

# Online Financial Information: Law and Technological Change\*

CAROLINE BRADLEY

*Two contrasting narratives about the impact of the Internet on investors point to different responses by regulators: a narrative of empowerment suggests that regulators should encourage investors to make investment decisions for themselves. But a narrative of vulnerability suggests that these investors may not be able to use the information that is available, and may be at increased risk of loss. Regulators should aim to promote investor empowerment while taking due account of investor vulnerabilities.*

*Three characteristics (immediacy, interactivity, and interjurisdictionality) distinguish online investment information from offline investment information and have implications for the regulation of online information.*

In 1991, Louis Lowenstein wrote that money and finance had moved from being “arcane topics” to being “front page news” (Lowenstein 1991: 17). More recently commentators have noted a trend to “investment autonomy” (e.g. Bailey, Nofsinger & O’Neill 2003: 149) which means that people are increasingly taking responsibility for management of their own financial welfare. In making choices about their investments investors consult financial advisors, or they learn about investing from newspapers’ financial pages, specialized magazines, and the Internet. The Internet reduces the costs of publication of information and provides investors with access to software programs that can analyze their investment objectives or train them to become day traders. Financial services regulators need to rethink the regulation of financial information in the light of these changes in investor behavior.

---

\* Earlier versions of this paper were presented at a symposium to inaugurate the Centre for Law in the Digital Economy at Monash University, Melbourne, Australia in August 2001 and at the Law and Society Association annual meeting in Vancouver in 2002. I would like to thank participants in these conference sessions, the contributors to this issue, Michael Froomkin, and two anonymous reviewers for comments on earlier versions of this paper. All errors are mine.

Address correspondence to Caroline Bradley, Professor of Law, University of Miami School of Law, PO Box 248087, Coral Gables, FL, 33124. Telephone: (305) 284 2082; fax: (305) 284 6506; e-mail: cbradley@law.miami.edu.

There are two contrasting narratives about what technological change means for the regulation of investment information. The first is a narrative of empowerment: investors are now in a position to make investment decisions for themselves, using information resources that hitherto were only available to professional market participants (e.g. Levitt 1999; Stefanadis 2001: 21). The second is a narrative of vulnerability: investors in general may not be able to use the information that is available, and may be at increased risk from fraud, or from losses incurred through their own lack of relevant skills (e.g., Levitt 1999).

Both of these narratives have some truth in them, and regulators should try to promote investor empowerment while taking due account of investor vulnerabilities (see Australian Securities & Investment Commission (ASIC) 2003: 1). This balancing task is complicated by the fact that those who push either narrative as the appropriate story may have hidden reasons for doing so. The rhetoric of empowerment can be used by those who want to limit the role of regulation, perhaps in ways that would harm the interests of investors. The rhetoric of vulnerable investors can be used by those who wish to protect and consolidate the privileges that the existing regulatory setup gives them.

Part I of the article discusses the relationship between law and technological change generally, then Part II focuses on the ways in which technology has changed investors' access to information. Part III suggests three characteristics (immediacy, interactivity, and interjurisdictionality), which distinguish online investment information from offline investment information, and suggest some ways of thinking about how online investment information should be regulated. Part IV examines the ways in which the developing regulation of investment information in the United States, United Kingdom, and Australia reflects concerns about vulnerability of investors and investor empowerment, and takes account of the distinguishing characteristics of new information providers. Part IV argues that regulators should focus on two strategies: (1) educating investors about how to identify which sources of information are reliable and (2) (where possible) giving investors cooling-off periods during which they can cancel investment arrangements. By combining these two strategies, regulators will reduce investor vulnerability and increase investor empowerment, while addressing the harmful effects of the immediacy and interactivity of new means of providing online investment information. These two strategies can also apply at the global level, thus responding to issues of interjurisdictionality, through unilateral or multilateral actions of regulators.

## I. LAW AND TECHNOLOGICAL CHANGE

Technological change challenges institutional structures, including legal rules, by facilitating changes in social practices. Two factors intensify this

challenge. First, technological development occurs at an increasingly rapid rate over time (e.g., Moore 1997), as does the rate of development of applications of new technology (Basel Committee 2001: 5). Second, the modern tendency to promulgate very specific legal rules means that existing rules may be particularly vulnerable to technological change (Merges 2000: 2190). The combination of these factors does not make it easier to predict the changes in social practice that technology will enable in the future. Existing legal rules may interfere with desirable changes, and may be incapable of controlling undesirable changes. Financial regulation is no exception to this trend.

What we call “new technology” today is by no means the first example of the interaction of technological development with law, but merely a recent instantiation of a recurrent phenomenon. The development of the printing press facilitated the reproduction of texts, and led to disputes over rights to reproduce texts, and the development of copyright law (cf. Stallman 1996: 293). The introduction of the railways and motor vehicles created issues of safety (Winfield & Goodhart 1933: 372), and property rights (Keasbey 1890: 245), which prompted the development of new legal rules (Kahn-Freund 1939: 136–7). Photography, and the idea that it could be used by newspapers, raised issues of what rights to privacy people should have (Warren & Brandeis 1890: 195).

In common law countries, the first stage in the adaptation of law to the new technology in these examples was the adaptation of rules of common law to the new situation (e.g. Holdsworth 1934: 190). One of the advantages commentators claim for the common law is its adaptability to new circumstances: “Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society” (Warren & Brandeis 1890: 193).

Common law copyright doctrine antedated copyright statutes. The rules that applied to common carriers were applied to the railways (e.g. *Louisville & S. I. Traction Co. v Worrell* 1908 at 489). Statutes regulating the railroads followed later (Siegel 1984), because legislators perceived that statutes were necessary to deal with some of the issues raised by the new technologies. The common law may be able to control how the provider of a service should provide that service, but it is less apt to control the price charged for the service (cf. Bender 1994: 735–6). The common law (and equitable rules) may be able to regulate the conduct of a financial services provider, but it cannot regulate access to the status of a financial services provider.

During the twentieth century, regulatory regimes took over much of the territory that had been regulated by the common law in earlier centuries, leading commentators to refer to the rise of the regulatory state (e.g., Glaeser & Shleifer 2001). In this regulatory state, licensing regimes controlled who could become a banker, or a broker-dealer, or an insurance broker, and how those people who were allowed access to such a status should perform their functions. The growth of regulatory regimes raises the question of

the extent to which pre-existing rules of common law, and fiduciary law, are pre-empted by the new rules (e.g. Law Commission for England and Wales 1992). To the extent that the regulatory statutes do pre-empt pre-existing rules, the job of adapting the rules to technological change is a job for the regulators, and, if the statutes are not amenable to satisfactory interpretation by the regulators, the job is one for the legislature. Thus, the adaptation of existing rules in a world of change may depend on how far the regulator is legally able, or willing, to push its authority, and on how easy or difficult it is for the legislature to achieve agreement on new rules. As an example, the definition of a stock exchange in the U.S. Securities Exchange Act of 1934 refers to an organization which "maintains, or provides a market place" (Securities Exchange Act 1934: §6). This definition, referring to a "market place", which suggests a specific location, does not apply well in a world where traditional securities exchanges have abandoned their trading floors, and where alternative trading systems never had trading floors. The Securities and Exchange Commission (SEC) therefore adjusted the definition of an exchange by regulation (e.g., SEC 1998: 70847; 17 C.F.R. §240.3b-16). In 1999, Laura Unger, an SEC Commissioner, pointed out that: "[e]lectronic trading systems do not always fit neatly into the 'broker-dealer' and 'exchange' boxes set out in 1934" (Unger 1999a). Securities markets today are very different from securities markets in 1934 (Pitt 2001).

Obsolete statutory definitions of exchanges are not the only problems of fit between established rules and new financial practices. The Internet allows investors to acquire information about potential investments from many new sources, and to transact in securities online, in different markets, and outside normal trading hours (Unger 1999b). This causes stresses for statutes and regulations, because of the need to apply existing rules to new contexts. For example, the concepts of best execution, and suitability may require adjustment in the context of new investor behaviors (e.g. Barnett 2000; Unger 1999b: 2).

These problems occur because legislation tends to be backward-looking, focusing on the problems of the past, rather than those of the present (Murphy & Roberts 1987: 172), let alone those of the future. Regulations, similarly, tend to focus on past, or, at best, current issues. Even where legislative schemes at their inception relate to current reality, over time they tend to become anachronistic (Calabresi 1982), and courts, regulators, and the regulated population encounter difficulties in interpreting and applying them.

Securities rules and other financial regulations are affected by problems of statutory obsolescence just as much as other areas of law (Santomero 2001). How significant these problems are depends on how easy it is for legislators to amend the statutes when necessary, or on how much flexibility the statutes give to the regulators who implement them. Statutory schemes for financial regulation now seek to address the perception that regulation should be flexible in order to adapt to changing circumstances by ensuring that much of the work of the system is done by agencies empowered to issue rules.

In some jurisdictions, legislators have sought to deal with problems of lack of fit between regulation and social practice with dramatic overhauls of the systems of financial regulation (e.g., Financial Services and Markets Act 2000; Financial Services Reform Act 2001). The new statutory schemes resulting from these overhauls are designed to reflect the modern reality of financial services in which multifunction firms provide banking, insurance, and securities services to their customers (e.g., Wilmarth 2002: 219–20; Australian Securities & Investments Commission 2001a: 4). In Australia and the UK, multifunction regulators supervise multifunction firms. It is notable that the U.S. version of rules for multifunction firms leaves in place a system of regulation where responsibilities for regulation are partitioned between different federal and state regulatory agencies, resulting in issues of regulatory coordination (see Gramm-Leach-Bliley Act 1999; Meyer 2000). The different legislative structures for the regulation of financial business have implications for the application and development of rules for electronic commerce in financial products and services. A multifunction regulator needs to think about the implications of its rules across a wide range of financial activity, whereas a regulator with a narrower remit will only think about the implications of its rules for activities outside the scope of its mandate when it is forced to do so by circumstances. For the regulated populations, and, perhaps, even for consumers, it is likely to be easier to negotiate about proposed rule-making with one multi-function regulator, even if it is organized in different departments, than with multiple regulators. On the other hand, multi-function regulators may be overwhelmed with the range of issues for which they are responsible, and may find it difficult to develop adequate expertise. A multi-function regulator with sufficient resources to ensure expertise may be so big that it is difficult to manage. Rule-making for a system with a multi-function regulator may be just as complex as rule-making for systems with regulators which have more limited functions (e.g., Financial Services and Markets Act 2000 (Financial Promotion) Order 2001).

