

Courtooms in the Clouds
MORPHEUS IN THE UNDERWORLD:

Free Speech at its Freest. (And at its most dangerous.)

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**Elephants, Arabians, Indians and courtesans,
Acrobats and juggling bears, exotic girls, fire-eaters,
Musclemen, contortionists, intrigue, danger and romance,
Electric lights, machinery, and all that electricity,
So exciting, the audience will stomp and cheer.**

- From "*The Pitch*", Moulin Rouge, Lyrics by Baz Luttman and Craig Pearce, to the tune of Offenbach's *Orpheus in the Underworld* (the "*Can-Can*" overture), Copyright 2001 Twentieth Century Fox Films.

I don't feel much like Moses, and none of us will know whether it's the Promised Land until society fully gets there, but I think that I've seen the face of the future of communication, and it's an exciting, vibrant, and uncensored future. The new second and third generations of peer to peer computer file transfer protocols ("P2P") already provide some immediate and incomparable opportunities to the consumers, producers, and distributors of adult content materials and they promise to have profound effects on law and society. They may even make the prosecution of obscenity obsolete.

We may have the record industry to thank, curiously, for this development. On July 20, 2001, the New York Times reported on page one, "The record industry's largely successful effort to cripple Napster . . . has left it facing something potentially worse: a new generation of music-swapping sites, more numerous and much harder to police."

But the new generation of file transfer protocols handles much more than MP3's. On the strong recommendation of genuine, bona fide, under-25 computer geeks, I took a close look at Music City's Morpheus (<http://www.musiccity.com>), an online peer-to-peer file sharing protocol.

At 2:00 a.m. on a recent Monday morning, over 464,894 users around the world were sharing 72,230 files with one another, all interconnected by Morpheus. The Morpheus file sharing protocol browser is a free download on C/NET,

<http://download.cnet.com/downloads/0-1857922-102-0-1.html>, and Tucows. It has been on C/NET's Download hit parade for 42 weeks and is consistently one of the top five downloads. At the time this article is being written, it was the number one download in its category on C/NET, with over 1.4 million downloaded in the prior week. None of this will surprise many people under twenty-five. The generation now in school uses it to trade music. But they also get their porn, hacker and phone phreak training manuals, and commercial computer programs from Morpheus and other similar peer-to-peer protocols such as KaZaA, aimster, and gnutella. Sketchy numbers indicate that this generation may be looking at more porn than any generation that preceded it, without paying for it, and just about evenly among males and females. A casual look at the webcam images and clips posted on the newsgroups shows that the generation coming up seems willing to make and post its own amateur porn, too, in big numbers. (I looked at KaZaA, too, and found it to be nearly a twin sister of Morpheus in its interface appearance and operation, available content by nature and amount, and the volume of persons online.) All of this suggests some major changes are ahead in the way American society deals with erotica and sexuality that may make what passed for porn-chic in the generation of the Seventies seem quaint.

By attacking Napster, the record industry pushed the traders of music and other entertainment files onto the dispersed computers of the users swapping the files. Morpheus works as a decentralized, self-indexing network, in which each user's computer becomes, in effect, a server, providing the files placed by the user in a "shared files" directory, to other network users. It uses advanced FastStream™ technology to provide a constant download rate from multiple sources – so that the file you get will most likely be the result of partial downloads from many other members of the network, choreographed to get the stream of bits that make up images to you as quickly as can be arranged, from the fastest source at each instant. The program selects certain members' computers, with good connection speeds, to be nodes in the network and funnels searches outward to these nodes, through cyberspace, to look for the object of your search on all the other member computers. It sounds far more complicated in that description than it is. It is simple and easy to use. Morpheus licenses components from Microsoft Internet Explorer and Windows Media to make a familiar interface.

