

doning the unpublished opinion on which the *Anastasoff* panel had relied and under which Ms. Anastasoff had lost (*Christie v. United States*), and acquiescing in a Second Circuit decision (*Weisbart v. United States*) under which Ms. Anastasoff would have prevailed.

Eighth Circuit Rule 28A(i) and its siblings in other courts have survived to serve again, at least for now.

Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17 (2000); *Anastasoff v. United States*, 223 F.3d 898, vacated, no. 99-3917EM (8th Cir., Dec. 18, 2000) (en banc); *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000); *Christie v. United States*, no. 91-2375MN (8th Cir, Mar. 20, 1992) (per curiam).

## THE HORSE COMES HOME TO ROOST

INTERNET EXCEPTIONALISM is waning. Dot-com investors have learned that sometimes stock prices are linked to financial performance. And dot-com consumers have begun to learn that there is no direct correlation between media salivation over a dot-com merchant and that merchant's capacity to provide high-quality products or low prices or quick delivery.

In a related development, late-blooming champions of traditional, bricks-and-mortar legal concepts are appearing on the Internet – at least when it comes to the law of property. They have discovered the costs of, among other things, giving away information that they could sell if only they could shut down free access to portions of the Internet that they now view as their own. In other words, they have lost their faith in the law of the horse.

In 1996 Judge Frank Easterbrook cautioned against the creation of special property laws for cyberspace. He described the craze for e-law as an example of what Karl Llewellyn called the “the law of the horse.” Llewellyn was

contrasting the Uniform Commercial Code (“rules for trade between merchants,” “a menu of options from which they could choose at low cost”) with the law of the horse (“rules for idiosyncratic transactions between amateurs”). In place of a special law of the cyber-horse, Easterbrook proposed: “Develop a sound law of intellectual property, then apply it to computer networks.” Experience appears to be teaching that Easterbrook was right. As e-businesses become less amateurish, as the pressures of the market begin to sort out losers as well as winners, netizens look for some regular rules to govern the sorting.

Maureen O'Rourke of Boston University reports that the dot-com pioneers of yesterday – Amazon, eBay, and their ilk – are leading the charge. Having staked their claims to pieces of the ether and developed valuable brand identities, product and market information, and other goodies, these e-big businesses are as committed as any bricks-and-mortar Neanderthal to profiting from information capital and keeping customers loyal by keeping them in the dark about the comparative value of others' products and services.

O'Rourke focuses on current litigation over the access of shopbots – Internet services that gather pricing and other information from numerous web retailers and provide it to consumers in a format that facilitates comparison shopping – to the web sites of major players such as eBay. But her thoughtful proposals – amounting essentially to a soft landing in a rationalized, generally applicable property law regime – are specific manifestations of the themes identified by Easterbrook long ago: (1) make rules clearer, to promote bargains; (2) create property rights, where now there are none – again to make bargains possible; and (3) create bargaining institutions.

Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207; Maureen A. O'Rourke, *Shaping Competition on the Internet*, 53 Vand. L. Rev. 1965 (2000).