Rules that are designed to reflect current market practices may not adapt well to future developments in business or in technology, even if they are designed to be flexible. Statutory language may constrain the regulators' scope of action because of the legislators' limited ability to predict the future. On the other hand, statutes that give the regulators significant amounts of flexibility create other concerns about transparency and certainty.

Financial regulators have been focusing on a number of issues associated with online financial activity, but in different jurisdictions the issues are resolved in different ways. At the same time, legislators in different jurisdictions clearly feel a need to respond to perceived problems associated with the development of the Internet (e.g. *Reno v ACLU* 1997; *State of Washington v Heckel* 2001). This raises boundary issues: are issues of the advertising and marketing of financial products and services really issues about advertising and marketing generally, or are they really issues about financial products and services?

## II. ONLINE INVESTMENT INFORMATION

Investors in the twenty-first century are potentially empowered by access to vast amounts of information through the Internet (e.g., Unger 2001). Not everyone will benefit from this possibility of access equally: some investors are more comfortable with new technology than others; some investors have the financial resources to invest in computers and software that others do not have (or would prefer to spend on investing rather than on technology). Some investors have faster connections to the Internet than others. Investors may have different levels of ability to evaluate the information they can obtain about investments. Governmental authorities recognize that investors are attracted by the idea of empowerment (e.g., Great Britain Treasury 2001: 9), but are also nervous that investors may not be able to cope well with the new powers they have. This leads regulators to focus increasingly on how to educate investors (Fanto 1998).

Even without new technology, investors can now choose to obtain advice about investments from traditional securities professionals, such as brokers and investment advisors. Investors can read large numbers of investment-oriented publications, including books, magazines such as *Kiplinger's Personal Finance*, investment newsletters, and the financial sections of newspapers. These publications focus on specific issuers of securities (e.g., Smith 2004), or on specific funds (e.g., Goldberg 2004). They may describe, or recommend, particular investment strategies (e.g., Polyak 2004), or caution against spending money on certain products or strategies (e.g., Feinberg 2004). Financial services providers advertise in investment publications. Such printed publications are therefore useful resources for information about market trends and investment strategies. But printed publications lack immediacy: even daily newspapers do not provide current information to investors. The Efficient Capital Market Hypothesis suggests that efficient markets incorporate the latest information into the prices of investments (Fama 1970, 1991). Investors who rely on print publications for their investment information are, therefore, always behind professional investors in their access to information, free-riding on the prices established by professional investors (Gilson & Kraakman 1984: 569). Traditionally, the costs of acquisition of information that would be useful in trading have been high (Gilson & Kraakman 1984: 594).

Television and radio stations carry financial news and programming about investments. CNN's money programs are available online (CNNmoney). Information provided through such channels is much more immediate than information provided in newspapers and magazines, although, typically, radio and television are not used for the transmission of large amounts of very detailed information and analysis (e.g., TheStreet.com 2000: 4). Financial services providers advertise on radio and television as they do in print media.

The Internet combines features of other media: like print media, it provides information at very many different levels of detail, from headlines published

on news sites to complex resources for learning. Like broadcast media, the Internet can publish current information quickly, and can make it available through sound and film broadcasts. Investors can access information published on websites, and they can sign up for e-mail services that provide investment information. But the Internet is different from other media in various ways. First, web publishing requires fewer financial resources than print and broadcast publishing, so it allows a wider range of people to get into the business of publishing (Volokh 1995: 1807). Second, web-published documents may be different from the printed equivalent, for example, because readers of material on the web read a screen of information at a time, and cannot always develop a sense of the full document they are reading from the outset (unless they print out all available pages and read them offline). Web publishers also tend to use hyperlinks, which is an attractive feature of web-published documents, allowing readers to pursue subjects that interest them. However, reliance on linked documents means that the publisher provides multiple different ways of reading a text.<sup>1</sup> Moreover, links may decay, or the content of a linked page may change over time. Third, the Internet is more interactive than other media: investors can participate in electronic message boards, and in chat sessions. Fourth, the global reach of the Internet contrasts dramatically with that of print and broadcast media (Federal Deposit Insurance Corporation 2001: 67029).

Much of the informational content available on the Internet is the same as that available offline. For example, investor-oriented publications such as *Kiplinger's* publish online editions (see <http://kiplinger.com>). But the interactive fora in which investors can communicate with other participants in the fora provide "information" to a wide readership that is not available in other formats. The Internet is also a useful medium for the provision of timely information about breaking financial news and market data. Investors can read analyses of the market, of trading strategies, and of individual issuers and investments online. In addition, investors can now access online information about trading prices for securities without paying for that information. NASDAQ provides delayed information online and Yahoo provides "Real-Time ECN quotes." Current data about market prices are available at a cost. Ordinary investors can also use the Internet to access tools that were once only available to rich people or professionals, training programs such as those available at <http://www.pristine.com>, and even "online universities" such as Bloomberg University (<http://www.bloomberguniversity.com>) focusing on investments using the Internet. These resources have developed alongside other distance-learning initiatives, such as those of the Open University in the UK (e.g., Terry 2001: 98). Although this wealth of resources for education and training promises investor empowerment, securities regulators in the U.S. listed investment seminars among the top-ten investment scams in 2001 (North American Securities Administrators' Association 2001). Investors may find it difficult to distinguish between legitimate educational resources and scams.

Of course, websites carry advertisements, just as do the print and broadcast media. However, when an investor reads an advertisement in a newspaper that promotes the services of a particular broker-dealer, the investor has to make some effort to pick up the telephone, or log on to the Internet in order to contact the broker-dealer. Advertisements on television and radio are similar to those in printed publications in this respect. The investor has to make a positive effort to contact the advertiser. Clicking a button on a web page to be transferred to the website of the advertiser involves far less effort on the part of the investor, and potentially less reflection. The distinction between print publication and online publication can be pushed too far, however, as newspapers publish online editions, which contain financial content very like that published on sites which are run by non-newspapers, including buttons to connect readers directly to advertisers. Distinctions between financial businesses and information businesses are also breaking down. For example, Reuters, an information business, is one of the owners of Instinet, an electronic communications network, or ECN (Reuters 2002: 4).

Internet financial portals such as yahoo.com provide access to all of these features of the Internet. TheStreet.com describes itself as “a leading multimedia provider of proprietary, timely, independent and insightful financial commentary, analysis, research and news.” The company says that its content “is available across diverse media platforms, including the internet, print, radio and conferences” (TheStreet.com 2002: 4). The metaphor of a “portal” suggests that the user will move through the facility rather than simply engaging with it. Unger has described portals as “the ‘on-ramp’ to the internet” (Unger 1999b: 4). Like other websites, financial portals allow users to move through them, carrying advertisements by financial services providers, and allowing their users to click through to a particular provider. Financial portals, however, are not necessarily run by financial businesses: they may be run by markets, such as NASDAQ, by Internet service providers (ISPs), such as Yahoo, by publishers who started out in print or broadcast media, or they may have been recently created to take advantage of the opportunities provided by the Internet.

The linkage of the websites of the portals to the websites of financial providers, and their facilitation of interactions between portal users and financial service providers means that there is a risk that in some circumstances financial portals might need to be regulated as broker-dealers (Owens 2001). Most problematic are arrangements whereby the portal’s remuneration increases as users enter into securities transactions (e.g., Sokenu 2001; Owens 2001; Unger 1999b: 7). In 1996 the SEC’s Division of Market Regulation issued a no-action letter to Charles Schwab,<sup>2</sup> which suggested that it would be acceptable for an ISP to receive a nominal flat-rate fee for the transmission of orders to Schwab’s website (Charles Schwab 1996). In a subsequent no-action letter, the Division of Market Regulation suggested that Streetline could receive per-transaction fees that at \$1 per



transaction were more than nominal because of safeguards that would prevent Streetline from soliciting transactions in securities. The Division of Market Regulation noted that Streetline “will not hold itself out as a broker-dealer, provide information or advice related to securities transactions to the customers of the foreign financial institutions, match orders, make decisions about routing orders, facilitate the clearance and settlement of executed trades, prepare or send transaction confirmations, screen counterparties for creditworthiness, or hold funds or securities.”<sup>3</sup>

The Internet significantly expands investors’ access to information. However, the Internet does not completely solve problems of how investors process (Gilson & Kraakman 1984: 594) and verify the information that is available to them. Empowerment narratives justify welcoming these new information resources. Vulnerable consumer narratives justify regulating them.

The next section of the article identifies three characteristics by which online financial information is distinguishable from information provided through other media, and suggests that these distinctions raise issues for regulation. The article then examines some of the ways in which legal rules control the provision of information to investors, with examples from the U.S., the UK, and Australia.

### III. SPECIAL CHARACTERISTICS OF ONLINE INVESTMENT INFORMATION

The major characteristics that distinguish online information from offline information are: immediacy, interactivity, and interjurisdictionality. Online publications are different from offline publications because of the speed with which they can be produced, and the speed with which investors can make decisions based on them; because some online publications are essentially like transcribed conversations, rather than conventional publications; because web pages may be read all over the world, even if they originate in and are hosted on a computer in one physical jurisdiction; and because publication on the Internet requires only limited financial resources. A number of issues for regulation arise because of these distinguishing characteristics.

In addition to these readily identifiable distinctions between online and offline information, there may be other, less apparent, distinctions that regulators should think about. Because much investor information that appears on websites is text based, regulators tend to analogize web publications to printed publications. Regulators worry about how to make sure that investors experience disclaimers on web pages in the same way as they experience disclaimers in printed texts. As the sub-section headed “Interactivity” below demonstrates, regulators have identified certain characteristics of web publication that are different from print publication, such as the ability to use hyperlinks. When thinking about how to treat e-mail interactions, we are likely to consider whether they are analogous to printed communications or

to conversations (cf. Froomkin 1995: 861). However, these analogies may have weaknesses. E-mail shares many characteristics with printed texts: the messages can be printed out so that there is a permanent record. E-mails now increasingly resemble web pages, with live links to web pages embedded in them. But e-mails are not like texts written on paper in all ways. People who cannot find the time to write a letter may find time to communicate with friends and relatives via e-mail. The ease of communication by e-mail leads to e-mail overload (e.g. Congress Online Project 2001), and, perhaps, disappointment in the speed of response. Perhaps this is because the distinctions between online and offline communication cumulate: e-mail is interactive and more immediate than snail-mail. It may be that forcing new communications techniques into existing conceptual boxes is an impediment, rather than an aid, to sensible rule-making. As well as thinking about e-mails, we should consider the experience of reading text on web pages. Do we know whether readers of online text experience that text in the same way they experience printed texts? Cyberpsychologists study the impact of technology on the psychology of individuals, suggesting, for example, that using the web may encourage “nonlinearity in the exploration of knowledge” and “communication via impressions rather than logical connections” (Gamberini & Bussolon 2001: 59).