I can't begin to describe the virtually uncompassed ambit of Morpheus's topical reach. The nature and identity of the files retrievable are limited only by the imagination of the network's users: Among the "documents" retrievable when I looked were: anonymously written chemistry handbooks that go *way beyond* the one that came with my Gilbert Chemistry Set when I was a kid; unauthorized guides to hidden features in popular software; what purported to be (not all that convincingly) a highly classified military handbook on dealing with recoveries of alien remains from UFO crash sites; a book promising to show how to crack DVD's; an employee's handbook from the NSA; and some hard to find works about practical Magic, and clandestine rites for the famed Ordo Templi Orientis, written by Aleister Crowley in the era of World War One, recently reprinted but long since out of copyright. All the popular and expensive image manipulation and web design programs with which I'm familiar, whose unlicensed distribution would be in violation of the Copyright Act, were listed along with key generators. (Whether the programs contained malicious viruses or even worked, I don't know.) I do know that some of the programs listed were shareware or trialware limited-duration trial copies, probably put there by the copyright owners to get wide distribution of their products in the hands of people most likely to like them well enough to buy them.

I thought it would be a good test of music availability to look for a corny old song that I've liked since childhood, suspecting it to be of little interest to very many of the users of Morpheus, who I'd suspect to be younger than me in the main. I picked *Limbo Rock*. In seconds, I found not only Chubby Checker's standard version on the computers of 22 other users, but also learned that three other users had an obscure performance by Harry Bellefonte that I'd never heard; He sings as though he's trying to convince us that he's on psychotropic drugs. (He doesn't quite pull that, or anything else off. But you're not reading this for a music review, I know.) I also found choral performances of *Pange Lingua*, *Tantum Ergo*, and other formerly top-ten Gregorian Chant standards from the Thirteenth Century that haven't frequently been heard in American Catholic churches since Lyndon Johnson was in the White House.

Leaving pseudo-Calypso and Latin ecclesiastical music behind, my survey of P2P came to The Porn: The Arabians, courtesans, contortionists, and machinery – everything that the cast of Moulin Rouge sang about to the tune of Orpheus in the Underworld exists

in the world of Music City's erotic Morpheus – and much, much more. I saw a genre of videos depicting the use of sexual machinery that I didn't know existed. (Well, I knew the machinery existed, but I didn't know that it had spawned a video market.) One man's – or woman's - erotica is another person's belly laugh. The user can find and download on Morpheus just about anything one can imagine that's capable of digital transmission. This costs nothing beyond being subjected to advertising banners and popups that sometimes seem to crash Windows. Meanwhile, the user can share his or her digital files with a worldwide audience in a fairly topical and focused manner by describing them topically when he or she places them in the “shared file”.

The erotic range of what is out there on Morpheus runs a wide range of interest, to suit all mainstream tastes and some fairly obscure niches. I saw some disturbing images that frankly I wish I could unsee. (Just because you're a free speech lawyer doesn't mean that you want to actually see everything that is out there.) And that points out one of the problems with Morpheus. Because members are completely free to describe the files they share, and because people are, after all, people, the descriptions are frequently not very accurate, and sometimes downright misleading. Searching for Brittany Spears in Morpheus has a not insignificant chance of leading to porn.

This mislabeling, and the lack of safeguards against access by minors to pornography, troubles Congress. See Report, Children's Access to Pornography Through Internet File-Sharing Programs Prepared for Rep. Henry A. Waxman and Rep. Steve Largent Minority Staff Special Investigations Division, Committee on Government Reform U.S. House of Representatives. July 27, 2001.

http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_pornog_rep.pdf. Morpheus now claims to have a filtering protocol with the aim of addressing material harmful to minors, but I was unable to assess its reliability. As the House Minority report makes clear, the web-based child protection software, controversial in itself and continuously attacked by Peacefire and others (and which often blocks my own non-pornographic free speech website because it has “xxx” in the domain name), is wholly useless to limit access to minors because Morpheus runs on its own proprietary browser.

