lack of resources for and inadequate training of law enforcement officers. As a result, even effectively drafted stalking statutes are not being enforced to their fullest potential. This shortfall is leaving thousands of victims vulnerable both to cyberstalking and more traditional stalking methods.

This Note highlights the crime of cyberstalking and the inability of the current legal regime to adequately address it. This focus is cast against the backdrop of the stalking problem in general and the devastating effects of the crime on multitudes of victims in this country each year. This approach highlights the realization that cyberstalking, while the newest form of stalking, is only one of an infinite number of methods a stalker can use to terrorize a victim. Therefore, the problems presented by cyberstalking and the potential solutions to these problems are inextricably intertwined with the problems and solutions presented by more traditional forms of stalking.

²¹ *Id.*

²² *Id.*

²³ Andrea Rock, *Stalkers On Line*, LADIES HOME J., Mar. 1, 2000, at 60.

²⁴ See STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 24.

²⁵ *Id.* at 16.

²⁶ *Id.*

²⁷ See CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 6.

Part I outlines stalking and its effects, discussing the alarming prevalence of stalking in the United States, profiling stalkers and their victims, and noting the psychological and social effects of stalking.

Part II surveys the current state and federal stalking statutes that were enacted to address the newly acknowledged problem of stalking. It then analyzes these statutes in the context of traditional forms of stalking and discusses the potential strengths and weaknesses of different types of stalking statutes. The section concludes with a discussion and analysis of the constitutional challenges these statutes have faced.

Part III describes the newest form of stalking, cyberstalking, and the ways in which it is being perpetrated. The section starts with a discussion of the Internet and the characteristics that make it such an appealing medium for stalkers to carry out their crimes. Part III concludes with a discussion of the steps that private industry has taken to combat cyberstalking and how these steps could be taken further.

Finally, Part IV considers several potential solutions to stalking in cyberspace. The section applies the current state and federal stalking statutes to the problem of cyberstalking. After a thorough analysis, the section draws a conclusion similar to the one arrived at in Part II—that many of the current statutes and their enforcement are insufficient to combat this new form of stalking. Part IV then considers the congressional response to cyberstalking, The Stalking Prevention and Victim Protection Act of 1999.²⁷ The section concludes that, while representing a serious effort at providing better protection for victims of stalking, this Act is an inadequate response to cyberstalking and susceptible to potential constitutional challenges. A proposed Model Federal Stalking Statute is then outlined and discussed, including the justifications for its provisions. The Note closes with a brief conclusion and a proposed Model Federal Stalking Statute.

²⁷ H.R. 1869, 106th Cong. (1999).

I. STALKING AND ITS EFFECTS

A. *The Prevalence of Stalking*

Although it is difficult to know the exact number of people in the United States who are stalked each year, the National Violence Against Women (NVAW) Survey—the first comprehensive national survey ever conducted on the issue—places the number of victims at approximately 1,375,000 annually;²⁹ of those, over one million are women.³⁰ Illustrating the magnitude of this number, the NVAW Survey also finds that approximately three hundred thousand women were the victims of an attempted or completed rape during the previous year.³¹ Therefore, the Survey indicates that a woman is three times more likely to be stalked than raped in a one-year period.³²

The Survey also finds that over eight million women—roughly one in every twelve—have been stalked at some point in their lives.³³ The number of women who reported being stalked jumped to over twelve million when the definition of stalking was relaxed to include behavior that caused the victim to feel only somewhat or a little frightened, as opposed to feeling extremely frightened.³⁴ This statistic reveals that, in addition to numerous full-fledged stalking cases, there are millions of other incidents each year in the United States that border on stalking.

B. *The Act of Stalking: Traditional Behavior*

Although no two stalkers, and therefore no two methods of stalking, are identical, there are several types of behavior in which a “typical” stalker frequently engages to commit his crime.³⁵ Stalking victims have reported that their stalkers engage in the following types of behavior: bombarding the victim with incessant phone calls (including calls in

²⁹ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 5–6. These numbers were obtained by applying the percentages obtained from the NVAW Survey to the U.S. Census estimates of the number of women and men in the country. *Id.* The NVAW Survey was “a nationally representative telephone survey of 8000 U.S. women and 8000 U.S. men.” *Id.* at 5. Stalking, as defined by the survey, constitutes “a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communications, or verbal, written or implied threats, or a combination thereof, that would cause a reasonable person fear, with repeated meaning on two or more occasions.” *Id.* at 6.

³⁰ *Id.* at 6.

³¹ *Id.* at 7.

³² *Id.* This comparison, of course, is not meant to minimize the heinous crime of rape but only to highlight the prevalence of stalking in the United States.

³³ *Id.* at 6.

³⁴ *Id.* at 8.

³⁵ Although stalkers can be either male or female, I refer to stalkers as males in this Note since the overwhelming majority of stalkers are men. See STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 10.

which the stalker disconnects as the phone is answered and never actually speaks to the victim); constantly sending gifts and letters to the victim that often include declarations of affection and love; following the victim; stealing the victim's mail; spying on the victim or standing outside her home, place of work or recreation; vandalizing the victim's property; and killing, or threatening to kill, the victim's family pet.³⁶

Stalkers may have various reasons for engaging in this type of conduct. Some may desire to control the victim out of jealousy, anger, or revenge, while others may act out of obsession and an attempt to win the affection of the victim.³⁷ Although some of these acts may seem benign, such as sending letters or gifts to a person, the acts may be only a small piece of what could eventually become an extremely dangerous puzzle.³⁸ These acts can be a prelude to violence against the victim, including assault, rape, and murder.³⁹ This violence is estimated to occur between 25% and 35% of the time.⁴⁰ As stalking expert Dr. Robert Fein noted:

Stalking, like assassination, is a form of "targeted violence," a situation in which there is a known perpetrator and/or target. Like assassination, stalking—and the violent outcomes sometimes associated with stalking cases—includes a pattern of behavior Behavior is key A behavior seemingly as innocuous as sending flowers (which sends the message "I know where you live and I am tracking you") may be part of a pattern of stalking.⁴¹

Another factor adding to the difficulty of determining which behavior is dangerous and which is harmless is the fact that fewer than half of all stalking victims are directly threatened by their stalker.⁴² Rather, it is the stalker's course of conduct, taken in context, that causes a reasonable person to fear for her safety.⁴³ This fact underscores the notion put forth by Dr. Fein that the focus of concern needs to be on the behavior of the stalker and its impact on the victim, rather than on any overt threats that may or may not be made.⁴⁴

³⁶ *Id.* at 12.

³⁷ U.S. DEP'T OF JUSTICE, REGIONAL SEMINAR SERIES ON IMPLEMENTING ANTI-STALKING CODES 4 (June 1996) [hereinafter REGIONAL SEMINAR SERIES].

³⁸ See *Hearings*, *supra* note 1, at 99 (statement of Dr. Robert Fein, forensic psychologist, U.S. Secret Service's National Threat Assessment Center).

³⁹ See *id.* at 32 (statement of Bonnie J. Campbell, Director, Dep't of Justice Violence Against Women Office).

⁴⁰ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 2.

⁴¹ *Hearings*, *supra* note 1, at 98 (statement of Dr. Fein).

⁴² STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 13-14.

⁴³ *Id.* at 14.

⁴⁴ See *Hearings*, *supra* note 1, at 99 (statement of Dr. Fein).

*C. Profiles of Stalkers and Their Victims**1. The Stalkers*

Since the problem of stalking has only recently gained widespread recognition, research on this issue is still quite sparse.⁴⁵ Much of the earliest research focused on the high-profile cases of strangers stalking celebrities.⁴⁶ These dramatic situations captured the attention of not only researchers and the media, but the criminal justice system as well and helped create the public perception that stalking is a crime perpetrated only by strangers.⁴⁷ However, further research has revealed this to be an incomplete notion.⁴⁸

Generally, a stalker is classified in one of three categories based on his relationship with the victim:

1. Intimate or former intimate stalker. He may be married to or divorced from the victim, a current or former cohabitant, serious or casual sexual partner, or former sexual partner of the victim. A history of domestic violence may also exist.
2. Acquaintance stalker. He knows the victim casually, either through formal or informal contact. For example, he may be a coworker or neighbor, or he may have dated the victim once or twice but was not a sexual partner.
3. Stranger stalker. He does not know the victim at all. Cases involving celebrities and other public figures generally fall into this category.⁴⁹

Though stalking is a gender-neutral crime, research has shown that the overwhelming majority of stalkers are male.⁵⁰ Confirming previous reports, the NVAW Survey found that only 23% of female victims reported being stalked by strangers, which suggests that the remaining 77% were stalked by a current or former intimate partner or acquaintance.⁵¹ In fact, 59% of female victims were stalked by some type of intimate partner—defined as a current or former husband, cohabitating partner, date, or boyfriend.⁵²

⁴⁵ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 2.

⁵⁰ In fact, the NVAW Survey revealed that approximately 87% of stalkers are male. *Id.* at 10.

⁵¹ *Id.*

⁵² *Id.*

Violence is estimated to occur in 25% to 35% of stalking situations; the stalker most likely to be violent is one who has had an intimate relationship with the victim.⁵³ The NVAW Survey provides additional compelling evidence of a link between stalking and emotionally abusive behavior in intimate relationships.⁵⁴ It was found that ex-husbands who displayed emotionally abusive and controlling behavior were much more likely to stalk their ex-wives than those who did not display such behavior.⁵⁵ In addition, batterers were often found to be insecure and fearful of abandonment, and were therefore more likely to become obsessed and stalk their victims upon separation.⁵⁶ The presence of physical abuse can make the period of separation between a victim and her abuser the most dangerous time because, fearing the loss of the victim, the batterer will often escalate his abuse.⁵⁷ Stalking by intimates or former intimates also lasts significantly longer than non-intimate stalking. On average, this stalking will last almost two years and three months—a half-year longer than the “typical” case involving a stranger.⁵⁸

While stalkers are often classified into one of three categories based on their relationship with the victim, there are certain characteristics and patterns of behavior that transcend any categorical demarcation and may be a trait of a stalker in any of the three categories. One who is intellectually or socially disabled or simply awkward may use stalking in an attempt to form a relationship with the victim.⁵⁹ Another type of stalker is someone who is repeatedly rejected and channels the resulting humiliation into rage and anger.⁶⁰ These emotions “fuel [the stalker’s] pursuit of his victim.”⁶¹ Other stalkers have heroic fantasies of establishing or re-establishing a relationship with the victim.⁶² However, when the potential stalker finds that the victim is dating someone else, he begins the tracking and stalking behavior. This perverse behavior will often satisfy the offender: he gets his pleasure out of showing the victim he has control over her. Unfortunately, in some cases, the tracking and stalking no longer satisfies the stalker, and his behavior escalates into violence.⁶³

Although stalking is not normal or appropriate behavior, a stalker will not necessarily have a diagnosed mental illness.⁶⁴ However, the

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 15.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ *Id.*

⁵⁸ *Id.* at 21.