This section of the paper explores these distinguishing characteristics of immediacy, interactivity, and interjurisdictionality.

#### A. IMMEDIACY

The idea that the world is speeding up (and becoming busier) is not new (e.g. Keasbey 1890: 270). But changes in communications technology change how we interact with the world. Ordinary investors can have nearly as much information about market conditions as professionals, although they may not be as well-informed as professionals, and the information on which they rely may not be subject to rigorous fact-checking (e.g., Singer 2003: 152–3). Investors can have access to current market prices for securities, and to breaking news about the financial conditions of issuers. Investors may receive some of their information via e-mail newsletters, and faxes and e-mails seem generally to require more immediate responses than letters received through the postal system. Web pages promise the possibility of instant connection to vendors of services 24/7, whenever the investor wants to transact business, and service providers hire staff to answer questions raised by the web pages at any time too. Cell phones and wireless modems mean that investors never need to be out of touch. If they want to, they can trade in securities at the beach, or half-way up a mountain. This improved access to information, and improved access to financial service providers who can help investors use the information they have, feeds into narratives of investor empowerment. The informed investor can make her investment decisions whenever she wants, and can give effect to them immediately.

However, the idea that it makes sense for ordinary investors to be deciding to trade securities at 7AM at the beach contrasts starkly with traditional views that ordinary investors who are investing primarily to pay for their retirements should be buying investments to hold on to them, rather than trading. Technology is associated with immediacy, but it may not make sense for most investors to take much advantage of this feature (e.g., Johnston 2001). Online investors may suffer from overconfidence, so that their feelings of empowerment may mask vulnerability (e.g., Barber & Odean 2002).

Traditionally, securities regulation has focused on ensuring that investors have adequate information to make their investment decisions, and on fraud prevention. Problems of fraud remain (International Organization of Securities Commissions (IOSCO) 1997: §I-C), but in many ways online fraud is no different from offline fraud. The only real difference is that technologies which enable fraudsters to communicate with their victims from a distance, and anonymously, interfere with the ability of investors and regulators to track down the fraudsters. More interesting analytically are problems associated with the way in which investors experience truthful information they acquire online. For example, if it were the case that online investors were more likely than offline investors to take rash investment decisions, this would be a problem of investor psychology that would have implications for what regulators do. It is, of course, an empirical question whether investors experience online information differently from offline information. Two solutions are possible: developing mechanisms for educating online investors to make their investment decisions more carefully, and providing ways for investors to reverse hasty decisions. Both of these are problematic.

Increasingly, financial regulators seek ways to educate investors about sensible investment strategies. Just as financial and information businesses can exploit the Internet to reach large audiences, so can the regulators. The Australian Securities & Investments Commission (ASIC) has a special website for consumers, called "Fido," and produces a monthly e-mail letter to investors, called *Fido News*. The SEC has an Office of Investor Education and Assistance with pages on the SEC website.

Regulators' web pages tend to be less eye-catching than those of businesses that hope to make a profit, which may impact on the success of their educational programs. But regulators are conscious of the need to avoid the "dusty brochure syndrome" (IOSCO 2003: 6). In addition, regulators who want to persuade investors to be more careful about making their investment decisions (and who are therefore likely to be invoking ideas of vulnerability) run up against the narratives of empowerment, which suggest that investors need to behave in particular ways to make real money. Despite these problems, regulators are getting involved in investor education, which involves a significant change in their role from one of policing to one of educating. This change is not uncontroversial (Hu 2000: 837–8).

Where a sense of immediacy results from high-pressure sales tactics, regulators like to provide investors with a way of escaping from commitments

they make, and this kind of concern underlies regulatory attempts to restrict cold-calling. The UK's Financial Promotion Regulations distinguish between real-time communications with investors and non-real-time communications, and different rules apply to the different types of communication, depending on the financial product or service involved. The EU's Distance Marketing Directive requires Member States to allow investors to benefit from a "cooling-off period" so that they can pull out of certain financial transactions if, on reflection, they decide that they have made the wrong decision (Distance Marketing Directive 2002: Art. 6). The Directive suggests that these consumer protections are necessary in order to create a single European market in financial services. However, the right of withdrawal does not apply to "financial services whose price depends on fluctuations in the financial market outside the suppliers control" (*ibid.*: Art. 6(2)(a)). The UK's Financial Services Authority (FSA) concludes that this will "exclude a wide range of financial services" that the FSA regulates, such as transferable securities, but that the right would apply to investment advice (FSA 2003: 17–8).

In one sense this exclusion of a wide range of transferable securities from the right of withdrawal is unsatisfactory because of the dangers that investors will be influenced by the immediacy of online information resources into making trading decisions too quickly and without adequate reflection. On the other hand, if a right of withdrawal did exist in such circumstances, an investor could choose to exercise the right when a trading decision turned out to be a bad investment decision and not to exercise the right if the decision turned out well. Financial firms should not be forced to guarantee investment performance in this way.

Immediacy as a characteristic therefore has two contrasting attributes: it may be a source of empowerment if it enhances the amount and quality of information available to investors, or it may be a source of vulnerability if investors become overconfident and make decisions rashly or too hurriedly, and without adequate time for reflection.

## B. INTERACTIVITY

From chat rooms to interactive web pages, the Internet is interactive in ways that the print media are not. Newspapers and magazines publish letters to the editor, and may publish articles sent in by the public, but the interaction between readers and publishers is generally not continuous, and newspapers publish contributions by a very small percentage of their readerships. Newspapers and magazines can, of course, choose not to publish contributions they do not like. Radio talk shows provide greater opportunities for people in general to express their views in public, although moderation by the host and, perhaps, screening by the radio station, occasionally serves as some constraint on what is said. Listeners can express their views, but their interactions with other listeners are limited.

The interactive nature of the Internet may make it a particularly attractive source of information.

Two aspects of the Internet's interactivity are relevant to financial regulators. First, associated with the immediacy of the Internet, investors can link directly from information sources to vendors of products and services via a web page. This linkage between information and products and services makes financial portals look different from newspapers, and more like entities involved in investment business. If advertisers pay more depending on how many visitors to the website click on the advertisement, this gives the portal an incentive to carry informational content that would encourage visitors to click on the advertisements. Portals owned by firms with investments in financial businesses might have incentives to promote those businesses through the information they publish. So the financial incentives to which financial portals are subject may be different from those to which traditional print publications are subject (although online newspapers could be in a position very similar to that of the portals). In 2001 ASIC suggested that a portal that received different levels of remuneration depending on investors' investment decisions could be regarded as giving investment advice and might therefore be subject to regulation (ASIC 2001b: 20). A visitor to a financial portal who thought that the portal was a news source like a newspaper might expect that links to broker-dealer firms were paid for in the same way as traditional newspaper advertisements. If that person also preferred to obtain information through the portal rather than from magazines or newspapers because of the portal's interactivity and ease of use, then it would be more important to ensure that the portal's news content did not steer them to service providers advertising on the portal. Journalists ascribe to codes of ethics which suggest that journalists should report truthfully and independently (e.g., Singer 2003: 145). A financial portal which republished a story next to an advertisement related to the topic of the story (*ibid.*: 154) might create a different impression than the story's author might have intended. A visitor to a financial portal who thinks of the financial portal as analogous to a newspaper might think that the authors who contributed to the informational content were bound by journalists' codes of ethics, although those authors might not think of themselves as journalists and might not consider that they were bound by journalists' ethical codes (*ibid.*: 151). Financial regulators want to ensure that investors understand the risks that financial incentives might distort a portal's informational content (e.g., IOSCO 2003: 6).

The Internet challenges traditional distinctions between journalists and financial advisors by allowing the development of financial portals that operate as hybrid providers of financial information and advice and news. Financial portals are a significant engine for making information available to investors, and promoting investor empowerment, and regulators should be cautious about imposing rules on them that will drive them out of business. More interesting and, perhaps, more reliable portals should attract

more visitors, and thus more advertising revenues. If these portals compete with broker-dealers and investment advisors to drive down the price of investment advice, this is a good outcome for investors. But there is no guarantee that the market for online financial information will work properly. The most popular online resources may not be the most reliable. Licensing systems for financial professionals (including investment advisors) seek to ensure that licensees meet certain standards of skill and professionalism, but financial portals may not be subject to these licensing requirements. Compliance with licensing requirements would increase the cost of operating a portal, so requiring operators of financial portals to be licensed as investment advisors might not be the best solution.

A compromise between requiring operators of portals to be licensed as investment advisors and treating portal operators like newspapers that do not need to be licensed would be for regulators to encourage habits of skepticism in users of financial information generally, whether from online or offline sources. This approach would be consistent with ideas of decentered regulation discussed elsewhere in this issue.

A second way in which the Internet involves interactivity is that it facilitates two-way and multi-way discussions of issues, including issues relating to investments, among groups of people, by means of listserves, electronic bulletin boards, and chat rooms. Although such facilities may be moderated or monitored by an operator, they may often rely on self-regulation to constrain the behavior of participants.

For example, hundreds of Yahoo electronic bulletin boards concentrate on investment issues. These boards may attract large numbers of posts in a single day, containing a number of "threads", or series of postings on one topic. Some posters post more than one message, and users respond to other users' posts in the same way that members of a listserve respond to posts by other members. Readers can view messages chronologically, or by thread. The identities of the posters are often opaque; although Yahoo provides access to user profiles, these may be unavailable, uninformative, or even misleading. Although identities are opaque to the world at large, Yahoo claims to require users to inform it of their true identities.<sup>4</sup> Even so, Yahoo allows users to "Create up to 6 different Public profiles with one account!" and users can set up more than one account. Thus, the casual reader cannot tell precisely how many users are posting messages to the bulletin board. The messages themselves show varying degrees of coherence and control. Yahoo provides users of the boards with opportunities to "Recommend this Post," "Ignore this User," and "Report Abuse," but Yahoo's Terms of Service accept no responsibility, or liability in respect of the content of any posts (Yahoo Terms of Service, para. 6), or for any material available through links to other websites or other resources (*ibid.*: para. 15). The Terms of Service also state that users agree not to do certain things, such as making available unlawful content, or unauthorized advertising (*ibid.*: para. 6), but people use Yahoo in ways that are supposedly prohibited all

the time. Yahoo does reserve the right to refuse or move content, but it is unclear to what extent it exercises this right.