It is obvious that many adult websites with limited budgets (but huge ambitions) are using Morpheus to get attention and build popularity by sharing porn clips of 20

second to two minute duration, complete with graphic animated intros and a running logo with URL in the lower right of the frame. I saw some well-done video clips that work to create interest coming from sites I'd never heard of before. From a distributor/webmaster point of view, Morpheus is exciting and provides an interesting and attractive opportunity for free and effective advertising. Many of the clips posted amount to porn TV commercials for porn sites. The sharing member can index, describe, name, and rate the clip in any way he wishes in a generous field of information that will be seen on the user's computer when he chooses download and be passed on to others with comments. This promotion costs essentially nothing but the cost of production. It will get attention by consumers far more particularized than would one more line in an already-spammed-out newsgroup would get, especially because the viewer is seeking it out, and such promotion avoids battle with the ardent cybersoldiers of the anti-spamming community. Special software is available from Music City for users who wish to share more than 5,000 files.

I can't think of a cheaper or more effective way to get large files to a world-wide audience. The potential to get a message out is simply enormous and unprecedented and limited only by human creativity and ingenuity, whether the file is a self-published book, a photograph, the Bible, or a video clip. Just as the development of the technology of fax machines affected developments in China and the satellite telephone affected developments in the former Soviet Union and in the Gulf War in the early 1990's, look for this technology to change history, too, in conjunction with the increasing market penetration of broadband. It excites me because it expands the power of expression exponentially in ways that ordinary people can harness.

But Morpheus also presents you with opportunities to cut your own throat, as most breathtaking technological developments do. Morpheus has a dark and dangerous side and only time will tell what steps are taken with respect to it. That's what led me to title this article as I have.

A small number of images I found on Morpheus are quite illegal to possess or distribute. I am not talking here about what the law just brands as obscene; I'm talking about the much nastier stuff involving the depiction of underage persons. I saw quite a bit of age-questionable borderline material, but I did not see a great many images involving

obviously underage persons, and this tracks with my assessment that the very large majority of persons have only one reaction to these kinds of images, and that it is disgust. However obsessed the devotees of that stuff may be with it, they are not numerous. The distribution and even the private possession of lewd images of minors under the age of eighteen are always against American law, even in some cases, where the subjects are fully clothed. It's serious: There is a fifteen-year penalty per image for distribution. Because there is more of it out there, the age-questionable borderline material is precisely what is most likely to put someone in jail: All it takes is a jury that believes a testifying government pediatrician, that the subject is a person under eighteen, to a reasonable degree of medical certainty. It is not a smart idea to set the Morpheus browser for some automatic downloads of still or moving pictures and to walk away, because if you do so, you will have no idea what you are acquiring and passing on to others; You will do so at your own peril. Check to see what you have downloaded pretty frequently, or before the download is complete, as Morpheus permits, and terminate the download of illegal content or material that you find disgusting before you spread it to others.

One of my most serious criticisms of Morpheus is that its browser makes it way, way too hard, and way too confusing, to effectively terminate the sharing of files. It is possible to be sharing files that you thought you had zapped, and that's the biggest danger of this interface. Morpheus makes it hard and complicated to delete files and terminate downloads once someone has started to upload a file from your computer; Given the dangers, that is a problem that should be addressed immediately. (It is also my strong recommendation that every computer user install and use regularly a disc scrubbing program that will completely, totally, and permanently eradicate all remnants of browser activity and wipe disc slack space every time that a computer is turned off. New computers should come with this software.) Illegal images can be encountered quite innocently in web surfing, they may even be invisible to the viewer but in your computer as the result of javascripting, hidden under a site you are browsing. And they will remain on your computer even when disc cache is cleared, even if you delete the files, unless you take affirmative steps to wipe your disc. Destroy the images and report such images whenever you encounter them on the web to <http://www.asacp.org/reportsite.html> where

the information will be passed along to Customs and the FBI. Don't send the pictures to them or to anyone else.)