⁵⁹ Peter Monaghan, *Beyond the Hollywood Myths: Researchers Examine Stalkers and Their Victims*, CHRON. HIGHER EDUC., Mar. 6, 1998, at A17.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 51.

⁶⁴ REGIONAL SEMINAR SERIES, *supra* note 37, at 16.

mental illness most common among stalkers is erotomania.⁶⁵ Erotomania is the delusional belief of being loved by another.⁶⁶ Although research on erotomania may still be considered in its infancy relative to research on many other mental disorders, "some mental health experts speculate that erotomania is a psychotic variant of mourning."⁶⁷ An erotomaniac becomes obsessed with his victim and imagines that he has a relationship with the object of his obsession.⁶⁸ The situation is exacerbated by the fact that erotomaniacs misinterpret their objects' responses.⁶⁹ Sometimes a stalker suffering from this disorder will even have delusions that the victim is victimizing him.⁷⁰ Erotomania can be seen as a "romantic, almost spiritual union with an idealized true love."⁷¹

Erotomaniacs are often unmarried and socially immature. Their "loner" personalities make them unable to establish or sustain close relationships with others; they rarely date and have few, if any, sexual relationships.⁷² This delusional attachment to another is typically the only way erotomaniacs can allow themselves to experience any kind of intimacy.⁷³ As one commentator explains, "What erotomaniacs cannot attain in reality is achieved through fantasy, and it is for this reason that the delusion seems to be so difficult to relinquish: even an imaginary love is better than no love at all."⁷⁴

While erotomaniacs maintain adolescent-like fantasies of ideal love, their physical maturation makes it easier to attempt to realize their fantasies.⁷⁵ Erotomaniacs tend to be older, smarter, and better educated than other mentally ill law-breakers—most have graduated high school if not college.⁷⁶ This makes them even more dangerous because they tend to have greater intellectual and financial resources for pursuing their victims.⁷⁷

Erotomania transformed the life of Robert Bardo, the man largely responsible for bringing stalking to the attention of the nation. In 1990, Bardo shot and killed actress Rebecca Schaeffer in front of her Los Angeles apartment complex.⁷⁸ Bardo became obsessed with Schaeffer after

⁶⁵ DOREEN ORION, *I KNOW YOU REALLY LOVE ME* 33 (1997).

⁶⁶ *Id.*

⁶⁷ Monaghan, *supra* note 59, at A17.

⁶⁸ *Id.*

⁶⁹ ORION, *supra* note 65, at 71.

⁷⁰ Monaghan, *supra* note 59, at A17.

⁷¹ ORION, *supra* note 65, at 33.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 69.

⁷⁶ *Id.* at 35.

⁷⁷ *Id.*

⁷⁸ Mike Tharp, *In the Mind of a Stalker: The Man Who Killed Actress Rebecca Schaeffer is a Symbol of a Spreading National Menace*, U.S. NEWS & WORLD REP., Feb. 17, 1992, at 28.

watching her on the television show *My Sister Sam*.⁷⁹ He attempted to visit her twice at the Burbank, California studio where the series was filmed, but he was turned away both times by security.⁸⁰ This rebuffing led Bardo to believe that the actress was getting arrogant.⁸¹ Consequently, Bardo later tracked down Schaeffer's home address through a private detective to whom Bardo paid \$250 for the service.⁸² On the last fateful day of her life, as Schaeffer opened the glass security door to her apartment complex, Bardo killed her with one shot to the chest.⁸³ Even after the shooting, Bardo has been unable to let go of his obsession with the young woman whose life he took. In a jailhouse interview, Bardo insisted that Schaeffer's appointment book contained his name and phone number on the day she died.⁸⁴ This phantom fact, which existed only in his mind, was his proof that she was interested in him and was going to call.⁸⁵

2. *The Victims*

Though stalking is a gender-neutral crime, it is perpetrated in the vast majority of instances against women. Nearly four out of five victims of stalking are female.⁸⁶ The NVAW Survey estimates that one in every twelve women will be a victim of stalking at some time in her adult life.⁸⁷ The "average" stalking victim is in her late twenties, and 74% of all victims are between the ages of eighteen and thirty-nine.⁸⁸ Although any woman or man can become a victim of stalking, women who are involved in relationships with men who are emotionally abusive and controlling are particularly susceptible to this insidious crime.⁸⁹ Additionally, therapists, health professionals, lawyers, and adult-education teachers, regardless of gender, are common targets of stalking.⁹⁰

D. *The Resulting Psychological and Social Effects of Stalking*

Stalking is an act that can leave a victim traumatized for years after the stalking has ceased. The most obvious harm that could result from stalking is violence. As discussed previously, stalkers are violent toward their victims in 25 to 35% of all cases.⁹¹ However, stalking also results in

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 10.

⁸⁷ *Id.* at 8.

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 15; *see also* discussion *supra* Part I.C.1.

⁹⁰ Monaghan, *supra* note 59, at A17.

⁹¹ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 2.

great psychological and social consequences, even if no actual violence occurs.⁹² Stalking can cause victims to suffer acute emotional distress and can seriously disrupt their lives. Some victims lose their jobs when they are stalked at work, and others are forced to change their appearance, move to a different city or state, and maintain anonymity.⁹³ Furthermore, 30% of female victims and 20% of male victims seek psychological counseling.⁹⁴ One expert estimates that as many as 70% of victims suffer from a form of post-traumatic stress disorder marked by chronic anxiety, depression, and sleep disturbances.⁹⁵ Additionally, nearly one in four victims considers suicide.⁹⁶

The prevalence of stalking and its accompanying harms have only recently begun to enter the public consciousness. As a result, research about the crime is still in its early stages, and there is very little specific information available that measures its broader social effects. Undoubtedly, the negative ramifications extend beyond those felt by the direct victims of the crime. For instance, family members and close friends of the victims likely suffer psychological trauma as well. Moreover, quantifiable economic harm can result from this crime. Over one-quarter of victims reported having lost time from work as a result of the stalking, including 7% who never returned.⁹⁷ On average, excluding those who left their jobs permanently, victims missed eleven days of work as a result of being stalked.⁹⁸ While it is not clear exactly why the victims missed work, typical reasons given by stalking victims include attending court hearings, meeting with a psychologist or other health professional, receiving counsel from an attorney, and avoiding their stalker.⁹⁹

II. THE ENACTMENT OF STALKING STATUTES AND THE CONSTITUTIONAL CHALLENGES

A. State Statutes

Stalking went unacknowledged in the United States for many years. It was not until the 1990 murder of actress Rebecca Schaeffer, described in Part I.C.1 above, that stalking entered the national consciousness. This dramatic murder, which received an enormous amount of media attention, was instrumental in opening the collective eyes of the country to a

⁹² Jane E. Brody, *Researchers Unravel the Motives of Stalkers*, N.Y. TIMES, Aug. 25, 1998, at F1.

⁹³ *Id.*

⁹⁴ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 19.

⁹⁵ Brody, *supra* note 92, at F1.

⁹⁶ *Id.*

⁹⁷ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 20.

⁹⁸ *Id.* at 21.

⁹⁹ *Id.*

problem that had reached alarming proportions by the 1980s.¹⁰⁰ Soon after the Schaeffer murder, California became the first state to criminalize the act of stalking. This created a domino effect among the states that resulted in the passage of stalking statutes in all fifty states and the District of Columbia by 1995.¹⁰¹

The behavior someone must display to fall under the provisions of these statutes varies from state to state. All of the statutes focus on the behavior of the perpetrator by requiring some type of action such as following, harassing, or engaging in a "course of conduct" that is directed at a victim.¹⁰² Some statutes take this focus on the perpetrator one step further by requiring that prosecutors prove not only the commission of certain acts but also the presence of a specific intent to harass or instill fear in the victim.¹⁰³ Other statutes go as far as requiring actual physical pur-

¹⁰⁰ See *id.* at 59; see generally Tharp, *supra* note 78 at 28.

¹⁰¹ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 16.

¹⁰² ALA. CODE § 13A-6-90 (1992); ALASKA STAT. § 11.41.270 (Michie 1993); ARIZ. REV. STAT. § 13-2923 (1998); ARK. CODE ANN. § 5-71-229 (Michie 1995); CAL. PENAL CODE § 646.9 (Deering 2000); COLO. REV. STAT. § 18-9-111 (2000); CONN. GEN. STAT. § 53a-181e (1995); DEL. CODE ANN. tit. 11, § 1312A (1996); FLA. STAT. ch. 784.048 (1997); GA. CODE ANN. § 16-5-90 (2000); HAW. REV. STAT. § 711-1106.5 (1995); IDAHO CODE § 18-7905 (1992); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1999); IND. CODE § 35-45-10-1 (1998); IOWA CODE § 708.11 (1998); KAN. STAT. ANN. § 21-3438 (1992); KY. REV. STAT. ANN. §§ 508.130, 508.150 (Michie 1992); LA. REV. STAT. ANN. § 14:40.2 (West 2000); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1999); MD. ANN. CODE art. 27, § 124 (1998); MASS. GEN. LAWS ch. 265, § 43 (West 1997); MICH. COMP. LAWS § 28.643(8) (1998); MINN. STAT. § 609.749 (2000); MISS. CODE ANN. § 97-3-107 (2000); MO. REV. STAT. § 565.225 (1993); MONT. CODE ANN. § 45-5-220 (1995); NEB. REV. STAT. § 28-311.03 (1998); NEV. REV. STAT. § 200.575 (1999); N.H. REV. STAT. ANN. § 633:3-a (2000); N.J. STAT. ANN. § 2C:12-10 (West 1999); N.M. STAT. ANN. § 30-3A-3 (Michie 1997); N.Y. PENAL LAW § 120.45 (McKinney 1999); N.C. GEN. STAT. § 14-277.3 (1997); N.D. CENT. CODE § 12.1-17-07.1 (1995); OHIO REV. CODE ANN. § 2903.211 (West 2000); OKLA. STAT. tit. 21, § 1173 (1993); OR. REV. STAT. § 163.732 (1995); 18 PA. CONS. STAT. § 2709 (1997); R.I. GEN. LAWS § 11-59-2 (1995); S.C. CODE ANN. § 16-3-1700 (Law. Coop. 1995); S.D. CODIFIED LAWS § 22-19A-1 (Michie 1997); TENN. CODE ANN. § 39-17-315 (1995); TEX. PENAL CODE ANN. § 42.072 (West 1999); UTAH CODE ANN. § 76-5-106.5 (2000); VT. STAT. ANN. tit. 13, § 1061 (1999); VA. CODE ANN. § 18.2-60.3 (Michie 1998); WASH. REV. CODE § 9A.46.110 (1999); W. VA. CODE § 61-2-9a (1999); WIS. STAT. § 940.32 (1999); WYO. STAT. ANN. § 6-2-506 (Michie 1993). While many states have multiple degrees of stalking—just as they do for other crimes such as burglary or murder—this footnote provides only one citation for each state, with the exception of Kentucky's statute, which is inextricably intertwined in two sections of its statutes. In the event that a state has more than one degree of stalking, the citation refers to the section of the applicable state statute that contains the lesser degree of stalking. For example, Connecticut provides for stalking in the first, second, and third degrees. CONN. GEN. STAT. § 53a-181(c)–(e) (1995). However, this footnote only cites to the last section because the purpose of this part of the Note is to determine the lowest degree of conduct required for a perpetrator to violate the nation's relevant stalking statutes.