Yahoo's electronic bulletin boards link to a "Reminder," which refers to the Terms of Service, and warns readers that:

Information posted to message boards should not be used as a substitute for independent research, and should not be relied on to trade or make investment decisions. Prudent investors do their homework and don't believe everything they read on message boards.<sup>5</sup>

A similar reminder appears at the bottom of the message-board pages in small type, and readers need to scroll down to read it. Even if one could work out how many people regularly post to a particular bulletin board (Yahoo clearly can), it is unclear how many people read the posts to the board, and even less clear to what extent readers in fact take account of the substance of the posts in making their investment decisions.

ASIC encourages Internet discussion sites that are not licensed to put in place policies and procedures that are similar to Yahoo's Terms of Service. But ASIC also suggests it is interested in monitoring the compliance of Internet discussion sites with the terms of its guidelines. A number of these are geared to enabling ASIC to exercise its enforcement functions in relation to frauds perpetrated through discussion sites, but others are geared to putting investors on notice that the information they are receiving is not professional advice (ASIC 2000). The International Organization of Securities Commissions (IOSCO) has also said that investors should be educated to understand that information on bulletin boards may be false (IOSCO 2003: 6).

Empirical research in this area could help us to understand better the implications of bulletin boards for price formation in the financial markets (e.g., Tumarkin & Whitelaw 2001: 48), and their effects on investor behavior. If we knew more about the users of message boards, and how seriously they take the information they find there, we would be in a better position to know how to go about regulating (or not regulating) the boards.

### C. INTERJURISDICTIONALITY

The Internet is a global medium, but investor protection is largely a matter for individual states, although IOSCO (e.g., Sommer 1996), the Basle Committee, the International Association of Insurance Supervisors, and other groups seek to agree on principles of financial regulation at the international level, and regional organizations agree to harmonize some of their rules (e.g., *ibid.*: 16). Software programs that help investors to make investment decisions may be regulated as investment advice in some jurisdictions but not in others.

Initially, some financial regulators responded to the global reach of investment websites by suggesting that they wanted to treat all websites as being published in their jurisdictions (e.g., IOSCO 1998). However, over time,

many regulators have decided that they should only claim to regulate investment information directed at people within their territorial jurisdiction, or originating from their jurisdiction (e.g., IOSCO 2003: 2). For example, the UK's financial promotion restrictions do not apply to communications directed only at people outside the UK (Financial Promotion Regulations 2001: Art. 12(1)(b)). Problems may still occur where regulators or courts in the jurisdiction where an Internet publisher is based as well as regulators or courts in the jurisdictions where publications are directed claim jurisdiction over the publisher, and where each regulator applies slightly different rules. U.S. courts will exercise jurisdiction over conduct involving securities in the U.S. or conduct that produces effects in the U.S. (e.g., *Europe and Overseas Commodity Traders v Banque Paribas London* 1998).

At the domestic level, the SEC has reacted to claims that Internet investment advisors are subjected to excessive regulatory burdens by exempting certain "Internet Investment Advisors" whose websites provide interactive investment advice from the need to register with the states and to allow them to register with the SEC instead without meeting the \$25 million statutory threshold for registration with the SEC (2002). The SEC describes the services provided by the investment advisors as follows:

These advisers, which we call "Internet Investment Advisers", provide investment advice to their clients through interactive Web sites. Clients visit these Web sites and answer on-line questions concerning their personal finances and investment goals. Thereafter, the adviser's computer-based application or algorithm processes and analyzes each client's response and then transmits investment advice back to each client through the website. Clients residing in any state can, upon accessing the interactive Web site, obtain investment advice at any time. (SEC 2002: 77620)

Investment advisors who merely use the Internet for marketing, or who operate chat rooms and bulletin boards may not benefit from the rule (SEC 2002: 77621). Although this is a domestic example, the regulation illustrates a regulator's concern that compliance with multiple licensing requirements is costly. At the global level, financial information providers need to decide whether the profits they may make from directing information into different jurisdictions are likely to exceed the costs of regulatory compliance in different jurisdictions.

On the one hand, one could argue that anything that expands the range of investment options for investors, and promotes competition between financial services providers, is a good thing. Thus, the global reach of websites that provide financial information is conducive to the empowerment of investors. However, the interjurisdictionality of the Internet may also facilitate cross-border frauds, raising new concerns about the vulnerability of investors. Even if foreign websites are not fraudulent, there is a risk that investors who can understand information about their domestic financial markets, and products and services available on those markets, will have difficulty understanding the implications of foreign products and services (e.g. IOSCO



2003: 30). Again, there is an issue of balancing investor empowerment with investor protection. Domestic rules that are designed to protect investors can act as barriers that will prevent investors from having access to products and services from abroad. Domestic financial services providers may lobby for investor protection rules in order to protect their own financial viability.

Regulators in different jurisdictions have developed different approaches to the control of online financial information, which reflect the different statutory and constitutional contexts in which they operate. The U.S. Constitution constrains financial regulators in their ability to regulate news media that publish impersonal investment advice (e.g. *Lowe v SEC* 1985: 207–8). Singer observes that:

Safeguarded by the First Amendment, US journalists have long claimed to provide a public service – not just to help individuals but to help democratic society as a whole. (Singer 2003: 144)

Regulators in different jurisdictions may share the view that publishers of traditional newspapers should not be regulated as investment advisors but that producers of other types of publication may be. The U.S. Supreme Court suggested that it was appropriate to distinguish between traditional newspapers and tip sheets (*Lowe v SEC* 1985: 206) and the UK's FSA has also suggested that as a normal rule newspapers should not be considered to be providing investment advice (FSA 2004: §7(5)(3)). In Australia, ASIC has suggested that resolving the question whether a publication involves investment advice involves an assessment of the context of the publication (ASIC 2001c: para. 1(2)(2)). These different approaches represent different views about the roles of the news media and of regulation in society, but it is also clear that whereas the U.S. Supreme Court could in 1985 draw a clear distinction between traditional newspapers and tip sheets, on the Internet the distinction is no longer as clear.

National differences are problematic for businesses that would like to offer their services across borders, and are likely to insulate regulated financial information businesses from competition from foreign information providers. Such insulation may not be in the best interests of investors. As with other issues associated with cross-border services, regulatory harmonization looks like the answer. Here, the EU Commission has greater incentives to think about the problems than other bodies, because the aim of achieving a single internal market for financial services is an important part of the single market objective. However, even within the EU, it is often difficult to achieve agreement on harmonized standards (e.g., Karmel 1999: 19).

#### IV. THE REGULATION OF INVESTMENT ADVERTISING

Investors can now inform themselves about potential investments and investment strategies via a variety of tools, but these tools are not all regulated

in the same way. For example, a firm that is regularly engaged in investment business and is licensed to carry on that business will be subject to scrutiny by its regulator. This scrutiny extends to the advertising and investment recommendations produced by the firm. In contrast, investment information produced by non-regulated entities, such as newspapers and magazines and analogous publications, will be controlled by different sets of (probably self-regulatory) rules. This is problematic from both the perspective of protecting vulnerable investors and that of empowering them, especially if there is, in fact, little distinction between the publications produced by traditional news media and more recently established new-economy information providers. The most vulnerable investors may not recognize the legal or regulatory significance of the distinctions between the sources of the information on which they rely.

Differential regulation also has economic consequences. Imposing different regulatory compliance costs in relation to the same publications produced by different types of publisher gives a competitive advantage to the lower-regulatory-cost publisher unless higher-cost publishers are able effectively to communicate an impression of higher quality, and have some realistic possibility of recouping the extra costs.

The separation of regulatory responsibilities for controlling the provision of information to investors within and between different countries means that information providers who wish to take advantage of the interjurisdictionality of the Internet as a medium for communication have to deal with complex (and therefore potentially costly) issues of compliance. There are two major issues for compliance for financial portals: when the publisher of financial information needs to be regulated as an investment business, and, if it does, what rules apply to the provision of financial information online. A regulated securities firm that operates a financial portal will need to comply with the rules its regulators specify for the publication of financial information. A publisher that sets up a financial portal online would like to avoid being regulated as a securities firm. Financial regulators want to protect investors, but they may also be reluctant to seem excessively paternalistic. Financial regulators are also reluctant to try to regulate newspapers, and must take account of constitutional or treaty rules that protect freedom of expression (e.g. Article 19 of the Universal Declaration of Human Rights (1948); Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)). The public interest in protecting investors must be balanced against the public interest in freedom of expression (cf. *Attorney General v Punch* 2002 at 27–30, per Lord Nicholls of Birkenhead). It is increasingly difficult, however, to draw clear distinctions between newspapers and other publishers of financial information, and the difficulty is most apparent when one compares online newspapers and online portals that include some financial resources.

Investor education might make investors less vulnerable and empower them to manage their own financial lives. Regulators in different countries

are working to develop investor education initiatives (e.g. IOSCO 2003: 36). Investor education programs, however, involve some of the same issues as online financial information. Investors may not find it easy to identify quality programs generally, or to find the programs that are suited to their needs.

#### A. REGULATION OF FINANCIAL INFORMATION PROVIDERS AS FINANCIAL FIRMS

If rules defining when information constitutes investment advice truly sought to balance the objectives of protecting vulnerable investors and empowering capable investors then they would provide different levels of investor protection depending on the characteristics of the investor. Vulnerable investors would receive higher levels of protection and sophisticated parties would be less regulated. If investors could correctly assess their own levels of vulnerability we could allow them to choose whether to opt in to a more protective regime. But there are reasons to doubt whether investors can make such assessments. Behavioral economists suggest that there are reasons to believe that people often do not behave as rational self-interested economic actors (e.g., Langevoort 2002). Empirical research may show that all investors are vulnerable, or that investors who use online information resources are more vulnerable than those who consult broker-dealers, but we do not yet have sufficient empirical data about investor behavior to reach those conclusions. This lack of data is particularly troubling given that there is some reason to suspect that some investors who feel most empowered, such as some online day traders, may in fact be unaware of their own vulnerability (e.g., Barber & Odean 2002). If vulnerable investors do not recognize, their vulnerability the default rules should provide a higher degree of protection than would be the case if investors could be trusted to recognize how much protection they needed. So a cautious regulatory regime would allow investors to opt out of protection rather than allowing them to opt in to protection (e.g., Camerer et al. 2003: 1224–5). Investors who make decisions too quickly should be allowed time to reflect and perhaps change their minds during cooling-off periods (*ibid.*: 1238–42). The immediacy of online financial information may mean that cooling-off periods are particularly important for those who obtain investment information online (or directly from salespersons who pressurize them into making decisions on the spot) rather than from more traditional publications.