Copying and the act of passing along the whole or a substantial part of someone's copyrighted work are each against the law, and doing so intentionally can trigger enormous punitive damages. Nothing in this article is intended to encourage that practice. Don't do it. Music City has begun a digital rights management program to protect copyrighted works. However, one gets the strong sense that a generation that's grown up on DVD rips and warez software pirating doesn't (as a whole) have much commitment to traditional notions of intellectual property protection through copyright, and that little will stand in the way of the efforts of the more creative and adventurous members of this generation to break whatever copyguarding scheme may be devised. The growing reality is that whatever is of quality out there will ultimately be shared one way or another without benefit of license; That is likely to have some effect, maybe profound, on the creative efforts that writers, photographers, and others will put into production and writing. Time will tell. Anyone who puts his creative work on the Internet must realistically assume that, in the end, the best he or she can practically achieve is to prevent its unauthorized *commercial use* by others and, through creative means, to assure that some promotional value will come out of the unstoppable private trading.

But the most interesting part of Morpheus to me is what it means to the law of obscenity.

Not every State has an obscenity statute. Illinois and most States do. Under the Illinois obscenity statute, and that of some other States, it is not a crime to distribute even frankly obscene materials depicting consenting adults (and members of the animal kingdom) unless they are transferred for money or other consideration. This puts adult porn, traded gratis P2P, as Morpheus enables, outside the criminal proscription of the lawmakers in Springfield. (I emphasize that this discussion involves obscene materials involving *adults*. Anything and everything involving lewd images of persons under eighteen is always illegal in this country and most seriously so.)

Other less enlightened States, and the federal government, do have obscenity statutes that criminalize the transfer of obscene materials, even when done without charge. However, Morpheus presents a nightmare of legal issues to a prosecutor and a

myriad of nightmares of evidentiary proof to a law enforcement agency seeking to enforce obscenity laws. Unlike the situation with drugs, the private home possession and use of obscene materials featuring adults is not a crime and cannot be made a crime under the First Amendment as explained by the United States Supreme Court.

The evidentiary problems begin because the members are identified to one another with a user name that can be and probably is quickly jettisoned after a session, because all of the transfers are decentralized out there in the field instead of centralized in a server, and because it does not appear that Internet Protocol addresses are recorded in the operation of a peer to peer protocol. (But it would amaze me to learn it to be so if the Government couldn't track uploads and downloads and search queries from a particular member under suspicion, whether encrypted as Morpheus claims, or otherwise. There are some very smart and creative minds in law enforcement and there almost surely exist technical government means that can deal with the hundreds of thousands of persons trading tens of thousands of files simultaneously, to sniff out the downloads and uploads of governmental interest. Distilling significant information from vast streams of data is what, for example, the NSA has been mainly about for decades. Insufficient data at this time to know one way or the other about the use of this technology in criminal obscenity enforcement.) Because there is no exchange of money, the staple law enforcement technique of following the trail of the money is of no use. The practical impossibility of halting the free flow of erotica and of enforcing the obscenity laws may itself make the laws obsolete. Especially in victimless "morals" crimes, the police do not want the responsibility of enforcing laws that can't be enforced.

So much for practical law enforcement issues. The legal issues are stimulating, too. We are likely soon to have some answer, even if only tentative, about the application of the Miller "Community Standards" test to online website porn when the Supreme Court resolves *Ashcroft vs. ACLU*. The decision of the lower court, in holding provisions in the Child Online Protection Act to be unconstitutional in the context of materials "harmful to minors", was that no webmaster, under existing technology, could even know into what community his materials were being sent, and that fundamental fairness would be denied in holding the webmaster to criminal responsibility for the standards of a destination community that he did not know was involved in his operations. But any

consideration of a prosecution based on the transmission of a file through Morpheus would take the unfairness of such a situation to a new depth.

With the file distribution technology and protocol used by Morpheus, as it appears to operate and as it has been explained in the popular media, many users in many places are simultaneously trading many parts of many files with many other users in many places. And the member, of course, has no way at all of knowing where the file parts are going geographically. Morpheus is unlikely to know, either.