¹⁰³ ALA. CODE § 13A-6-90 (1992); ARK. CODE ANN. § 5-71-229 (Michie 1995); CAL. PENAL CODE § 646.9 (Deering 2000); FLA. STAT. ch. 784.048 (1997); GA. CODE ANN. § 16-5-90 (2000); IDAHO CODE § 18-7905 (1992); KAN. STAT. ANN. § 21-3438 (1992); KY. REV. STAT. ANN. §§ 508.130, 508.150 (Michie 1992); LA. REV. STAT. ANN. § 14:40.2 (West 2000); MD. CODE ANN., art. 27, § 124 (1998); MASS. GEN. LAWS ch. 265, § 43 (West 1997); MISS. CODE ANN. § 97-3-107 (2000); MO. REV. STAT. § 565.225 (1993); NEB. REV. STAT. § 28-311.03 (1998); NEV. REV. STAT. § 200.575 (1999); N.M. STAT. ANN. § 30-3A-3

suit of the victim.¹⁰⁴ There are, however, some stalking statutes that shift the focus away from the perpetrator and toward the victim. Such statutes are concerned with the effect or potential effect of the perpetrator's behavior on the victim, focusing on the fear felt by the victim rather than on any intent that the perpetrator may or may not manifest.¹⁰⁵ Statutes of this type usually proscribe specific conduct by the perpetrator that would place a reasonable person in fear.

Although some state stalking statutes have the potential to be quite effective, many of them have severe limitations. For example, nearly one third of the statutes require the perpetrator to display some type of credible threat before any law enforcement agency can take action.¹⁰⁶ In order to be convicted of stalking in Massachusetts, an individual would have to, among other things, "make[] a threat with the intent to place [another] person in imminent fear of death or bodily injury."¹⁰⁷ This type of requirement is problematic because stalkers do not always make explicit threats against their victims. Rather than making explicit threats, the stalkers often pursue a course of conduct that, when taken in the aggregate, would cause fear in a reasonable person but stops short of an explicit threat.¹⁰⁸

In response to this problem, the majority of states that prohibit only acts accompanied by a credible threat allow the threat to be implied by conduct.¹⁰⁹ For example, Kansas defines stalking as "an intentional, mali-

(Michie 1997); N.C. GEN. STAT. § 14-277.3 (1997); OKLA. STAT. tit. 21, § 1173 (1993); 18 PA. CONS. STAT. § 2709 (1997); R.I. GEN. LAWS § 11-59-2 (1995); S.C. CODE ANN. § 16-3-1700 (Law. Co-op. 1995); S.D. CODIFIED LAWS § 22-19A-1 (Michie 1997); W. VA. CODE § 61-2-9a (1999); WYO. STAT. ANN. § 6-2-506 (Michie 1993).

¹⁰⁴ CONN. GEN. STAT. § 53a-181e (1995); HAW. REV. STAT. § 711-1106.5 (1995); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1999); MD. ANN. CODE art. 27, § 124 (1998); N.C. GEN. STAT. § 14-277.3 (1997); WIS. STAT. § 940.32 (1999).

¹⁰⁵ Ten states do not explicitly mention any requisite intent in their respective stalking statutes. ARIZ. REV. STAT. § 13-2923 (1998); DEL. CODE ANN. tit. 11, § 1312A (1996); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1999); IND. CODE § 35-45-10-1 (1998); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1999); MICH. COMP. LAWS § 28.643(8)(1998); N.J. STAT. ANN. § 2C:12-10 (West 1999); N.D. CENT. CODE § 12.1-17-07.1 (1995); TENN. CODE ANN. § 39-17-315 (1995); VT. STAT. ANN. tit. 13, § 1061 (1999).

¹⁰⁶ Six states require a threat to be made before any conduct qualifies as stalking. ALA. CODE § 13A-6-90 (1992); ARK. CODE ANN. § 5-71-229 (Michie 1995); CAL. PENAL CODE § 646.9 (Deering 2000); KAN. STAT. ANN. § 21-3438 (1992); KY. REV. STAT. ANN. § 508.130, 508.150 (Michie 1992); MASS. GEN. LAWS ch. 265, § 43 (West 1997). Another nine states require a threat only if the perpetrator is not physically pursuing the victim, i.e., when he is stalking the victim through "harassment." ARIZ. REV. STAT. § 13-2923 (1998); COLO. REV. STAT. § 18-9-111 (2000); DEL. CODE ANN. tit. 11, § 1312A (1996); IOWA CODE § 708.11 (1998); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1999); N.H. REV. STAT. ANN. § 633:3-a (2000); N.J. STAT. ANN. § 2C:12-10 (West 1999); UTAH CODE ANN. § 76-5-106.5 (2000); W. VA. CODE § 61-2-9a (1999).

¹⁰⁷ MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1997).

¹⁰⁸ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 14.

¹⁰⁹ Only Arkansas, Massachusetts, and West Virginia require the threat to be explicit. ARK. CODE ANN. § 5-71-229 (Michie 1995); MASS. GEN. LAWS ch. 265, § 43 (West 1997); W. VA. CODE § 61-2-9a (1999).

cious and repeated following or harassment of another person *and* making a *credible threat* with the intent to place such person in reasonable fear for such person's safety."¹⁰ The statute then defines "credible threat" as a "verbal or written threat or a threat implied by a pattern of conduct . . . made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety."¹¹ Defining the crime of stalking in such a manner alleviates the problem of needing an overt threat before conduct can fall under the statute.

However, this definition is linguistically redundant. To meet the definition of stalking under the Kansas statute, an individual must follow or harass a person in an intentional, malicious, and repeated fashion.¹² The statute defines "harassment" as a "knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose."¹³ The statute also requires that the perpetrator make a credible threat so as to place the victim in reasonable fear of her safety.¹⁴ However, since the threat may be implied by conduct, this requirement can simply be composed of the conduct of the perpetrator that satisfied the first part of the stalking statute: intentional, malicious, and repeated harassment. The credible threat required is no more than the conduct that was originally required to trigger the statute. Therefore, the inclusion of a credible threat as an element of stalking makes the language of this statute, and others similarly drafted, redundant.

A possible explanation for this redundancy is the desire of state legislators to avoid constitutional challenges to their statutes on overbreadth and vagueness grounds. The objective of these stalking statutes, as presumably is the case with any criminal statute, is to punish only culpable conduct. States that explicitly provide for a credible threat in their stalking statutes are presumed to be attempting to accomplish this objective. Requiring that a threat be made, whether implied or overt, removes most types of innocent conduct from the category of behavior that is forbidden by a particular stalking statute. However, as discussed above, a credible threat requirement is, in many instances, nothing more than a superfluous element of the crime.

Consequently, the insistence of many state legislatures to include a credible threat element in their respective stalking statutes poses two problems. First, it has the potential to make the prosecution of stalking cases much more difficult. Second, the credible threat requirement places an undue emphasis on the stalker and his behavior rather than on that

¹⁰ KAN. STAT. ANN. § 21-3438 (1992) (emphasis added).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

behavior's effect on the victim. By retaining the focus on the stalker's behavior, the psychological devastation that a victim suffers is downplayed. Furthermore, it perpetuates the belief that harm from stalking only occurs in the event of physical violence or the most egregious and "threatening" acts. This belief ignores the trauma that a victim endures when a stalker engages in conduct that may appear benign when in isolation, such as telephoning or e-mailing the victim, but amounts to psychological terrorism when done incessantly. As Dr. Fein noted, "A behavior seemingly as innocuous as sending flowers . . . may be part of a pattern of stalking."¹¹⁵

Although including a credible threat element in a stalking statute places undue emphasis on a stalker's behavior, some statutes focus on a stalker's behavior in more drastic ways. For instance, six states protect victims only against stalking that involves actual physical pursuit.¹¹⁶ Connecticut, for example, forbids conduct only if it involves "willfully and repeatedly following or lying in wait."¹¹⁷ This statute is based upon archaic views of stalking—those in which the only type of stalker is one who hides in bushes, dressed in camouflage, waiting for the opportunity to leap out and attack his unsuspecting victim. Although this type of stalking exists, it is but one of many methods used to perpetrate this crime. Thus, statutes like Connecticut's ignore the other means by which a stalker can harass his victim, such as sending letters and gifts, incessantly telephoning, or bombarding the victim with e-mails. Even if a person telephoned or e-mailed a woman daily threatening to rape and murder her, that person apparently could not be convicted of stalking in states like Connecticut with laws that require actual physical pursuit before allowing a victim legal protection from her predator.

A further problem with the nearly half of state stalking statutes is the presence of a specific intent element. Many stalking laws require the prosecution to prove specific intent—that the defendant specifically intended to injure or instill fear in the victim. This heavy burden on the state may help explain why there have been a limited number of prosecutions for stalking.¹¹⁸ When faced with a choice between pursuing a stalking conviction with a specific intent requirement or pursuing a conviction for a lesser offense with a lighter burden of proof, such as harassment, the prosecutor may be inclined to choose the latter.¹¹⁹ This issue

¹¹⁵ *Hearings, supra* note 1, at 99 (statement of Dr. Fein).

¹¹⁶ CONN. GEN. STAT. § 53a-181e (1995); HAW. REV. STAT. § 711-1106.5 (1995); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 1999); MD. ANN. CODE art. 27, § 124 (1998); N.C. GEN. STAT. § 14-277.3 (1997); WIS. STAT. § 940.32 (1999).

¹¹⁷ CONN. GEN. STAT. § 53a-181e (1995).

¹¹⁸ *Hearings, supra* note 1, at 101 (statement of Mr. Beatty). Mr. Beatty was directing his remarks toward the Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A (Supp. II 1996), but his words could be just as easily applied to state statutes that similarly require the prosecution to prove the specific intent of the defendant.