In 2002 the EU adopted a directive on the distance marketing of financial services which should be implemented in the Member States by 9 October 2004. The directive provides that where a consumer enters into a distance contract for financial services (a contract making exclusive use of means of distance communication) the consumer should be provided with information about the service provider, the service, and the contract before conclusion of the contract (Distance Marketing Directive: Art. 1). In addition, the consumer should benefit from a cooling-off period during which she may

exercise a right of withdrawal from the contract (*ibid.*: Art. 6). In this way the directive addresses issues raised by the immediacy of the Internet as a medium for contracting, and mitigates some of the harmful effects of immediacy by allowing consumers to change their minds after time for reflection. However, the right of withdrawal guaranteed by the directive does not apply to “financial services whose price depends on fluctuations in the financial market outside the suppliers control,” such as securities (*ibid.*: Art. 6(2)(a)), although the right would apply to life insurance policies.

The FSA has suggested that it considers that the directive will result in changes to the rules that apply to regulated firms, rather than expanding the range of firms that will be subject to disclosure requirements (FSA 2003). The impact of the cooling-off periods will fall on providers of financial services, who are already subject to regulation, rather than to providers of financial information who may or may not otherwise be subject to regulation by financial regulators. Such an approach protects investors who decide that they want protection, but does not interfere with freedom of the press (although it may mean that financial services providers will want to alter the terms on which they contract with financial portals).

Allowing investors who make their investment decisions in the heat of the moment to change their minds on reflection is one way of addressing the impact of new technology on investor behavior. Regulators in the U.S. and Australia have also sought to apply traditional definitions of investment advice to the new market for information. Information will look more like investment advice if it is tailored to the situation of a particular investor, so information that is personalized rather than impersonal looks like investment advice that should be regulated. The U.S. Supreme Court held in one case that the Investment Advisers Act of 1940, which distinguishes between investment advice and the publication “of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation” (15 USC §80b-2(a)(11)(D)), did not apply to investment newsletters giving impersonal investment advice, because to regulate such publications would violate the First Amendment to the U.S. Constitution (*Lowe v SEC* 1985 at 207–8). The Court contrasted impersonal advice with “the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act” (*ibid.*: at 210). The Court also suggested that the Act sought to distinguish between genuine publishers and “hit and run tipsters” or “touts” (*ibid.*: at 206). From this perspective online information resources that are interactive look more like investment advice than resources which merely communicate general information about investments. But the statutory exclusion of bona fide newspapers means that newspapers should never require licensing as investment advisers.

Courts in the U.S. are unlikely to allow regulators to treat online information resources that are interactive (in the sense of allowing investors to identify their own investment profiles) as being personalized information, which means that the information provider will not need to be licensed. In

a 1999 case, the federal district court for the District of Columbia held that the Commodities Futures Trading Commission's (CFTC) rules requiring licensing of commodities trading advisors (CTAs) were an impermissible prior restraint on speech (*Taucher v Born* 1999). Adopting a distinction identified by Justice White in his concurring opinion in *Lowe* (*Lowe v SEC* 1985 at 228, 232), the district court held that the CFTC was regulating speech rather than regulating a profession when it required publishers to register as CTAs. The court described the publishers' activities as follows:

Through their products, they provide advice on commodities futures trading strategies and techniques; they sell trading systems designed to influence their customers' trading decisions; in some instances, they even go so far as to offer specific buy and sell recommendations; but their advice and recommendations are identical for every customer and their products are available to all who wish to purchase them. Moreover, the plaintiffs never have any personal contact with their customers. They never supplement their general recommendations with specific recommendations directed at individual customers. They never make trades for their customers. They simply sell their products and leave it to their customers to decide for themselves whether and how they will use the advice and recommendations purchased from the plaintiffs. (*Taucher v Born* 1999 at 478)

Distinctions between personal and impersonal advice and between genuine publishers and tipsters are harder to draw in 2003 than they were in 1985, although Australia and the UK also make a distinction between personal advice and general advice (FSRA 2001: §766B). The UK's FSA states that:

Giving a person generic advice about specified investments (for example, invest in Japan rather than Europe) is not a regulated activity nor is giving information as opposed to advice (for example, listings or company news). However, the context in which something is communicated may affect its character; for example, if a person gives information on share price against the background that, when he does so, that will be a good time to sell, then this will constitute advice. (FSA 2004a: §2.7.15)

The context for the provision of information is complex in new ways. Financial portals publish financial news, but they do so in an interactive way that raises questions about when advice is impersonal or general and when it is not. If a financial portal publishes news that suggests that a particular investment is desirable is it acting as a genuine publisher or not? Does it make a difference whether established newspapers publish similar items in their online editions or not? Would a sense of urgency deriving from the immediacy of the Internet as a medium make recommendations look more like tipping than like genuine news? The U.S. Constitution limits the ability of financial regulators in the U.S. to expand ideas of personalized information to include the sort of interactive information an investor can now obtain through a financial portal.

The situation is different in the UK and Australia, where the regulators have sought to develop guidance about the distinction between regulated

investment advice and non-regulated information based on current information delivery arrangements. In 2001, before Australia's Financial Services Reform Act of 2001 (FSRA) was enacted, the Australian Press Council (2001) expressed concern that the new rules would require journalists to be licensed and that this requirement would interfere with the freedom of the press and with the "fundamental social role of informing the public on matters of public interest." The Australian Press Council further said that:

It is inappropriate for the press to be burdened with a regulatory regime which would lead it to have to consider whether the information that they propose to disseminate is financial product advice or to re-express that material so that it eliminates the implication that it is financial product advice. (Australian Press Council 2001)

The legislation now includes exemptions for newspapers and periodicals and for general advice provided by an "information service," including broadcasting services and "an online database service or a similar service." In all of these cases the exemption is available if the sole or principal purpose is not the provision of investment advice (FSRA 2001: §911A; see also, e.g., Corporations Amendment Regulations (2002) No. 2: Schedule 1, §8, reg. 7.1.08). One requirement for the exemptions is comprehensible disclosure of a material financial interest a publisher has in the provision of financial product advice (Corporations Amendment Regulations (2002) No. 3). However, the disclosure requirement does not apply where the principal purpose of the publication or transmission is to report or comment on news rather than to give financial product advice, or in relation to paid advertising which can be distinguished from other information in the publication or transmission. However, the regulations do not promote certainty about the application of the rules, as they suggest that a publisher's material financial interest in readers' acting on information need not be disclosed if the principal purpose of the publication is reporting on news. The regulations do not address the question of when a material financial interest would result in a re-characterization of the principal purpose of the publication.

The requirement to disclose financial benefit does not apply where there is compliance with either an industry code of practice, or with the Australian Press Council's Statement of Principles or with an internal policy which addresses conflicts of interest (Corporations Amendment Regulations (2002) No. 3, Schedule 1, §29, reg. 7.6.01B). Thus, some aspects of the regulation of investment advice in Australia are decentered (Kingsford Smith 2004), although the general context is a context where the rules are set by statutes and regulations and by an official regulator. The existence of effective non-regulatory arrangements for limiting the risk that conflicts of interest could affect the content of published information is consistent with the idea of protecting vulnerable investors while not imposing excessive costs on the provision of information to investors. This only works if the self-regulation is in fact effective.

ASIC has issued a guide to when providers of information would need to be licensed,<sup>6</sup> which emphasizes the significance of the context in which a communication is made (ASIC 2001c: §1.2.2). For example, a communication is more likely to be considered to be financial product advice if the provider is remunerated for providing it or stands to gain from a person's use of the information. If the information provider makes representations to the recipient of the communication these are also relevant (*ibid.*: §1.2.3). In the policy proposal paper that preceded the guide (ASIC 2001b), and which some commentators worried was too detailed (*ibid.*: 5), ASIC had suggested a wider range of considerations that would be relevant to the regulatory treatment of a communication: as well as benefits to the author of a communication and representations made by the author, the fact that the communicator was required by law to act in the investor's interests was identified as being relevant, as was whether a person in the investor's position was likely to be influenced by the author's reputation (ASIC 2001b: 13). The guide does not address these potential factors, but its reference to "the overall impression created by a communication, and all the surrounding circumstances in which it is provided" (ASIC 2001c: §1.2.2) suggests that they may well be treated by ASIC as being relevant. Again these considerations speak to the question of whether regulation is necessary to protect investors. The Australian approach to the issue of when publishers must be licensed echoes the U.S. statute's exclusion of "bona fide" newspapers from the licensing requirement. A publication that only contains "objectively ascertainable information whose truth or accuracy cannot be reasonably questioned" (*ibid.*: §1.2.4) is not giving financial product advice unless the information is presented in such a way as to amount to a recommendation (*ibid.*: §1.2.5). The complexity of the rules and guidance reflects the complexities of the modern market for information.

Under the Australian regulations, information "conduits" do not need to be licensed (Corporations Amendment Regulations (2002) No. 2: Schedule 1, reg 7.1.31). Publishers and operators of Internet portals who merely pass on information rather than endorsing the information they provide could be regarded as conduits rather than as providers of financial product advice (ASIC 2001c: §1.4.2(c)). The guide follows the policy proposal paper (and regulation 7.1.31) in treating endorsement of the communication as being relevant to this distinction between passing on and providing information, but the policy proposal paper also referred to other criteria, providing that the portal's remuneration should not depend on consumers' decisions, the identity of the author should be made clear, and the portal's reputation should not lend credence to the statement (ASIC 2001b: 20). The policy proposal paper suggested that portals which included questionnaires which are used to give users information about selected financial products, or which used "data mining" techniques to work out what sort of products the user was interested in, would not be considered as "mere conduits" (*ibid.*: 42). The guide omits all of these considerations, but would still seem to leave

open the possibility that ASIC could treat such factors as being relevant to the question whether a portal was providing financial product advice or not.

