The Problems of "Rethinking" the Internet

by Phyllis Schlafly *July 29, 1998*

When asked by reporters whether she favors curbs on the Internet, which has played a key role in breaking the news about the President's scandals, Hillary Rodham Clinton ominously replied: "We are all going to have to rethink how we deal with this, because there are all these competing values. " According to a Reuters dispatch, she went on to deplore the fact that the Internet lacks "any kind of editing function or gatekeeping function."

The now famous appearance of Matt Drudge at the National Press Club showed that Mrs. Clinton is not alone in attacking the notion that a website, such as the Drudge Report, without any supervisory editor, can compete with established news sources. The copyright bill now racing through Congress, H.R. 2281, appears to emanate out of this same mindset that we should rethink our laws about freedom of the Internet.

Copyrights are, of course, a good thing. But the lobbyists for Hollywood, cable, software and publishing industries are exploiting temporary confusion on Capitol Hill over high-tech issues.

The problem is the changes to copyright law contained in H.R. 2281's main sections, the WIPO Copyright Treaties Implementation Act and the Internet Copyright Infringement Liability Clarification Act. H.R. 2281 has many provisions that are unacceptable in a free society. H.R. 2281 sets up a procedure which effectively turns Internet service providers into gatekeepers. A competitor, asserting that you are infringing his copyright, can demand that your service provider delete your website, file or link.

H.R. 2281 makes it almost sure that your service provider will punch the Delete button, no matter how insubstantial or frivolous the complaint. The bill reads: "A service provider shall not be liable for monetary relief . . . for infringement . . . if the provider . . . responds expeditiously to remove or disable the reference or link upon notification of claimed infringement. "

It doesn't take a rocket scientist to figure out that, when a service provider receives an intimidating letter on legal letterhead demanding X, and he knows that if he expeditiously does X he is immune from a lawsuit, most service providers will do X. And presto, your website, file or link -- t he private property of the future -- is taken from you without due process.

H.R. 2281 enables a bully (a corporation or special-interest lobby) to eliminate future Drudges and others by merely intimidating the Internet service provider. Neither a court order nor even a registered copyright is necessary for a competitor to demand removal of material from the Internet.

The advocates of **H.R.** 2281 assert that the bill is designed to prohibit "black box" descramblers for cable TV, but the language of the bill goes far beyond this excuse. The bill

will allow seizure of your computer or VCR without advance notice and without any finding of wrongdoing.

This bill imposes prison sentences of up to five years if a federal court determines that you were using a computer, VCR or website contrary to the rights of a copyright owner. H.R. 2281 empowers a federal judge to order the seizure of your personal computer or VCR without any finding of wrongdoing, even in the absence of any pending criminal prosecution.

A proposed change to allow for 72-hour advance notice was rejected, even though prior notice of a deprivation of property is a

constitutional right of due process. It could take you years of litigation to get your computer returned, and meanwhile your business is ruined just because of an alleged copyright infringement.

We've heard a lot of rhetoric from free-marketeers who want to prohibit taxes on the Internet but, as bad as taxes are, they impose only a marginal cost. H.R. 2281 would empower federal judges, and even your business competitors, to force a seizure of your property without any finding of guilt. The bill provides for a replacement of seized property, but only under certain conditions and only after the damage has already been done.

Microsoft, Time Warner, Hollywood and the publishing industry, the chief backers of H.R. 2281, should be able to protect themselves against unauthorized users without new legislation. Big corporations should not be permitted to use federal prosecutors and judges, spending taxpayer dollars, to defend corporate interests against competitors.

As Silicon Valley engineers know, the computer industry was developed by the use of reverse engineering of competitors' products for the purpose of copying interfaces and discovering unpatented features. The Internet itself is built on widespread copying and unfettered competition, with enormous benefit to the public.

H.R. 2281 includes an exemption for reverse engineering, but it is limited to having a "sole purpose" of engineering "necessary" for interoperability. That is so narrow that it is almost meaningless, and a competitor faces five years in jail if the court disagrees about the necessity or if the engineer could have learned the same information through a different, perhaps costlier, means.

Congress will be making an enormous mistake if it empowers federal judges and gatekeepers to control the Internet.