¹¹⁹ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 24.

becomes particularly compelling when looked at in the context of other options. For example, a statute could apply a reasonableness standard, i.e., the person knew or reasonably should have known that his conduct would cause an individual to reasonably fear for her safety, as justifiably as it applies a specific intent standard. Both provide sufficient notice to the defendant that his conduct is illegal, but only the reasonableness standard is practical enough to make many prosecutions feasible.¹²⁰

Another deficiency with stalking laws that include a specific intent element arises in the case of erotomaniacs. A person who suffers from this disorder generates an obsession for another person.¹²¹ He does not see the obsession and pursuit of his victim as wrong but instead sees it as a merging of two souls in an idealized true love.¹²² Therefore, an erotomaniac usually has no intention of causing great trepidation in his victim. This delusional state would presumably prevent a court from finding that a diagnosed erotomaniac possessed the specific intent required by most state stalking statutes.

B. Federalization

The U.S. Congress passed the Interstate Stalking Punishment and Prevention Act in 1996.¹²³ With the implementation of the federal stalking statute, federal resources—federal law enforcement agencies, officers, and federal prosecutors—joined with state and local efforts for the first time to change the way the justice system responds to the behavior of stalkers. The statute was enacted in response to the lack of adequate stalking statutes in general and the lack of protection from stalking on federal lands and across state lines.¹²⁴ Although the majority of stalking cases remain within state jurisdictions, thousands occur each year on federal lands and across state borders.¹²⁵

While states may still pursue charges against a person who stalks across state lines, the Interstate Stalking Punishment and Prevention Act provides important benefits for fighting this crime. In cases where the stalker has traveled from one state to another to commit the offense, it may be difficult for local law enforcement officials to gather enough evidence to prosecute the crime.¹²⁶ This is not problematic in a federal prosecution because of the nationwide resources of the Federal Bureau of Investigation (FBI). A federal prosecutor can avail herself of these valuable resources to gather evidence that could be located in opposite cor-

¹²⁰ *Hearings*, *supra* note 1, at 102 (statement of Mr. Beatty).

¹²¹ *ORION*, *supra* note 65, at 33-34.

¹²² *Id.* at 33.

¹²³ 18 U.S.C. § 2261A (Supp. II 1996).

¹²⁴ *See Hearings*, *supra* note 1, at 102 (statement of Mr. Beatty).

¹²⁵ *Id.*

¹²⁶ *Id.*

ners of the country. While the expense of such an investigation would likely be prohibitive for a local law enforcement agency, a federal prosecutor could gather this evidence and pursue the charges with much less effort and expense. The problem of stalking across state lines and the solution provided by the federal statute were instrumental in the enactment of the Interstate Stalking Punishment and Prevention Act.¹²⁷

The federal law protects against stalking when the perpetrator has crossed state lines to commit the crime.¹²⁸ It states:

Whoever travels across a State line . . . with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to, that person or a member of that person's immediate family . . . shall be punished as provided in section 2261 of this title.¹²⁹

As the language above demonstrates, the statute applies only when a stalker physically crosses a state line to commit the crime. It does not provide any federal recourse for a victim who is being bombarded with interstate telephone calls, letters, gifts, or e-mails.

C. Constitutional Challenges to Stalking Statutes

Although stalking laws have been the subject of numerous constitutional challenges since their inception, the statutes have withstood scrutiny.¹³⁰ Defendants on trial for stalking offenses have traditionally challenged stalking statutes on the grounds that they are unconstitutionally overbroad and vague.¹³¹ The first of these arguments rests upon the notion that a stalking law is unconstitutionally overbroad if it forbids conduct constitutionally protected by the First Amendment of the U.S. Constitution.¹³² The second argument is based on the idea that a penal law must

¹²⁷ See *Hearings*, *supra* note 1, at 32 (statement of Ms. Campbell).

¹²⁸ 18 U.S.C. § 2261A (Supp. II 1996).

¹²⁹ *Id.*

¹³⁰ See *STALKING AND DOMESTIC VIOLENCE*, *supra* note 2, at 35.

¹³¹ See, e.g., *People v. Zamudio*, 689 N.E.2d 254, 255 (Ill. App. Ct. 1997) (arguing that § 12-7.3(a) of the Illinois Criminal Code is overbroad because it applies to innocent conduct and is vague for lack of adequate definitions); *State v. Saunders*, 695 A.2d 722, 725 (N.J. Super. Ct. App. Div. 1997) (contending that the New Jersey stalking statute unconstitutionally prosecutes protected conduct and fails to adequately define the offense); *Commonwealth v. Miller*, 689 A.2d 238, 241 (Pa. Super. Ct. 1997) (claiming that the Pennsylvania stalking statute was overbroad because it infringed on the defendant's constitutional right to travel).

¹³² See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

sufficiently put people on notice of what conduct is prohibited. *Salt Lake City v. Lopez*¹³³ addressed these two constitutional issues and is, in a sense, a "typical" case challenging the constitutionality of state stalking statutes.

The defendant in *Lopez* sought a reversal of his stalking conviction on the grounds that the statute was unconstitutionally overbroad on its face and as applied to him, as well as unconstitutionally vague on its face.¹³⁴ The defendant claimed that the stalking statute infringed upon his First Amendment rights of freedom of association and freedom of movement.¹³⁵ The Utah Court of Appeals denied the defendant's claim and upheld the constitutionality of the state statute.¹³⁶ With regard to the first claim based on the facial overbreadth doctrine, the court reasoned that First Amendment rights "exist[] on a continuum, and can be regulated by the state for compelling interests."¹³⁷ The court found that the statute did not prohibit a substantial amount of association and movement.¹³⁸ Further, the court held that the statute was serving a compelling state interest in protecting citizens from threatening and harmful behavior.¹³⁹ Finally, it determined that the statute was narrowly drafted because it restricted only threatening or harmful behavior, with limited infringement on the rights of free association and movement.¹⁴⁰

This case and other state cases with similar holdings are in line with the U.S. Supreme Court's reasoning that a government may criminalize true threats without violating the First Amendment's protections against overly broad statutes.¹⁴¹ The act of stalking generally "involves conduct reasonably understood to constitute a threat of violence," and such threats may be criminalized consistent with the First Amendment's pro-

¹³³ 935 P.2d 1259 (Utah Ct. App. 1997).

¹³⁴ *Id.* at 1261.

¹³⁵ *Id.* at 1263.

¹³⁶ *Id.* at 1265.

¹³⁷ *Id.* at 1264.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* The court stated:

Under the statute, conduct is not criminal unless it is repeated (specifically defined as two or more occasions), and the defendant "intentionally or knowingly engages in a course of conduct" that is "directed at a specific person" such that a "reasonable person" would suffer emotional distress, and the defendant knows or should know that the specific person will suffer emotional distress. The restrictions this statute may impose on a person's ability to move about and associate freely are limited and justified by the state's compelling interest in protecting its citizens from threatening or harmful behavior.

Id. (quoting UTAH CODE ANN. § 76-5-106.5(2) (1995) (internal citations omitted)).

¹⁴¹ *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (emphasizing that speech implicates strong First Amendment protections so that a threat must be distinguished from what is constitutionally protected speech).

tections.¹⁴² Stalking can consist of various acts that must be considered as an amalgamation comprising a course of conduct that instills fear in a particular victim. The scope of conduct that can be involved in stalking involves such a wide range of actions that statutes criminalizing the behavior need to be relatively broad to be effective.¹⁴³ Because of this tension between the breadth of activities involved in stalking behavior and the expressive nature of the stalker's conduct or speech, a careful drafting of the statutes is required in order to avoid substantial interference with rights protected by the First Amendment.¹⁴⁴ If a particular statute is drawn too broadly, it could create a chilling effect on First Amendment rights.

As a result, the most effective and constitutionally sound stalking statute will be broad enough to criminalize as much threatening behavior as possible, but narrow enough to avoid outlawing a substantial amount of constitutionally protected activity. Despite this tension, stalking statutes have been consistently upheld in the face of overbreadth challenges.¹⁴⁵

Defendants have also argued that stalking statutes are unconstitutionally vague. Under the Due Process Clause of the Fourteenth Amendment,¹⁴⁶ a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."¹⁴⁷ Although the doctrine is concerned with both sufficient notice to citizens and arbitrary enforcement, the latter, which requires that the legislature establish minimal guidelines to govern law enforcement, is most important.¹⁴⁸ As the U.S. Supreme Court has stated:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.¹⁴⁹

If the legislature does not provide the necessary minimum guidelines, the statute would allow policemen, prosecutors, and juries to act capriciously, and would, therefore, be unconstitutional under the Due Process

¹⁴² CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 15.

¹⁴³ *See id.* at 15.

¹⁴⁴ *See id.*

¹⁴⁵ *See generally* Beth Bjerregaard, *Stalking and the First Amendment: A Constitutional Analysis of State Stalking Laws*, 32 CRIM. L. BULL. 307, 332 (July-Aug. 1996).

¹⁴⁶ *See* U.S. CONST. amend. XIV, § 1.

¹⁴⁷ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹⁴⁸ *Id.* at 357-58.

¹⁴⁹ *Id.* at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

Clause.¹⁵⁰ Nevertheless, although many defendants have challenged the constitutionality of state stalking statutes on vagueness grounds, courts have consistently rejected these challenges and upheld the statutes.¹⁵¹

Some stalking statutes have also been criticized for not requiring a high enough standard of *mens rea*. Critics argue that the statutes attempt to prevent future harm by attaching criminal liability before truly culpable conduct has occurred.¹⁵² According to established principles of criminal law, if a statute punishes on the basis of a potential future harm—as do statutes that criminalize attempts and conspiracies—due process requires that criminal liability attach only when the defendant has demonstrated the requisite intent to commit the crime in question. In such cases, the intent requirement, the *mens rea*, is heightened to offset the corresponding decrease in the activity requirement, the *actus reus*. Critics posit that stalking statutes attach criminal liability before any harmful act has occurred and do so without any heightened *mens rea* requirement.

This argument against stalking statutes is misguided, however. Stalking statutes do not punish on the basis of a potential future harm, but rather, they punish for a harm that is already occurring. As discussed previously, stalking can cause great social, psychological, and economic harm.¹⁵³ This harm can, and usually does, occur before the stalker perpetrates any violent act. Therefore, stalking statutes do not point to a specific secondary offense, an offense of violence, as the place where harm occurs and the requisite intent is needed. Instead, the statutes focus on the acts comprising stalking and the harm caused by those acts.¹⁵⁴ This is where the misperception that stalking statutes are designed to prevent future harm might originate. People confuse this early intervention—intervention during the stages of psychological, social, and economic harm—as preceding and preventing harm rather than stopping harm that is already occurring. In this way, stalking differs from crimes such as criminal attempt and conspiracy, and therefore, a heightened emphasis on a *mens rea* requirement is unnecessary for stalking statutes.