In contrast to the U.S. position, ASIC's policy proposal paper concluded that even newspaper journalists might be caught by the licensing requirement under certain circumstances, for example if the journalist's reputation is such that readers are likely to be influenced by specific recommendations in a column (ASIC 2001b: 56). The wording of the guide contains no hint of ASIC's current views on this issue. But ASIC's approach illustrates a nuanced view of the various factors that might affect how investors perceive information about investments.

ASIC has directly addressed issues of interactivity in the context of online questionnaires, and also in the context of Internet discussion sites (IDSs). ASIC suggests that it wants to facilitate investors' access to an inexpensive method of self-education on informal IDSs, while not allowing these IDSs to be regarded as a source of professional advice (ASIC 2000: 3–4). ASIC's presentation of its policy is thus consistent with what I would suggest is a desirable goal of balancing investor empowerment with investor protection. The guidelines in fact require extensive disclosure and warnings to people who view postings on a discussion site, including disclosure that the operator of the discussion site does not endorse postings or vouch for their accuracy, and that postings are not professional investment advice (*ibid.*: 12–13). In order to comply with the disclosure requirements, the operator of the site must "allow people to access postings only after viewing, or being clearly asked to look at, the required warnings" (*ibid.*: 12). The operator must also give warnings to posters, including warning them that they may incur liability as a result of their postings (*ibid.*: 13). ASIC also imposes various requirements on operators of IDSs (*ibid.*: 14–15), and although IDSs are not required to be licensed, they are subject to monitoring by ASIC.

In addressing the issue of distinguishing between regulated investment advice and unregulated information the UK rules focus on the capacities in which the information provider and the reader of the information act. The UK has general rules regulating financial promotions (see FSMA 2000: §21; Financial Promotion Regulations 2001) in addition to the rules which require investment advisers to be licensed (see Financial Services and Markets Act 2000 (Regulated Activities) Order 2001). Article 54 of the Regulated Activities Order suggests that the essential question is whether the primary purpose of the publication, including advertising and any promotional material is to give advice about the merits of investment decisions (*ibid.*: Art. 54(1)). The fact that newspapers are perceived to require a specific exclusion suggests that they might otherwise be caught by the restriction on providing investment advice. The FSA's guidance on the application of the authorization requirement suggests that, although a person who was not giving advice for commercial purposes might escape the need for authorization, newspapers may not be able to use the argument



that they are not in the business of giving investment advice on the basis that they do not specifically charge for advice (FSA 2004: §7.3.4). Thus, a journalist who warned readers against a particular investment in order to protect people from crime would not be regarded as giving advice for commercial purposes, although a newspaper which answered readers' letters with advice "to generate goodwill" or a website which generated income from advertising rather than from readers might be regarded as giving advice for commercial purposes (*ibid.*: §7.3.4). The UK rules do not therefore only apply to personalized advice, and the FSA's interpretation of the Article 54 exclusion recognizes that buy or sell recommendations might constitute leading persons to buy or sell securities so that the exclusion would not apply (*ibid.*: §7.4.9(1)). In some circumstances hypertext links might suggest that the purpose of an online publication was to lead to transactions (*ibid.*: §7.4.11).

The FSA's guidance on the application of the Article 54 exclusion emphasizes that what is critical is the "characteristic content of the publication or service looked at over time" and that:

This judgment depends on the overall impression of content. One way of approaching this is to consider what an average consumer of a publication or service might expect to find when making a decision whether to buy a particular edition or to use the service. (FSA 2004: §7.4.7)

The regulations state that the FSA has the power to grant a (conclusive) certificate that a publication or service falls within the exclusion (Regulated Activities Order 2001: Art. 54(3)).<sup>7</sup> The FSA suggests that applications for certificates should only be necessary in cases of significant doubt (FSA 2004: §7.5.4), and that "websites which provide financial news or information" and "national or local newspapers providing the normal range of non-financial news and coverage of other matters (such as sports, arts and leisure) and which simply contain financial journalism (such as reports on particular investments or markets) as one element of their all-round coverage" (*ibid.*: §7.5.3) are cases where the exclusion is capable of applying.

The rules and guidance in Australia and the UK force newspapers to think about their role and whether they are in fact providing information to readers that the readers would think of as investment advice. ASIC and the FSA have both focused on ways in which the interactivity of online information resources may be significant for the users of those resources, although they both conclude that traditional newspapers would not need to be licensed to carry on their publication of news. But the difference in the analysis of the issue in Australia and the UK on the one hand and the U.S. on the other suggests that the global harmonization of the rules that would be desirable from the perspective of the interjurisdictionality of online information resources is unlikely to happen. More limited harmonization among states with similar approaches such as Australia and the UK is more feasible.

## B. REGULATION OF INFORMATION PROVIDED BY REGULATED FIRMS

Regulators' distinctions between regulated online investment advice and unregulated online information reflect a consciousness of the significance of interactivity. Where regulators set standards for the provision of investment advice by regulated information providers they are also influenced by conditions such as immediacy, which may encourage investors to be swayed by the information they are given. The FSA's conduct of business rules contain detailed requirements about financial promotions that apply different requirements to "real-time" and "non-real-time" communications. In particular regulated firms should generally not communicate real-time unsolicited financial promotions (FSA 2004: COB 3.10.3 R).

Real-time communications are those that involve "interactive dialogue" (Financial Promotion Regulations 2001: Art. 7(1)), but e-mails are considered to be non-real-time communications (*ibid.*: Art. 7(3)). This may contrast with the lived experience of e-mail users. On a number of occasions I have enjoyed what felt like (somewhat slow) e-mail conversations with friends in California, Australia, and the UK. The Financial Promotion Regulations also distinguish between communications that are "made to another person" and those that are "directed at persons" (*ibid.*: Art. 6). This is a distinction between communications addressed to a particular person, and those addressed to persons generally, such as through a website. Communications directed at more than one recipient, by way of a system that in the normal course creates a record of the communication which can be referred to at a later time, and which do not enable or require immediate responses would tend to be regarded as non-real-time communications (*ibid.*: Art. 7(4) and (5)).

The FSA has addressed the question of when a website might involve a financial promotion in guidance contained in the *Handbook*. The FSA emphasizes that the test is the same as the test that applies to any other medium (FSA 2004: Auth App. 1.22.2 G). However, a hypertext link may in itself constitute a financial promotion depending "on the nature of the hypertext link and the context in which it is placed" (*ibid.*: 1.22.3 G). Text on a website that encourages visitors to activate links may also constitute financial promotion (*ibid.*: 1.22.3 G). In relation to the Conduct of Business Rules that apply to financial promotions the FSA warns that:

When designing websites and other electronic media, firms should be aware of the difficulties that can arise when reproducing certain colours and printing certain types of text. These difficulties could cause problems with the presentation and retrieval of required information. (FSA 2004: COB 3.14.4G)

These UK rules and guidance do clearly suggest a concern for issues of immediacy and interactivity in the context of the provision of financial information online, although the FSA's views about what factors distinguish real-time from non-real-time communications may not accurately reflect how recipients of e-mails relate to e-mail communications.

In the U.S., NASD requires the firms it regulates to ensure that their communications with the public are:

based on principles of fair dealing and good faith and . . . provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry or service. No member may omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communication to be misleading. (NASD Rule 2210(d)(1)(A), NASD 2004: 4174–5)

NASD rules provide that broker-dealers must not make an “exaggerated, unwarranted or misleading statement or claim” (NASD Rule 2210(d)(1)(B), NASD 2004: 4175).

Broker-dealers in the U.S. are also generally required to ensure that recommendations they make to their clients are suitable for those clients. For example, NASD Rule 2310 states:

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

In order to ensure that recommendations are suitable for a non-institutional client, the broker-dealer should make reasonable efforts to obtain relevant information from the client (NASD Rule 2310(b), NASD 2004: 4261). As Rule 2310 suggests, the suitability doctrine tends to apply to recommendations directed to a particular client, rather than to the issuance of general research reports, so does not fit well in a context where broker-dealers issue general recommendations through websites, unless the broker-dealer has no reasonable basis for believing that the recommendation would be suitable for some customers (e.g., Unger 1999b: 25). The NASD manual suggests that a number of different investment strategies are presumed to contravene the fundamental responsibility for fair dealing. For example, short-term trading in mutual funds is presumed to be improper (*Krull v SEC* 2001 at 911; NASD IM-2310–2(b)(3), NASD 2004: 4262).

The NASD’s approach to suitability is evolving in response to changes in the way investors obtain information and interact with broker-dealers. In 2000, the NASD issued new rules requiring firms which promote day trading strategies to provide prospective clients with detailed risk disclosure statements about those strategies, and to evaluate the suitability of those strategies for their customers (NASD 2000; SEC 2000). The rules define a day-trading strategy as: “an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities” (NASD Rule 2360(e), NASD 2004: 4298).

The NASD has been reluctant to define what constitutes a “recommendation” that would be subject to the suitability requirement. In early 2001,

NASD issued a policy statement on online suitability, describing circumstances in which an electronic communication would constitute a recommendation caught by the suitability rule (SEC 2001: 20697). The policy statement suggests that a communication which would be regarded as a "call to action" should be regarded as a recommendation, and that "in general, the more individually tailored a particular communication to a specific customer or a targeted group of customers" the more likely the communication is to be treated as a recommendation (*ibid.*: 20699). The NASD also suggests a distinction between suggesting the purchase of a security and providing objective data about a security (*ibid.*: 20700). The policy statement suggests that providing a portfolio analysis tool which would allow a customer to "input personalized information such as age, financial condition, and risk tolerance" and which would provide the customer with a list of suggested securities would be regarded as making a recommendation (*ibid.*: 20700), whereas providing general research resources would not (*ibid.*: 20699). However, the NASD has declined to set out a "bright-line" rule defining precisely when an electronic communication would or would not be a recommendation. The NASD stated: "this current Policy Statement does not . . . establish a 'bright line' test for determining whether a communication does or does not constitute a 'recommendation' for purposes of the suitability rule. No single factor . . . standing alone, necessarily dictates the outcome of the analysis" (*ibid.*: 20698).

Concerns about investor vulnerability clearly influence the attitudes of regulators to the regulation of online information provided to investors by regulated firms, and ideas of immediacy and interactivity also play a role in regulators' development of rules and guidance. More empirical data about how investors perceive the information they obtain online would help in the future development of the rules. Day traders should receive detailed risk disclosures from firms that promote day-trading strategies, but firms that do not promote day trading do not have to provide these risk disclosures.