Any one particular .mpg or .avi or .ram residing in your mass storage device may have been assembled in your home from data originating in dozens of other homes on different continents. It is unlikely that anyone would be able to know which part of the data, ultimately residing on your drive as an image file, came from how many sources, who those sources were, and where those sources were geographically located. In such a case, what jurisdiction(s) may, consistent with fundamental fairness under the Due Process clause of the Fourteenth Amendment, prosecute one of its residents for sending you a now-unidentifiable part of your file? The files you placed have in your “shared folder” may, with or without your knowledge of their contents, almost certainly without your knowledge of where parts of those files will be going geographically and what the prevailing standards of prurience and graphic sexual expression may be in those unknown places - and whether the destination jurisdiction even has an obscenity statute - have parts of their data sent to a myriad other jurisdictions. **Sharing a video file in Morpheus is about as unlike sending a videotape to a known mailing address in a Bible Belt community as can be imagined.** The traditional rule is that any jurisdiction in which a substantial part of an act was committed or prepared could prosecute the act criminally. (*See generally* the unfortunate pre-Internet decision affirming an conviction for the transfer of .gif images transmitted via BBS to Memphis and prosecuted under the community standards of Memphis in *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996)). But the application of such a rule of law, in this context, really would permit the application of the obscenity laws and community standards of the most conservative jurisdiction of several that might apply, even as respects one image and one act of “sharing”: The community standards of many jurisdictions may be involved in just one file: In a protocol in which the user cannot control or affect the destination of files he or

she “shares”, such as Morpheus and KaZaA, the ability of Utah, for example, to apply its obscenity laws (and the prevailing community values they incorporate), through criminal prosecution, to a portion of a particular file downloaded in Utah, would deter the expression everywhere else of that file, even a particular file that may be nonobscene in other jurisdictions: Such a power to prosecute, if recognized, would give a veto on expression, a censorial power, to the most conservative and restrictive jurisdiction as to any particular file which cannot be excluded by a member from transmission to Utah. Because this so seriously threatens protected expression, it is not a rule of law that has a great chance of prevailing. Finally, the prosecution of a work because of the transmission of particular file parts, perhaps not themselves obscene in any American jurisdiction at all, but part of a whole that may be obscene somewhere, would make scrambled eggs out of the proposition that to find a work obscene, a work must be judged “as a whole” under contemporary community standards. Should it be a crime to send a nonobscene part of an arguably obscene whole? Is that a substantial act involving crime? These are the confusing but inescapable issues.

It is a scenario under which it would be enormously unfair and impermissible to apply any particular community standards to impose a criminal penalty for obscenity, except maybe that of the community in which the Morpheus member sits, if even that community has a substantial enough interest under the constitution in what adult porn its members watch (and share with others at their home computers). And, to the extent that *Stanley v. Georgia* 394 U.S. 557 (1969) remains good law, the chances of that would appear slim. (Though there is always some remote chance in this strange post 9-11 era, that the limitations on *Stanley* contained in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), will expand to wholly eradicate from American jurisprudence the notion that a man’s home is his castle.) That’s why I think that file sharing protocols such as Morpheus threaten to shake the conceptual underpinnings of American obscenity law, and the *Miller Test* in particular, to the core and to beyond their shearing point. In sum, in the world of Morpheus, Morpheus itself is the only “local” community that it does or rationally can recognize. My view is that any attempt to relate its file transfer protocol to geographically local community standards results in issues of basic justice and fundamental fairness so hopelessly muddled as to be unusable in law.

I believe that Morpheus sets the stage for the next round of legal battles regarding the law of free expression versus obscenity, raising new issues in the debate that threaten to tear down the whole legal edifice of obscenity law in the United States no matter how the Supreme Court decides *Ashcroft v. Free Speech Coalition* and *Ashcroft v. ACLU*.

When I think of someone trying to stop the flow of these images now, what comes to mind is an illustration I remember from a grade school textbook, a drawing of King Canute in his throne, on the beach, desperately repeating an order to the tide not to come in, as his robes become soaked. And maybe next time I visit Morpheus, I'll go looking for that Bob Dylan song with the same metaphor, for the times really are a-changin', and the waters around the American law of obscenity really are rising.

This article is written to generally inform the public and does not provide legal advice nor does it establish an attorney-client relationship. If you have a legal issue or question, contact a lawyer. If you are arrested, make no statement, consent to nothing, but make no resistance, and contact a lawyer immediately.

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