¹⁵⁰ *Id.* at 358.

¹⁵¹ See, e.g., *Connecticut v. Cummings*, 701 A.2d 663, 667 (Conn. App. 1997) (rejecting the defendant's claim that the statute was unconstitutionally vague); *Illinois v. Zamudio*, 689 N.E.2d 254, 258 (Ill. App. Ct. 1997) (holding that the statute was not vague as applied to the facts of that case).

¹⁵² See James Quinn, *Man Pleads No Contest in "Stalking" Case*, L.A. TIMES, July 23, 1991, at B3 (discussing a new state stalking statute that allows law enforcement to intervene before the victim is harmed).

¹⁵³ See *supra* Part I.D.

¹⁵⁴ See Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 1011 (1993).

III. CYBERSTALKING: A NEW WRINKLE ON AN OLD PROBLEM

A. *The Internet: A Fertile Ground for Stalking*

The Internet is an immense global network that connects computers via telephone or cable lines to each other and a plethora of electronically stored information.¹⁵⁵ A user needs only a computer, a modem, a telephone or cable line, and an Internet Service Provider (ISP)¹⁵⁶ to communicate with, or access information from, other computers all over the world.¹⁵⁷ A user can send a message over the Internet from one computer to any other computer on this network, and it will arrive at the receiving computer almost instantaneously.¹⁵⁸ This form of communication is known as electronic mail, or e-mail for short.¹⁵⁹

In addition to e-mail, the Internet allows users to communicate (chat) with one another in real-time. To accomplish this, users go into "chat rooms"—Internet sites created, maintained, listed, and monitored by ISPs—where they can participate in real-time text conversations among all the users currently in that particular chat room.¹⁶⁰ Generally, anyone taking part in the chat room can access the conversation taking place.¹⁶¹ Another popular forum of communication is the electronic bulletin board. An Internet bulletin board is the electronic equivalent of a cork bulletin board, it allows users to post messages and read messages left by others.¹⁶² The messages are often archived and can be retrieved many months later by anyone with access to that bulletin board.

Currently, more than eighty million adults and ten million children have access to the Internet.¹⁶³ It is estimated that women, who four years ago accounted for just 5% of Web users, now account for 45% and will likely outnumber male Web users within the next four years.¹⁶⁴ While the Internet has made millions of people's lives easier by enabling them to instantly communicate with others and access a wealth of information with incredible speed, there is also a dark side: the Internet is used by stalkers at an ever-increasing rate to perpetrate their crimes. For example,

¹⁵⁵ See *A Parent's Guide to Internet Safety*, at <http://www.fbi.gov/library/pguide/pguide.htm> (last visited Feb. 8, 2001). I use the word "Internet" to refer to the entire global network of linked computers.

¹⁵⁶ Most ISPs are companies that offer direct and full access to the Internet for a monthly fee. Not all ISPs are commercial companies; some are educational, governmental, or nonprofit organizations that provide Internet access to their members at no charge. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ SHARON FISHER, *RIDING THE INTERNET HIGHWAY* 8 (1993).

¹⁵⁹ *Id.*

¹⁶⁰ *A Parent's Guide to Internet Safety*, *supra* note 155.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 6.

¹⁶⁴ Karen Epper Hoffman, *Women's Sites Benefit as Face of Web Changes*, INTERNET WORLD, Sept. 28, 1998.

a stalker can use the Internet to send messages to his victim via e-mail or to post a message to or about her on an Internet bulletin board. This type of activity is now known as "cyberstalking," and the problem is increasing nationwide. The Los Angeles District Attorney's Stalking and Threat Assessment Unit estimates that 20% of the cases it now handles involve cyberstalking.¹⁶⁵ Similarly, the Manhattan District Attorney's Sex Crimes Unit estimates that approximately 20% of its cases also involve cyberstalking.¹⁶⁶

There are several features of the Internet that make it especially attractive to stalkers. The Internet provides a stalker with an easy, low-cost method of communicating with his victim regardless of where in the world she is located. Another appealing attribute is the ability to remain anonymous when sending messages. Such anonymity can be achieved in various ways. First, there are Internet services, such as Hotmail, that offer free e-mail accounts. Most entities that provide these services request identification from the user when he enrolls, but few services verify the information provided.¹⁶⁷ This allows a stalker to obtain an e-mail account using a fictitious name, which he can then use to send messages to his victim. Alternatively, one desiring anonymity when sending messages over the Internet can use e-mail services that purposefully strip messages of any identifying information.¹⁶⁸ By forwarding e-mail through several of these services consecutively, a stalker can send a message that is nearly impossible to trace.¹⁶⁹

The Internet also facilitates stalking because its perceived "impersonal" nature may make a person less apt to view his online behavior as stalking.¹⁷⁰ Instead, he may view cyberstalking as non-confrontational and less aggressive than telephoning a victim, sending her a letter or gift, or spying on her in person, and therefore may be more inclined to commit the offense. The stalker may express things to an individual over the Internet that he would lack the courage to say if confronting that individual in person. This lack of direct personal contact gives many the misperception that cyberstalking is not truly threatening.¹⁷¹ However, there is no logical reason to distinguish, in stalking laws or otherwise, between a stalker who sends his victim letters through the post office and a stalker who sends his victim letters via e-mail. Both are forms of communication that can instill great fear and trepidation in a victim, and both should be among the acts that constitute stalking.

¹⁶⁵ CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 6.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ "Online" simply refers to using the Internet.

¹⁷¹ CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 9.

B. The Private Sector's Response

The private sector is becoming the first line of defense against cyberstalking. Most ISPs now provide features on their systems that are designed to limit members' exposure to potential dangers online. For instance, many services provide filter options that allow members to block incoming e-mails that contain explicit language, originate from a specific address, or do not originate from a familiar address.¹⁷² Moreover, many chat rooms now offer users the option to block, stifle, or disregard chat messages from individuals who are attempting to bother or threaten them.¹⁷³ Most ISPs also maintain policies regarding abuse of their services—which includes sending messages that threaten, annoy, or harass other users—and retain the right to terminate an abuser's account. Furthermore, Internet Alliance, one of the key Internet industry groups, has worked with the Federal Trade Commission and other governmental agencies on Project OPEN (Online Public Education Network), to provide valuable information to users about "fraud, parental controls and protecting privacy."¹⁷⁴ There are also several online groups that provide information and support to stalking victims.¹⁷⁵

Although the online industry has made significant advances in educating users on Internet safety, there is still more that could be done.¹⁷⁶ In a report on cyberstalking issued by the U.S. Attorney General's Office, Janet Reno highlighted several steps ISPs could take to further protect users from this crime. For instance, she suggested that ISPs should have clear and unequivocal policies regarding what types of conduct constitute a violation of the abuse clauses in their service agreements.¹⁷⁷ Also, their complaint procedures for reporting online abuses should be readily accessible and easy to use, and complaint follow-ups should be common procedure.¹⁷⁸ The industry could also go one step further and offer training for law enforcement personnel to educate them on the various forms

¹⁷² *Id.* at 12. Unfortunately, these options may be counterproductive when the messages sent are threatening. After all, is it better to have someone watching you nightly in preparation for an attack while you are oblivious to his presence, or is it better to have someone watching you and preparing just the same while you are fully aware of his intentions? Logic would lead one to answer that the latter is the better option, especially if the stalker is likely to carry out his intentions. In the case of cyberstalking, if the victim no longer receives the e-mails, she may be unaware of her stalker and only alerted to his presence when he arrives in person to carry out his threat.

¹⁷³ *Id.*

¹⁷⁴ *Id.* While these issues may not be directly relevant to cyberstalking, the tips provide valuable information about how to use the Internet safely and guard against practices that may make a user susceptible to the preying of a cyberstalker. *Id.*

¹⁷⁵ See, e.g., Cyberangels, at <http://www.cyberangels.com> (last visited Feb. 8, 2001); The Stalking Victims' Sanctuary, at <http://www.stalkingvictims.com> (last visited Feb. 8, 2001).

¹⁷⁶ CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 2.

¹⁷⁷ *Id.* at 11.

¹⁷⁸ See *id.*

that cyberstalking might take and how computer-related evidence gathering can be done more efficiently and effectively. This last objective should be one that both law enforcement officials and online industry leaders strive to achieve immediately, as its success has the greatest potential to curb online abuses like cyberstalking and help protect thousands of potential victims nationwide.

IV. POTENTIAL LEGAL SOLUTIONS TO STALKING IN CYBERSPACE

A. *State Stalking Statutes in Cyberspace*

Twelve states currently have stalking statutes that explicitly cover electronic communication in their definitions of acts that may constitute the crime.¹⁷⁹ Cyberstalking may also fall under the general stalking statutes in certain other states as well. A survey of the state stalking laws reveals that at least thirty-six of the current statutes could potentially be construed as prohibiting certain forms of cyberstalking. For example, Iowa's Code defines the course of conduct that constitutes stalking as "repeatedly maintaining a visual or physical proximity to a person without legitimate purpose or repeatedly *conveying oral or written threats*, threats implied by conduct, or a combination thereof, directed at or toward a person."¹⁸⁰ Under this statute, a person who repeatedly conveys written threats made via e-mail could presumably be prosecuted as a stalker.

Similarly, North Dakota's stalking statute was drafted with broad enough language that it, too, could be interpreted as proscribing certain types of cyberstalking. The statute defines stalking as "[engaging] in an intentional course of conduct directed at a specific person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose."¹⁸¹ The statute just as broadly defines "course of conduct" to mean "a pattern of conduct consisting of two or more acts evidencing a continuity of purpose."¹⁸² Presumably, with the general language of this statute, law enforcement officials would be able to bring charges against someone for cyberstalking in North Dakota.

While a majority of current state stalking statutes could potentially be construed to include certain forms of cyberstalking, there are some statutes that could not be applied to cyberstalking under any plausible

¹⁷⁹ See ALASKA STAT. § 11.41.270 (Michie 1993); CAL. PENAL CODE § 669 (Deering 2000); COLO. REV. STAT. § 18-9-111 (2000); GA. CODE ANN. § 16-5-90 (2000); LA. REV. STAT. ANN. § 14:40.2 (West 2000); MASS. GEN. LAWS ch. 265, § 43 (West 1997); MICH. COMP. LAWS § 28.643(8) (1998); MINN. STAT. § 609.749 (2000); OKLA. STAT. tit. 21, § 1173 (1993); VT. STAT. ANN. tit. 13, § 1061 (1999); WASH. REV. CODE § 9A.46.110 (1999); WYO. STAT. ANN. § 6-2-506 (Michie 1993).

¹⁸⁰ IOWA CODE § 708.11 (1998) (emphasis added).