#### V. CONCLUSION: BALANCING INVESTOR EMPOWERMENT AND INVESTOR PROTECTION

Technology changes the workings of the market for information, and presents investors with new opportunities to manage their finances. This market for information has significant potential to empower individual investors. On the other hand, having increased amounts of information available to investors, which comes from very diverse sources, shifts the concerns of regulators. Previously, regulators focused on ensuring that investors got information; now the focus is moving to controlling the information vulnerable investors get and regulating how they use it. These contrasting narratives of empowerment and vulnerability lead to contrasting regulatory approaches of disengagement or increased control.

I argue that we should recognize that both narratives contain some truth, and that this leads to a need for regulators to think about ensuring that regulations do not interfere with technology's ability to empower investors, while also ensuring that investors receive the protections they need for themselves and for the health of the financial markets. In particular, we should be skeptical of the demands by traditional financial services providers that new providers of financial information should be regulated. On the other hand, we should also be skeptical of the claims by traditional news media that they should be free from regulation even when they seek to compete with regulated businesses. Regulation should be based not on how news media and financial businesses operated in the past, but on how they operate today.

The paper identifies three ways in which online investment information is different from information investors may obtain through other media: interjurisdictionality, immediacy, and interactivity. All of these characteristics of online financial information have implications for how we might regulate it. Interjurisdictionality creates pressures for harmonization of rule-making. The immediacy of the experience of obtaining information online suggests a need for more empirical research on how investors process information they get from different sources. The interactivity of websites means that an investor's relationship with a website may be different from her attitude to a newspaper or a letter from a broker. Again, empirical research is necessary to explore the implications of this immediacy for regulation.

One of the problems in regulating the provision of online information is that traditional newspapers may be immune to regulation or difficult to regulate. Although regulators in the UK and Australia have sought to define circumstances in which newspapers could incur an obligation to obtain a license, this option is foreclosed in the U.S. by the courts' interpretations of the U.S. Constitution. These differences in approach based on sociocultural and historical differences make harmonization of the regulation of online financial information on a global basis unlikely. But regulators around the world can work to encourage investors generally to be skeptical of the information they receive from whatever source they receive it. Moreover, regulatory strategies such as allowing investors a period of time in which to cancel arrangements they have entered into online without adequate reflection would seem to be particularly well geared to deal with the harmful effects of immediacy and interactivity in the provision of investment information online. In part this is because the burden of the rules falls on regulated entities rather than on newspapers. Unlike the idea of global rules requiring financial regulators to regulate newspapers, it is possible to imagine global harmonization of cooling-off periods in respect of financial transactions concluded on the basis of online information.

CAROLINE BRADLEY is *Professor of Law, University of Miami School of Law.*

## NOTES

1. It is true that a reader of a printed brochure might start in the middle and skip about in the document, rather than reading it from start to finish. However, printed documents are designed to be read from start to finish, and this may not be the case with web publishing. Also, if links are created to documents outside the control of the publisher, there is a risk that the external documents will change or disappear without the publisher's knowledge.
2. See LEXIS 976, 26 November 1996.
3. See LEXIS 597, 14 June 2002.
4. For example Yahoo Terms of Service, <http://docs.yahoo.com/info/terms/>: para. 3.
5. See <http://messages.yahoo.com/reminder.html>.
6. This guide was updated in November 2002.
7. Although the certificate is described as being "conclusive" it should be susceptible to public law challenges. See, e.g., *Boddington v British Transport Police* 1998 (discussing the decision in *Anisminic v Foreign Compensation Commission* 1969).

## REFERENCES

- Australian Press Council (2001) *Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities on the Financial Services Reform Bill 2001*, 6 June 2001. Available at [http://www.presscouncil.org.au/pcsite/fop/fop\\_subs/finance.html](http://www.presscouncil.org.au/pcsite/fop/fop_subs/finance.html).
- Australian Securities & Investment Commission (ASIC) (2000) *Interim Policy Statement 162: Internet Discussion Sites – Exposure Draft*. Melbourne, Australian Securities & Investment Commission. Available at: <http://www.cpd.com.au/asic/ps/ps162.pdf>.
- Australian Securities & Investment Commission (ASIC) (2001a) *Building the FSRB Administrative Framework – Policy to Implement the Financial Services Reform Bill 2001*. Melbourne, Australian Securities & Investment Commission. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/fsrbuild.pdf/\\$file/fsrbuild.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/fsrbuild.pdf/$file/fsrbuild.pdf).
- Australian Securities & Investment Commission (ASIC) (2001b) *Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing – ASIC Policy Proposal*, FSRB Policy Proposal Paper No. 1. Melbourne, Australian Securities & Investment Commission. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/fsr1advdeal.pdf/\\$file/fsr1advdeal.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/fsr1advdeal.pdf/$file/fsr1advdeal.pdf).
- Australian Securities & Investment Commission (ASIC) (2001c) *Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing – An ASIC Guide*. Melbourne, Australian Securities & Investment Commission. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/advicedealguide.pdf/\\$file/advicedealguide.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/advicedealguide.pdf/$file/advicedealguide.pdf).
- Australian Securities & Investment Commission (ASIC) (2003) *ASIC: Internet and E-Commerce Initiatives*. Melbourne, Australian Securities & Investment Commission. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ecom\\_sum.pdf/\\$file/ecom\\_sum.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ecom_sum.pdf/$file/ecom_sum.pdf).
- Bailey, Jeffrey J., John R. Nofsinger, and Michele O'Neill (2003) "A Review of Major Influences on Employee Retirement Investment Decisions," *Journal of Financial Services Research* 23: 149–65.
- Barber, Brad M., and Terrance Odean, (2002) "Online Investors: Do the Slow Die First?" *Review of Financial Studies* 15: 455–87.

- Barnett, Renee (2000) "Online Trading and the National Association of Securities Dealers' Suitability Rule: Are Online Investors Adequately Protected?" *American University Law Review* 49: 1089–125.
- Basel Committee on Banking Supervision (2001) *Risk Management Principles for Electronic Banking* (Basel: Bank for International Settlement). Available at <http://www.occ.treas.gov/ftp/release/2001-42a.pdf>.
- Bender, Steven W. (1994) "Rate Regulation at the Crossroads of Usury and Unconscionability: the Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard," *Houston Law Review* 31: 721–811.
- Calabresi, Guido (1982) *A Common Law for the Age of Statutes*. Cambridge: Harvard Univ. Press.
- Camerer, Colin, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue, and Matthew Rabin (2003) "Behavioral Economics and the Case for 'Asymmetric Paternalism'," *University of Pennsylvania Law Review* 151: 1211–54.
- Congress Online Project (2001) *E-Mail Overload in Congress: Managing a Communications Crisis*. Available at <http://www.congressonlineproject.org/emailoverload.pdf>.
- Corcoran, Andrea M., and Terry L. Hart (2002) "The Regulation of Cross-Border Financial Services in the EU Internal Market," *Columbia Journal of European Law* 8: 221–92.
- Fama, Eugene F. (1970) "Efficient Capital Markets: A Review of Theory and Empirical Work," *Journal of Finance* 25: 383–417.
- Fama, Eugene F. (1991) "Efficient Capital Markets II," *Journal of Finance* 46: 1575–617.
- Fanto, James A. (1998) "We're All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education," *Case Western Reserve Law Review* 49: 105–80.
- Federal Deposit Insurance Corporation (FDIC) (2001) "Request for Comment on Study of Banking Regulations Regarding the Online Delivery of Banking Services," 66 Fed. Reg. 7029 3 (July 16, 2001).
- Feinberg, Andrew (2004) "Just Monkeying Around," *Kiplinger's Personal Finance* (May): 57–8.
- Financial Services Authority (FSA) (2003) *Implementation of the Distance Marketing Directive*, issued March 2003. Available at <http://www.fsa.gov.uk/pubs/discussion/dp21.pdf>.
- Financial Services Authority (FSA) (2004) *Handbook*, Release 029, March 2004. Available at [http://www.fsa.gov.uk/handbook/BL3AUTHpp/AUTH/Chapter\\_2.pdf](http://www.fsa.gov.uk/handbook/BL3AUTHpp/AUTH/Chapter_2.pdf).
- Froomkin, A. Michael (1995) "The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution," *University of Pennsylvania Law Review* 143: 709–897.
- Gamberini, Luciano, and Stefano Bussolon (2001) "Human Navigation in Electronic Environments," *Cyberpsychology & Behavior* 4: 57–65.
- Gilson Ronald J., and Reiner H. Kraakman (1984) "The Mechanisms of Market Efficiency," *Virginia Law Review* 70: 549–644.
- Glaeser, Edward L., and Andrei Shleifer (2001) *The Rise of the Regulatory State*. NBER Working Paper Series, no. 8650. Cambridge: National Bureau of Economic Research. Available at <http://www.nber.org/papers/w8650.pdf>.
- Goldberg, Steven T. (2004) "The 25 Best Funds," *Kiplinger's Personal Finance* (May): 36–50.
- Great Britain. Law Commission (1992) *Fiduciary Duties and Regulatory Rules. A Consultation Paper*. London: HMSO.
- Great Britain Treasury (2001) *Standards for Retail Financial Products*. Available at <http://www.hm-treasury.gov.uk/mediastore/otherfiles/17.pdf>.
- Holdsworth, W. S. (1934) "Case Law," *Law Quarterly Review* 50: 180–95.