¹⁸¹ N.D. CENT. CODE § 12.1-17-07.1 (1995).

¹⁸² *Id.*

construction. For instance, as discussed in Part II.A, in Connecticut a person commits the offense of stalking only if that person "willfully and repeatedly follows or lies in wait" for another person.¹⁸³ Such a statute, and others like it, reflects an outmoded view of stalking. Indeed, although the actual physical following and lying-in-wait prohibited by this statute may be what many people think of when they hear the word "stalking," it is certainly not the only conduct a stalker engages in to pursue his victim. In an attempt to terrorize his victim, a stalker could enlist any number of methods to accomplish his objective, ranging from physically following the victim to sending her e-mail and posting messages about her on an Internet bulletin board or Web site. Under Connecticut's statute, however, only the former conduct is considered stalking.¹⁸⁴ Such a statute leaves victims subjected to a multitude of stalking tactics, including cyberstalking, without legal recourse.

Even in states where the statutes seem to provide sufficient protection against cyberstalking, prosecutors may still have difficulty convicting defendants for many of the same reasons that prosecutors struggle to obtain convictions for more traditional forms of stalking.¹⁸⁵ These difficulties, as discussed in Part II.A, include poorly considered statutes that are drafted to include specific intent requirements or proof of credible threats.¹⁸⁶ The heavy burdens placed on the state are unnecessary and detrimental factors in constitutionally sound stalking statutes, and may help explain why stalking statutes are not utilized more frequently.¹⁸⁷

State stalking statutes alone are also insufficient to protect victims from cyberstalkers for many of the same reasons that originally gave rise to the need for the federal stalking statute. First, state statutes do not provide protection against stalking on federal lands and in other federal jurisdictions. While the majority of stalking cases are in state jurisdictions, thousands more occur each year on federal lands and across state borders.¹⁸⁸ This number will undoubtedly increase as the number of cyberstalking cases increases, since stalking a victim who lives in a different state is now as easy as clicking a button. Second, a general lack of both sophisticated resources and sufficient knowledge regarding the complex intricacies of computer crimes investigated by local law enforcement officials makes it harder to bring cyberstalkers to justice. Finally, since cyberstalking can easily be committed from great distances, jurisdictional questions and the logistics involved in gathering evidence

¹⁸³ CONN. GEN. STAT. § 53a-181d (1995).

¹⁸⁴ The courts in Connecticut presumably could distort the plain meaning of the statute and construe it as including these types of conduct as "following," but none have done so thus far.

¹⁸⁵ See STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 41.

¹⁸⁶ *Hearings*, *supra* note 1, at 102 (statement of Mr. Beatty).

¹⁸⁷ For a discussion of specific intent and credible threat requirements in stalking statutes, see *supra* Part II.A.

¹⁸⁸ *Hearings*, *supra* note 1, at 102 (statement of Mr. Beatty).

can complicate matters even further. On this issue, the San Diego District Attorney posed the following questions: "Suppose a threatening message is sent from a computer in Michigan to a computer in California. Who investigates? Who gets the search warrant? And if evidence is turned up in Michigan, can it be used in California?"¹⁸⁹

While states may still pursue charges against a person who stalks across state lines via cyberspace, there are definite benefits derived from the existence of an adequate federal stalking law broad enough to include cyberstalking. The unique factors involved in interstate stalking and cyberstalking may be managed more effectively by a federal investigation.¹⁹⁰ In fact, a number of stalking matters have already been referred to the FBI or the U.S. Attorney's Office because the victims and suspects were in different states and the local law enforcement agencies were unable to pursue the investigation adequately—presumably because of jurisdictional problems and a lack of sophisticated resources and expertise.¹⁹¹

This lack of expertise is especially apparent in cyberstalking cases. The majority of state and local law enforcement agencies have not yet investigated or prosecuted any cyberstalking cases.¹⁹² In addition, many law enforcement officials have not had the necessary training to enable them to recognize the potential danger and properly investigate this crime.¹⁹³ Deficient training leaves local law enforcement officials unprepared to appreciate the sensitive nature of such cases. In one example, a woman complained to her local police department that a man had been posting messages on the Internet, which included her home telephone number, claiming that her nine-year-old daughter was available for sex.¹⁹⁴ The victim, who had received numerous calls responding to the posting, was told by the police to just change her phone number.¹⁹⁵ The woman then contacted the FBI, who found that the local police department did not have a computer expert on the payroll and that the investigating officer had never been on the Internet.¹⁹⁶

While the lack of expertise in many state and local law enforcement agencies is a significant hindrance to proper investigation and prosecution of cyberstalking cases, there are a few municipalities that have taken great strides toward removing this deficiency. For example, the Los An-

¹⁸⁹ Valerie Alvord, *Cyberstalkers Must Beware of the E-Law*, USA TODAY, Nov. 8, 1999, at 22A.

¹⁹⁰ CYBERSTALKING: A NEW CHALLENGE, *supra* note 16, at 8.

¹⁹¹ *Id.* at 9.

¹⁹² *Id.* at 7.

¹⁹³ *Id.* at 8. For example, victims who have attempted to file complaints against cyberstalkers have reported that law enforcement officials have advised them to simply turn off their computer or come back if the cyberstalker confronts them in person. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

geles District Attorney's office has a Stalking and Threat Assessment Unit, which is specifically designed to combat cyberstalking and similar crimes.¹⁹⁷ California has trained over six thousand law enforcement officers to investigate stalking cases, many focusing on cyberstalking.¹⁹⁸ Similarly, the District Attorney's office in Manhattan has a Sex Crimes Unit that investigates cyberstalking, among other crimes.¹⁹⁹ These law enforcement agencies are given proper resources: adequate computer hardware, as well as, training on how chat rooms work, how to retrieve and preserve electronic evidence, and how to draft search warrants and subpoenas for a cyberstalking case.²⁰⁰

Nevertheless, gathering the evidence relevant to a cyberstalking investigation can be cumbersome and extremely expensive. It often involves the physical seizure of a cyberstalker's computer, followed by tedious hours of meticulously dissecting the files and hardware of the machine in search of corroborating evidence. While the exorbitant expense and sophistication required for this type of investigation would be prohibitive to a local law enforcement agency, a federal prosecutor could gather this evidence and pursue the charges with less effort and expense; the FBI has Computer Crime Squads located throughout the country.²⁰¹ Furthermore, each U.S. Attorney's Office employs experienced computer crime prosecutors who possess the expertise and technological sophistication to pursue cyberstalking cases.²⁰² These realities all point to the need for a well-drafted federal stalking statute to alleviate some of the difficulties posed by cyberstalking.

B. The Federal Stalking Statute in Cyberspace

The federal Interstate Stalking Punishment and Prevention Act²⁰³ makes it a federal crime to travel across state lines with the intent to injure or harass another person, but it is wholly insufficient to combat cyberstalking.

First, the statute makes interstate stalking a specific intent crime—the stalker must actually intend to place the victim in reasonable fear of death or serious bodily injury.²⁰⁴ According to one victims' advocacy expert, the language of the statute has made prosecution of the crime extremely difficult, if not impossible.²⁰⁵ This may help explain why the Department of Justice had only brought charges against nine defendants

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 6.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 10.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 18 U.S.C. § 2261A (Supp. II 1996); *see supra* text accompanying note 129.

²⁰⁴ *See id.*

²⁰⁵ *Hearings, supra* note 1, at 102 (statement of Mr. Beatty).

under the law as of April 1998.²⁰⁶ In addition to the problems arising from the specific intent requirement, the statute's focus on travel, in effect, excludes any prosecution for cyberstalking. Therefore, a stalker in one state who sits at his computer nightly sending harassing and threatening e-mails to a victim in another state could not be prosecuted under this federal law.²⁰⁷ The gap in protection against cyberstalking from afar leaves victims open to the terror and trauma caused by this particularly insidious form of stalking. In an attempt to close this gap, Congress is currently considering a bill that would make cyberstalking a federal crime.²⁰⁸

*C. The Congressional Response:
House Bill 1869: The Stalking Prevention and Victim Protection Act of
1999*

Sue W. Kelly, a Republican Representative from New York, introduced the Stalking Prevention and Victim Protection Act of 1999 in the U.S. House of Representatives on May 19, 1999.²⁰⁹ The bill is intended to close many of the loopholes that stalkers currently use to avoid prosecution. If enacted into law, it would amend the federal anti-stalking law and could substantially broaden the definition of the crime.²¹⁰ This section of the Note will discuss both the version of the bill that was introduced in the House on May 19, 1999 and the version that was passed by the House on November 10, 1999.²¹¹

²⁰⁶ STALKING AND DOMESTIC VIOLENCE, *supra* note 2, at 55.

²⁰⁷ There are other federal criminal laws that may proscribe this behavior. For example, 18 U.S.C. § 875 (1994) makes it a federal crime to transmit any communication in interstate or foreign commerce containing a threat to injure another. However, this statute is insufficient to protect against cyberstalking because it only applies to actual threats, which, as was noted earlier, occur in less than half of all stalking cases. See *supra* text accompanying note 42. Because it only criminalizes actual threats, this statute would not provide a victim protection in cases where the stalker posts messages on a bulletin board or in a chat room that cause the victim to reasonably fear for her safety. The same problem exists with 47 U.S.C. § 223(a)(1)(c) (1995), which makes it a federal crime to use a telephone or other telecommunications device to annoy, abuse, harass, or threaten any person at the called number so long as the perpetrator does not reveal his name. This law is insufficient to adequately protect against cyberstalking because it requires the perpetrator to remain anonymous—a seemingly absurd qualification. In addition, it fails to cover communications made via an electronic bulletin board or chat room.

²⁰⁸ See discussion *infra* Part IV.C.

²⁰⁹ H.R. 1869, 106th Cong. (1999). The House of Representatives passed the bill as amended on November 10, 1999, and the Senate Committee on the Judiciary is considering it at the time of this writing.

²¹⁰ See *id.*

²¹¹ The two versions of the bill vary considerably, and it is uncertain what changes the Senate Committee on the Judiciary might make to House Bill 1869. The Committee currently has before it several bills to amend 18 U.S.C. § 2261A, including the amended version of House Bill 1869 that the House passed, and a bill that was introduced in the Senate, 1999 S. 1660, 106th Cong. (1999), which mirrors Rep. Kelly's proposed version of the bill introduced on May 19, 1999. In light of the fact that the Senate may pass a version of

The version of the bill introduced in the House removed the interstate travel element of the offense and replaced it with a broader, more inclusive definition of interstate acts that may constitute stalking. Such acts could include sending e-mail, regular mail, and any other communication that may be used by a stalker to terrify his victim.²¹² In addition, the original version of the bill removed the specific intent requirement. Under the current federal anti-stalking statute, a perpetrator must engage in conduct with the "intent to injure or harass" his victim.²¹³ However, under House Bill 1869 as introduced, a prosecutor must show only that the perpetrator "knows or has reasonable cause to believe that [his] conduct" results in the victim's reasonable fear.²¹⁴ According to this version of the bill, someone commits the offense of stalking if he or she does the following:

(A) engages in any conduct that results in [an] individual's reasonable fear of (i) death or bodily injury to that individual; or (ii) the death of, or bodily injury to, a member of that individual's immediate family; and (B) knows or has reasonable cause to believe that such conduct results in that fear.²¹⁵

While the version of House Bill 1869 introduced in the House was a step toward providing better protection for victims of stalking, it had a potentially fatal flaw. As a result of its broad definition of the crime of stalking, it would likely be susceptible to constitutional challenges on the grounds of overbreadth and vagueness. As was discussed in Part II.C, a stalking law must not proscribe a substantial amount of constitutionally protected behavior. In addition, a stalking law must be sufficiently definitive to provide citizens with adequate warning regarding what type of conduct is prohibited. If a statute fails the first test, it will be deemed unconstitutionally overbroad; if it fails the second, it will be deemed un-

House Bill 1869 that more closely resembles the introduced, rather than the passed version of the bill, both versions will be discussed.

²¹² See *Hearings, supra* note 1, at 18 (statement of Rep. Bill McCollum, Chair, House Judiciary Committee).

²¹³ 18 U.S.C. § 2261A (Supp. II 1996).

²¹⁴ H.R. 1869. In addition, the introduced version of the bill,

would give judges the power to deny pretrial bail to stalkers who pose a higher risk to their victims by virtue of a previous conviction for a violent offense. This provision is critically important to the safety of victims, particularly in domestic violence cases. Evidence indicates that domestic violence stalking victims run a much higher risk of being assaulted or even killed immediately after the criminal justice system intervenes—i.e., when the stalker is arrested.

Hearings, supra note 1, at 18 (statement of Mr. Beatty).

²¹⁵ See H.R. 1869.

constitutionally vague. The original May 19, 1999 version of House Bill 1869 was vulnerable to both such challenges.

The May 19, 1999 version of the Stalking Prevention and Victim Protection Act provided no exceptions for conduct that could technically fall within its definition of stalking, but presumably is not intended to be prosecuted as such. For instance, consider a careless driver who, on a daily basis, drives his vehicle through a residential neighborhood at a high speed. The driver's reckless conduct would, in all likelihood, place residents of this neighborhood in fear for their safety or the safety of their immediate families, particularly their children. Such fear would certainly be reasonable and there would be little doubt that the driver "knows or has reasonable cause to believe" that his reckless conduct places residents in fear for their safety. Therefore, under the original version of the bill, a careless driver could meet all of the requirements to be prosecuted as a stalker. Similarly, a police officer's conduct on a stake-out would technically fall under the definition of stalking offered by this bill, as would lawfully organized picketing in many instances. Yet it is hard to believe that Representative Kelly and the other sponsors of the bill intended to create such a result. Therefore, as these examples indicate, not only would Congress be substantially infringing upon constitutionally protected conduct, but also would apparently be leaving it to prosecutors and courts to sort through the potential situations that could arise under this legislation and determine which ones the legislature actually intended to fall within the bill's scope. This implied delegation of congressional power is dangerously close to the type of action scrutinized in *Kolender v. Lawson*,²¹⁶ where the U.S. Supreme Court criticized legislatures drafting vague laws in order to encompass all offenders, thus leaving it to the courts to set limits on who can be reasonably detained.²¹⁷ The original version of the bill, therefore, seemed ripe for overbreadth and vagueness challenges.

However, the version of House Bill 1869 eventually passed by the House appears sufficiently tailored to alleviate the potential constitutional problems that accompanied the original version of the bill. The amended bill defines stalking as follows:

[A] person stalks an individual if that person engages in conduct—(1) with the intent to injure or harass the individual; and (2) that places the individual in reasonable fear of the death of, or serious bodily harm to, that individual, a member of that in-

²¹⁶ 461 U.S. 352 (1983).

²¹⁷ *Id.* at 358 n.7.

dividual's immediate family . . . or that individual's intimate partner.²¹⁸

The inclusion of a specific intent requirement appears to sufficiently tailor the bill to withstand constitutional challenges. A specific intent requirement provides sufficient notice regarding the type of conduct prohibited by the statute, thereby satisfying the vagueness prong. Moreover, nearly all conduct that is intended to "injure or harass" a person is not constitutionally protected, thus the bill satisfies the overbreadth prong as well.

Despite its narrow tailoring, the version of House Bill 1869 passed by the House is drafted broadly enough to encompass many forms of stalking. The amended version of the bill appears to prohibit any conduct that causes an individual to reasonably fear death or substantial bodily harm—assuming the stalker specifically intended such a result. With respect to cyberstalking, the bill states that the statute will be engaged if, "(1) for the purpose of stalking an individual, [a person] travels or causes another to travel in interstate or foreign commerce, [or] uses or causes another to use the mail or any facility in interstate or foreign commerce . . ." ²¹⁹ It is the direct reference to the use of "any facility in interstate or foreign commerce" in the bill's jurisdictional provision that brings cyberstalking within its parameters. Therefore, the version of House Bill 1869 passed by the House appears to proscribe most conduct employed by stalkers to terrorize their victims, including cyberstalking.

However, the inclusion in the bill of a specific intent requirement is problematic. As discussed in Part II.A, a specific intent requirement places a difficult burden on prosecutors to show that the stalker actually intended to instill fear in the victim. This focus on the stalker's intent, rather than on the fear felt by the victim, not only makes prosecutions for stalking more difficult, but it downplays the very real psychological harm caused by stalking, regardless of what the stalker intended. Additionally, the specific intent requirement creates a rather paradoxical result in cases involving erotomaniacs. As discussed previously, erotomaniacs generally do not intend to cause fear in their victims²²⁰ but rather try to realize what they see as an idealized true love. Therefore, it appears that an erotomaniac could not be prosecuted under the Stalking Prevention and Victim Protection Act as amended and passed by the House. Despite the efforts of Congress to effectively criminalize stalking, House Bill 1869 does not fully effectuate this goal.

²¹⁸ H.R. 1869, 106th Cong. (1999).

²¹⁹ *Id.*

²²⁰ See *supra* text accompanying notes 65–77.

D. A Proposed Model Federal Stalking Statute

Appended to this Note is a proposed model federal stalking statute.²²¹ The statute was drafted in an attempt to address the critical issues raised, and to alleviate the difficulties faced by the current legal regime in its attempt to adequately address the problems of stalking generally, and cyberstalking in particular. The model statute has been drafted with three broad goals in mind. First, the statute is written broadly enough to encompass the infinite number of activities that can constitute the act of stalking. Second, while being broad enough to encompass various types of acts, the statute is sufficiently tailored to punish only truly culpable conduct. Finally, the model statute acknowledges the devastating force of psychological harm by placing the focus of the statute on the victim and the effect of the stalker's behavior on the victim.

The model statute is broad enough to include all methods of stalking. The statute defines stalking as "willfully and repeatedly engag[ing] in a course of conduct that causes an individual to reasonably fear sexual assault, bodily injury, or death of that individual or a member of that individual's family."²²² Course of conduct is also defined broadly to include any activity directed at an individual that is not constitutionally or statutorily protected. Therefore, under the model statute, a person commits the crime of stalking if such person willfully and repeatedly engages in any activity, with limited exceptions, directed at an individual that causes that individual reasonable fear. The statute prohibits traditional forms of stalking, such as physically following or lying-in-wait, sending letters, or incessantly telephoning an individual. However, the statute, because of its breadth, also proscribes cyberstalking and nearly any other form of stalking that may develop in the future.

To balance its breadth and its potential for ambiguity, the model statute includes several elements that sufficiently tailor it both to protect due process concerns and to avoid substantially infringing upon a person's First Amendment rights. These safeguards help ensure that only truly culpable conduct will be punished. First, the model statute explicitly excludes acts that are "authorized by constitutional or statutory law, regulation, or order of a court of competent jurisdiction."²²³ Besides removing lawfully authorized activity from the list of conduct proscribed by the statute, this clause decreases the likelihood of arbitrary and capricious enforcement that exists when a legislature drafts a statute too broadly and relies on the judiciary to determine to whom the legislature intended the statute to apply. Second, the model statute requires that the defendant "knew or reasonably should have known that [his actions]

²²¹ See Proposed Model Federal Stalking Statute, *infra* Appendix.

²²² *Id.*

²²³ *Id.*

would cause the [victim] to reasonably fear sexual assault, bodily injury, or death of that individual or a member of that individual's family."²²⁴ This requirement of knowledge or imputed knowledge helps ensure that innocent conduct is not punished under this law by supplying citizens with sufficient notice that particular activities are illegal. Third, the model statute, as opposed to the bill currently before Congress, requires that the person's conduct be "directed at" an individual. This element serves as yet another safety device to keep lawful conduct beyond the statute's reach and provide notice of unlawful conduct. Furthermore, the statute requires that the defendant's actions actually cause fear in the victim and requires that this fear be reasonable. Consequently, to obtain a conviction under this model statute, a prosecutor would have to show the following: the challenged conduct was without lawful authority; the defendant's repeated activity was directed at an individual; the defendant knew or reasonably should have known that his repeated activity would cause fear in the victim; the defendant's repeated activity did cause this fear; and the victim's fear was reasonable. The exclusion of lawfully authorized activity in combination with the inclusion of the knowledge and "directed at" elements, as well as the reasonableness requirements, make this statute sufficiently tailored to avoid punishing both lawfully protected and non-culpable conduct.

Moreover, the model statute is designed to focus on the effect of the perpetrator's behavior on the victim. First, it removes the specific intent requirement that is included in the current federal stalking law, the House version of the Stalking Prevention and Victim Protection Act of 1999, and in almost half of the state stalking laws. Instead, as discussed above, the statute only requires that the defendant knew or should have known that his conduct would cause reasonable fear in the victim. The statute is written this way in recognition of the fact that focusing on the intent of the perpetrator places an unnecessary hurdle in the path of the prosecution. It also addresses the devastation and trauma caused by this crime that can occur regardless of whether the perpetrator actually intended the resultant harm.

Furthermore, the fear of sexual assault is included in the definition of stalking under the proposed model statute to close a loophole that exists for defendants under the current federal stalking law. The current law only recognizes as legitimate the fear of death or serious bodily injury. Although sexual assault results in serious bodily injury in some circumstances, it does not in many others. Therefore, a fear of sexual assault, no matter how justified, may not be recognized under the current law if such assault would not have resulted in serious bodily injury or death. Under this set of facts, the stalker could not be convicted. Yet, sexual assault results in serious psychological and emotional injury to the victim in

²²⁴ *Id.*

many cases.²²⁵ Therefore, in keeping the focus on the psychological harm that stalking victims suffer, it is appropriate to close this loophole and include the fear of sexual assault in the model stalking statute.