- Hu, Henry T. C. (2000) "Faith and Magic: Investor Beliefs and Government Neutrality," *Texas Law Review* 78: 777–884.
- IOSCO Technical Committee (1997) *Enforcement Issues Raised by the Increasing Use of Electronic Networks in the Securities and Futures Field*. Available at <http://iosco.org/pubdocs/pdf/IOSCOPD>.
- IOSCO Technical Committee (1998) *Securities Activity on the Internet*. Available at <http://www.iosco.org/pubdocs/pdf/IOSCOPD83.pdf>.
- International Organization of Securities Commissions (IOSCO) (2003) *Report on Securities Activity on the Internet III*. Available at <http://www.iosco.org/pubdocs/pdf/IOSCOPD159.pdf>.
- Johnston, Ian (2001) "'No Dave, You Can't Do That': The Regulatory Challenges of E-Commerce, and an Update on Financial Services Legislation." Presentation to the National Insurance Brokers' Association, 7 October. Available at [http://www.training.rmit.edu.au/assessment/fsr/index\\_files/dave.pdf](http://www.training.rmit.edu.au/assessment/fsr/index_files/dave.pdf).
- Kahn-Freund, O. (1939) "The Report of the Transport Advisory Council on the Square Deal Dispute," *Modern Law Review* 3: 136–49.
- Karmel, Roberta (1999) "The Case For a European Securities Commission," *Columbia Journal of Transnational Law* 38: 9–43.
- Keasbey, Edward Q. (1890) "Poles and Wires in the Streets for the Electric Railway," *Harvard Law Review* 4: 245–70.
- Kingsford Smith, Dimity (2004) "Beyond the Rule of Law? Decentered Regulation in Online Investing," *Law & Policy* 26: 439–76.
- Langevoort, Donald C. (2002) "Taming the Animal Spirits of the Stock Markets: a Behavioral Approach to Securities Regulation," *Northwestern University Law Review* 97: 135–88.
- Levitt, Arthur (1999) "Plain Talk About On-line Investing." Speech at the National Press Club, 4 May. Available at <http://www.sec.gov/news/speech/speecharchive/1999/spch274.htm>.
- Lowenstein, Louis (1991) *Sense and Nonsense in Corporate Finance*. Reading, Mass.: Addison-Wesley.
- Merges, Robert, (2000) "One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000," *California Law Review* 88: 2187–240.
- Meyer, Laurence H. (2000) "Implementing the Gramm-Leach-Bliley Act." Remarks Before the American Law Institute and American Bar Association, 3 February, Washington, D.C. Available at <http://www.federalreserve.gov/boarddocs/speeches/2000/20000203.htm>.
- Moore, Gordon (1997) "An Update on Moore's Law." Speech delivered at Intel Developer Forum, 30 September, San Francisco. Available at <http://www.intel.com/pressroom/archive/speeches/gem93097.htm>.
- Murphy, W. T., and Simon Roberts (1987) *Understanding Property Law*. London: Fontana Paperbacks.
- North American Securities Administrators' Association (NASAA) (2001) "Top 10 Investment Scams" List Released by State Securities Regulators. Available at [http://www.nasaa.org/nasaa/abtnasaa/display\\_top\\_story.asp?stid=125](http://www.nasaa.org/nasaa/abtnasaa/display_top_story.asp?stid=125).
- Owens, Andre E. (2001) "Relationships Between Broker-Dealers and Internet Portals." Statement at the Portals Roundtable, 23 May, Washington, D.C. Available at <http://www.sec.gov/news/extra/portals/owensport.htm>.
- Pitt, Harvey (2001) Remarks at the SEC Historical Society Major Issues Conference, 14 November, Washington D.C. Available at <http://www.sec.gov/news/speech/spch523.htm>.
- Polyak, Ilana (2004) "The Sweet Spot for Yield," *Kiplinger's Personal Finance* (May): 59–60.
- Reuters Group (2002) *Interim Report 2002*. Available at [http://about.reuters.com/investorinformation/interim2002/Interim\\_Report\\_2002.pdf](http://about.reuters.com/investorinformation/interim2002/Interim_Report_2002.pdf).



- Santomero, Anthony M. (2001) "The Causes and Effects of Financial Modernization, Remarks Before the Pennsylvania Bankers Association," Charleston, South Carolina, 7 May. Available at <http://www.phil.frb.org/publicaffairs/speeches/santomero9.html>.
- Securities and Exchange Commission (SEC) (1988) 70847; 17 C.F.R. §240.3b-16.
- Securities and Exchange Commission (SEC) (2000) National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Relating to the Opening of Day-Trading Accounts, Release No. 34-43021, 65 Fed. Reg. 44082 (17 July).
- Securities and Exchange Commission (SEC) (2001) Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Suitability Rule and Online Communications, 66 Fed. Reg. 20697 (24 April).
- Securities and Exchange Commission (SEC) (2002) Exemption for Certain Investment Advisers Operating Through the Internet, 67 Fed. Reg. 77620 (18 December).
- Siegel, Stephen A. (1984) "Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation," *Virginia Law Review* 70: 187-263.
- Singer, Jane B. (2003) "Who Are These Guys? The Online Challenge to the Notion of Journalistic Professionalism," *Journalism* 4: 139-63.
- Smith, Anne Kates (2004) "Bet on These Blue Chips," *Kiplinger's Personal Finance* (May): 54-5.
- Stallman, Richard (1996) "Reevaluating Copyright: The Public Must Prevail," *Oregon Law Review* 75: 291-7.
- Stefanadis, Chris (2001) "The Rise of Online Brokers," *Stern Business* (Spring/Summer): 19-23. Available at [http://www.stern.nyu.edu/Sternbusiness/spring\\_2001.pdf](http://www.stern.nyu.edu/Sternbusiness/spring_2001.pdf).
- Sokenu, Claudius O. (2001) "Web Portals Caught in the Web of Broker-Dealer Regulation," *New Jersey Law Journal* 166(4): 29-32.
- Sommer, A. A., Jr. (1996) "IOSCO: Its Mission and Achievement," *Northwestern Journal of International Law and Business* 17: 15-29.
- Terry, Nicolas P. (2001) "Bricks plus Bytes: How 'Click-and-brick' Will Define Legal Education Space," *Villanova Law Review* 46: 95-140.
- TheStreet.com (2000) *1999 Annual Report on Form 10-K*. Available at [http://media.corporate-ir.net/media\\_files/IROL/65/65508/reports/1999ar.pdf](http://media.corporate-ir.net/media_files/IROL/65/65508/reports/1999ar.pdf).
- TheStreet.com (2002) *Quarterly Report for the Quarterly Period ended September 30, 2002 on Form 10-Q*. Available at <http://www.sec.gov/Archives/edgar/data/1080056/000115752302001481/a4290948.txt>.
- Tumarkin, Robert, and Robert F. Whitelaw (2001) "News or Noise? Internet Postings and Stock Prices," *Financial Analysts Journal* 57: 41-51.
- Unger, Laura (1999a), "Electronic Trading Technology's Impact on the Fixed-Income Markets." Speech at the Bond Market Association, Fifth Annual Legal and Compliance Seminar, 28 October, New York. Available at <http://www.sec.gov/news/speech/speecharchive/1999/spch313.htm>.
- Unger, Laura (1999b) "Online Brokerage: Keeping Apace of Cyberspace," November. Available at <http://www.sec.gov/pdf/cybrtrnd.pdf>.
- Unger, Laura (2001) "Timeless Principles of Investing in an Electronic Age." Speech to the 2001 Los Angeles Times Investment Strategies Conference, 6 May, Los Angeles. Available at <http://www.sec.gov/news/speech/spch487.htm>.
- Volokh, Eugene (1995) "Cheap Speech and What it Will Do," *Yale Law Journal* 104: 1805-50.
- Wagner, Constance Z. (2001) "Securities Fraud in Cyberspace: Reaching the Outer Limits of the Federal Securities Laws," *Nebraska Law Review* 80: 920-47.
- Warren, Samuel D., and Louis D. Brandeis, (1890) "The Right to Privacy," *Harvard Law Review* 4: 193-220.

Wilmarth, Arthur E., Jr. (2002) "The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks," *University of Illinois Law Review*: 215–476.

Winfield, Percy H., and Arthur L. Goodhart, (1933) "Trespass and Negligence," *Law Quarterly Review* 49: 359–78.

#### CASES CITED

##### *Australia*

ASIC v Sharetrend Software Pty Ltd [2000] VSC 472.

##### *United Kingdom*

Anisminic v Foreign Compensation Commission [1969] 2 AC 147.

Attorney General v Punch [2002] UKHL 50, [2003] 1 All ER 289, [2003] 2 WLR 49.

Boddington v British Transport Police [1998] 2 All ER 203.

##### *United States of America*

CFTC v Vartuli, 228 F 3d 94 (2d Cir 2000).

Europe and Overseas Commodity Traders v Banque Paribas London, 147 F 3d 118 (2d Cir 1998).

Krull v SEC, 248 F 3d 907 (9th Cir 2001).

Louisville & S. I. Traction Co. v Worrell, 44 Ind. App. 480, 489 (1908).

Lowe v SEC, 472 US 181 (1985).

Reno v ACLU, 521 US 844 (1997).

State of Washington v Heckel, 143 Wn 2d 824; 24 P3d 404 (2001).

Taucher v Born, 53 F Supp 2d 464 (DDC 1999).

Thompson v Western States Medical Center, 535 US 357 (SCt 2002).

Universal City Studios, Inc. v Corley, 273 F 3d 429 (2d Cir 2001).

#### INTERNATIONAL INSTRUMENTS

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR).

Universal Declaration of Human Rights, GA Res. 217A, UN GAOR, 3d Sess., 183d plen. mtg. at 135, UN Doc. A/810 (1948).

#### LAWS CITED

##### *Australia*

Corporations Amendment Regulations (2002) No. 2, Statutory Rules 2002 No. 16. Available at <http://scaleplus.law.gov.au/html/numrul/18/9307/pdf/2002No16.pdf>.

Corporations Amendment Regulations (2002) No. 3, Statutory Rules 2002 No. 41. Available at <http://scaleplus.law.gov.au/html/numrul/18/9332/pdf/2002No41.pdf>.

Corporations Amendment Regulations (2003) No. 1, Statutory Rules 2003 No. 31. Available at <http://scaleplus.law.gov.au/html/numrul/19/9679/pdf/2003No31.pdf>.

Financial Services Reform Act 2001, No. 122, 2001 (FSRA).

##### *European Union*

Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and

98/27/EC, OJ L 271/16, 9/10/ 2002 (Distance Marketing Directive). Available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_271/l\\_27120021009en00160024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf).

*United Kingdom*

Financial Services Act 1986, 1986 c 60

Financial Services and Markets Act 2000, chap. 8. Available at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000008.htm> (FSMA).

Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001, No. 1335 (the Financial Promotion Regulations). Available at <http://www.legislation.hmso.gov.uk/si/si2001/20011335.htm>.

Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001, No. 544 (the Regulated Activities Order). Available at <http://www.hmso.gov.uk/si/si2001/20010544.htm>.

Human Rights Act 1998, 1998 c 42

*United States of America*

Commodity Exchange Act 7 USC §1 et seq.

Financial Modernization Act of 1999, Pub. L. No. 106–102, 106th Cong., 1st Sess. (Gramm-Leach-Bliley Act).

Investment Advisers Act of 1940, 15. USC §§80b-1–80b-21.

Securities Exchange Act 1934, 15 USC §78.

*SRO Rules*

National Association of Securities Dealers (NASD) (2000) *NASD Manual* Chicago: CCH.