A final issue raised by the model statute and addressed here is the jurisdictional element. In recent cases, the U.S. Supreme Court has begun to move away from its practice of almost categorically accepting congressional statutes authorized by Congress under the Commerce Clause.²²⁶ Instead, the Court is placing greater emphasis on a showing by the legislature that a nexus exists between a given statute and interstate commerce. In *United States v. Lopez*,²²⁷ the Supreme Court struck down the Gun-Free School Zones Act of 1990,²²⁸ reasoning that the Act "neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way to interstate commerce."²²⁹ The Court held that the Act "exceeds the authority of Congress to regulate Commerce . . . among the several States."²³⁰ In striking down the law, the Court identified three broad categories of activities that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce,"²³¹ (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,"²³² and (3) "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."²³³

Earlier this year, the Court again struck down a federal statute as an improper exercise of Congress's Commerce Clause power. In *United States v. Morrison*,²³⁴ the Court invalidated the section of the Violence Against Women Act of 1994 that created a federal civil remedy for victims of gender-motivated violence.²³⁵ The section stated: "All persons

²²⁵ See ROSEMARIE TONG, *WOMEN, SEX AND THE LAW* 115 (1984).

In fact, some victims of rape sustain no discernible physical injury at all. This is not surprising given that the harm peculiar to rape is not so much physical harm as a type of psychological harm, consisting of fear of death and feelings of degradation and humiliation sustained during the rape as well as after it. This psychological harm is no less devastating in its effects on a person's life, however, than the effects of some physical harms.

Id.

²²⁶ See U.S. CONST. art. I, § 8, cl. 3. (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

²²⁷ 514 U.S. 549 (1995).

²²⁸ See 18 U.S.C. § 922(q)(2)(A) (1996).

²²⁹ *Id.* at 551.

²³⁰ *Id.*

²³¹ *Id.* at 558.

²³² *Id.*

²³³ *Id.* at 558-59.

²³⁴ 120 S. Ct. 1740 (2000).

²³⁵ See 42 U.S.C. § 13981 (1994).

within the United States shall have the right to be free from crimes of violence motivated by gender."²³⁶ To enforce that right, the provision allowed a victim of a gender-motivated crime to bring "an action [in federal or state court] for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."²³⁷

In considering whether the creation of this federal civil remedy was within the scope of Congress's Commerce Clause power, the Court held that *Lopez* was controlling.²³⁸ The Court reiterated the three broad categories of activities delineated in *Lopez* that fall within the scope of Congress's Commerce Clause power.²³⁹ With these three categories in mind, the Court noted: "Given [the provision's] focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," the third category of Commerce Clause activity—that which substantially affects interstate commerce—was the proper framework for the case.²⁴⁰ The Court held that the regulated conduct, violence against women, did not fall within the third category because Congress did not show a substantial enough effect to override states' control over regulating crime, and that the Act was therefore unconstitutional. In invalidating the statute, the Court "preserve[d] one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."²⁴¹

Nonetheless, even with the increased scrutiny the Court has applied to federal statutes passed pursuant to the Commerce Clause, the proposed model statute offered by this Note is well within Congress's power to regulate interstate commerce as identified in *Lopez* and *Morrison*. The first jurisdictional element present in the proposed statute arises from the act of "traveling across a state line or within the special maritime and territorial jurisdiction of the United States" to stalk an individual. The traveling of a person across a state line "has long been recognized as a form of 'commerce,'" and, thus, within Congress's regulatory power.²⁴² This element, therefore, fits squarely within the second category of activities that Congress may regulate under its commerce power as

²³⁶ *Id.* at 1747 (quoting 42 U.S.C. § 13981(b)).

²³⁷ *Id.* (quoting 42 U.S.C. § 13981(c)).

²³⁸ *Id.* at 1745.

²³⁹ *Id.* at 1749.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1754.

²⁴² *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997); see also *Edwards v. California*, 314 U.S. 160, 172 (1941) ("[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [Article I, § 8 of the Constitution].").

identified by the Court in *Lopez* and *Morrison*: the power to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce."²⁴³

The second jurisdictional element contained in the proposed statute, "transmitting in interstate or foreign commerce any communication," is also sufficient to satisfy the interstate commerce requirements needed to support federal jurisdiction.²⁴⁴ In *United States v. Kelner*,²⁴⁵ the Court of Appeals for the Second Circuit found that a videotaped threat was transmitted in interstate commerce when the videotape was subsequently broadcast by a television station whose telecast reached three states.²⁴⁶ The court held that the fact that Yassar Arafat, the intended recipient of the threat, was in the same state from which the threat was made did not negate the interstate element of the crime. Additionally, the federal statute that proscribed the threat did "not require that the communication between [the defendant and the victim] be in commerce; rather, it requires that the threat which is communicated be *transmitted* in commerce."²⁴⁷ The rationale in *Kelner* is consistent with the rationale used by the Supreme Court in *Lopez* and *Morrison* when identifying the first category of activity that falls within Congress's commerce power: "[T]he use of the channels of interstate commerce."²⁴⁸ Therefore, the proposed model statute's regulation of "transmitting in interstate or foreign commerce any communication" is a regulation of the channels of interstate commerce and fits squarely within the first category of Congress's Commerce Clause power as defined by the Court in *Lopez* and *Morrison*.

Other courts have described similar methods of communication that are considered channels of interstate commerce. The Fifth Circuit held that mail, wire, and certain electronic devices are considered interstate channels of commerce.²⁴⁹ Additionally, in a case addressing the use of a computer to send threats, the Tenth Circuit held that "[a] threat that was unquestionably transmitted over interstate telephone lines [via a computer] falls within the literal scope of the [pertinent] statute and gives rise to federal jurisdiction."²⁵⁰ Under the rationale used in these cases and by

²⁴³ *United States v. Morrison*, 120 S.Ct. 1740, 1749 (2000); *United States v. Lopez*, 514 U.S. 549, 558 (1995).

²⁴⁴ See Proposed Model Federal Stalking Statute, *infra* Appendix.

²⁴⁵ 534 F.2d 1020 (2d Cir. 1976).

²⁴⁶ *Id.* at 1024.

²⁴⁷ *Kelner*, 534 F.2d at 1024 (emphasis in original). The statute, 18 U.S.C. § 875, states in relevant part: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." *Id.*

²⁴⁸ *Lopez*, 514 U.S. at 558.

²⁴⁹ See *United States v. Bailey*, 115 F.3d 1222, 1227 (5th Cir. 1997).

²⁵⁰ *United States v. Kammersell*, 196 F.3d 1137, 1139 (10th Cir. 1999). As in *Kelner*, the defendant sent the threat to a victim located in the same state only a short distance away. On appeal, the defendant argued that the threat was not transmitted in interstate commerce because, although the electronic message traveled from his computer in Utah to

the Court in *Lopez* and in *Morrison*, cyberstalking, or stalking by any other form of communication where the communication crosses a state line, falls within the ambit of federal jurisdiction via Congress's powers under the Commerce Clause.

V. CONCLUSION

Stalking and its insidious effects are longstanding problems, yet it was not until a decade ago that this issue entered the national consciousness. In the last ten years, however, the nation has reacted strongly in defiance of this abhorrent crime by enacting stalking statutes in every state and at the federal level. Unfortunately, as state and federal law enforcement officials have finally started to address this problem, the perpetrators have moved to the Internet to engage in their stalking behavior. While some statutes are flexible enough to adapt to this new form of stalking, many others, including the federal statute, are not sufficiently malleable to encompass the complexities and sophistication of cyberstalking. In addition, the lack of proper training and adequate resources for law enforcement officials, especially at the local level, is leaving scores of victims without sufficient legal protections from their cyberpredators.

The model federal stalking statute proffered by this Note attempts to address many of the inadequacies of the current legal regime. Although this may be a significant step in the right direction, contemporary legislation alone is not enough to alleviate the suffering inflicted upon over one million Americans each year. Rather, contemporary legislation must be joined by provisions for adequate enforcement resources and a systemic, nationwide effort to educate and train law enforcement officials on the intricacies of the Internet and how stalkers use it to terrorize their victims. Moreover, on a grander scale, there must be a continued movement to awaken society to the prevalence of stalking and its resulting harms. Only then will those who have suffered under the oppressive shadow of their stalker begin to experience vindication.

a central computer server in Virginia and then back to Utah where it was received by the victim on her computer, the threat could not have been seen by anyone outside the state. The defendant further argued that the statute contravened the "spirit" of *Lopez*. *Id.* at 1140. The court rejected the first argument, stating that the statute had no requirement that someone view the threat outside the state from which it was sent, but only a requirement that the threat be transmitted in interstate commerce. The court held that since the electronic message traveled from Utah to Virginia and back to Utah, it met the requirement of being a communication in interstate commerce. *Id.* Addressing the defendant's second argument that the statute contravened the spirit of *Lopez*, the court held that "[b]ecause [the statute] requires the use of a channel of interstate commerce, it is not subject to the same limiting interpretation as *Lopez*." *Id.* at 1140.

PROPOSED MODEL FEDERAL STALKING STATUTE

Any person who stalks an individual by traveling across a state line or within the special maritime and territorial jurisdiction of the United States or within Indian country, or by transmitting in interstate or foreign commerce any communication, shall be punished according to 18 U.S.C. § 2261.

For purposes of this section:

1. A person is guilty of stalking if that person willfully and repeatedly engages in a course of conduct that causes an individual to reasonably fear sexual assault, bodily injury, or death of that individual or a member of that individual's family; and
2. the person knew or reasonably should have known that such course of conduct would cause the individual to reasonably fear sexual assault, bodily injury, or death of that individual or a member of that individual's family.

"Course of conduct" means:

Any activity directed at an individual, including the sending or displaying of communications in any form. Acts authorized by constitutional or statutory law, regulation, or order of a court of competent jurisdiction, including, but not limited to, official duties of law enforcement officials and picketing that occurs during a labor dispute, are excluded from this definition.

"Repeatedly" means:

More than once.

"Family" means:


1. An individual's spouse, parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, or niece, whether related by blood, marriage, or adoption;
2. Anyone who regularly resides, or regularly resided within the last six months, in the same household as the individual.

CERTIFICATE OF SERVICE

I hereby certify that the following pleading entitled:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

was forwarded, this 26th day of August, 2004, by facsimile, with conformed copy by First Class Mail, to the individuals named on the attached DISTRIBUTION LIST.



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