

ACCIDENTAL PRIVACY SPILLS

By James Grimmelman

The realm of privacy law has more crimes than criminals, more wrongs than wrongdoers. Some invasions of privacy are neither intentional nor negligent; it's easy to recognize the harm, but hard to pin the blame. This article is the story of one such inevitable accident: an "accident" in that it needn't have happened, but "inevitable" in that there's no principled way to prevent similar misunderstandings from recurring, again and again and again.

LAURIE GARRETT'S EMAIL

Laurie Garrett is a science journalist and Pulitzer-prize winner best known for her book *The Coming Plague*.¹ In January 2003, while working as a medical and science writer for *Newsday*, she attended the World Economic Forum (WEF) in Davos, Switzerland. This annual event, a gathering of world leaders, major CEOs, and enough influential intellectuals to liven the discussion a bit, is roughly to international affairs what Cannes is to filmmaking: a heady mix of high-level networking, celebrity-spotting, and an official program of Important Events. In 1994, John Perry Barlow unleashed his *Declaration of the Independence of Cyberspace* at the WEF; more recently, it's been the target of strident anti-globalization protests.

Garrett was at the WEF on business, filing dispatches on speeches by Bill Gates and Colin Powell,² but she was also making some rather more personal observations. At the end of a week of "unfettered, class A hobnobbing," she sat down to write about the experience to a "handful" of friends. She composed a chatty 2,000-word email about the issues on the minds of the world's self-proclaimed movers and shakers. The email was basically a list of perpetual post-millennial hot topics—terrorism and trade,

American unilateralism versus anti-Americanism, the leaders (China) and laggards (the US) in global economic growth—bookended by some brief scene-setting and personal observations.

Her tone could hardly be called "intimate," but it's not exactly polished reporting, either. From the opening, "Hi, Guys" to the closing "Ciao, Laurie," the email is a light, informal letter. She calls Vicente Fox "sexy"; mentions the "very cool" wireless infrastructure; and describes the prevailing geopolitical sentiments among major Islamic leaders. Scientists will recognize the email as a straightforward conference report to one's close colleagues. This is where I went; this is who was there and what I saw; this is what I think of it all.

The WEF was held in the last week of January. In the next week, the email apparently circulated among a growing set of Garrett's friends and their friends. By February 6th, a copy of the email, by then forwarded several times, stripped of its original headers, and minus her last name, had made its way onto the "PH" mailing list run by the Institute for Psychohistory. And there it crossed into the bloodstream, because the PH list is archived on the Web.³

We all know what happens once something is on the Web. On February 11th, the Psychohistory archive version of the email was linked from MetaFilter,⁴ a "community weblog" whose members both post interesting links to the front page and post wide-ranging comments on each others' links.⁵ MetaFilter is moderated, but with a light touch, and because of its strong sense of community and conversation, the site was and is moderately influential with other bloggers, be they politically, culturally, or technically inclined.

The initial discussion in the thread on MetaFilter centered on the question of the email's authenticity. It wasn't hard to determine that "Laurie" was Laurie Garrett, but to some MetaFilter readers, the story had all the trappings of an obvious hoax. (Indeed, its initial caption was "Could this be true?"). After all, there wasn't a byline or a citation to a verifiable news outlet. Nor, for that matter, was the language especially polished. The second commenter, "damn yankee," thought it unlikely that a professional journalist would write "various insundry" for "various and sundry."⁶ On this view, the email was just the ramblings of a "breathless teenager" with a real journalist's name attached in order to make it plausible as an actual account.⁷ The close textual readings of the fraud-detection discussion rapidly spiraled off into a discussion of economic theory.

Meanwhile, some MeFi regulars decided to go check for themselves on the email's authenticity. (MeFi tends to have an investigative spirit; the community had a major

James Grimmelman is Associate Professor of Law, New York Law School. The author has been a MetaFilter user since 2000. This article was originally published, in somewhat different form on the LawMeme weblog at <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=938> on February 19, 2003. It is available for reuse under the Creative Commons Attribution 3.0 United States license, <http://creativecommons.org/licenses/by/3.0/us/>. Unless otherwise indicated, all Internet sources were last visited Apr. 11, 2008.

role in exposing the Kaycee Nicole hoax in 2001⁸ and an astroturfing campaign by the director of Givewell in 2008.⁹) Adam Davis, who was listed as having forwarded the email to the Psychohistory list, confirmed that he had done so, but couldn't vouch for the authenticity of the email that had arrived in his inbox.¹⁰

And then, as the economics discussion meandered along, Garrett herself, on February 14, confirmed her attendance at Davos. In an email to MetaFilter user beagle (who had started out his inquiries trying to prove the story a fake), Garrett stated that she hadn't actually read the email supposedly written by her. Instead:

I cannot imagine that any of the close personal friends to whom I sent a letter from Davos would viscerously pas it on in such a manner.

Yes, I went to Davos.

No, I never wrote a note intended for public consumption.

As I trust my friends, I must asum [sic], without going to these web sites, that it is a hoax. I would rather not learn that my friends are scoundrels who forward very personal mail to the entire world.¹¹

And so things sat for another three days, until Garrett broke her vow. She clicked on the URL beagle sent her, and yes, the email she saw there was genuine. Somehow, this "very personal mail" to her "close personal friends," not meant "for public consumption," had been forwarded "to the entire world." So she sat down and wrote beagle another email, which beagle promptly turned around and posted back to the MetaFilter thread.¹² Matt Haughey, MetaFilter's creator and benevolent dictator, added a front-page link to this exciting news. And here's where things get interesting.

METAFILTER FIGHTS BACK

Laurie Garrett wasn't happy to have her email shared with the world. She was even less happy that the "Internet addicts of the world" had wasted such extensive time and effort on such an "extraordinarily silly exercise." Her message to them ends with a peroration to "Be a citizen of the real world" and explicitly invokes the image of William Shatner telling a convention of Star Trek fans to get a life.

She didn't get much sympathy. Perhaps bristling against her insult to their community ("liberal elitist disingenuity," in the words of one), various MeFi-ites fired back—on MetaFilter, that is—with some harsh statements about dumb journalists who write emails they don't intend for public consumption. Thus:

Laurie Garrett needs to learn that you never write something you don't stand behind. And if you don't stand behind it, it was probably satire. Always make sure they know when you're serious and when you're not. Give them hints, here and there that you're toying with them. Before you fire off so hap-hazardly your one in a billion encounters with the most wealthy and powerful people on the planet.

—crasspastor¹³

Maintaining a free society requires an informed populace. Information is available in more places than ever before, including on the Internet. To be honest, I would worry about a democracy that did not encourage the dissemination of information using the Internet as a medium.

—jessamyn¹⁴

Let's spell this out for Ms Garrett in big fucking capital letters shall we? If your mate forwarded on a letter that you had failed to mark as privileged, read-only or with a similar disclaimer, then you've only got yourself and your friend to blame. The mail we discussed didn't have 'please don't forward on' written on it anywhere as far as I can see. Is your friend telepathic or are you making assumptions about your friends' attitude towards your privacy. Or, are your 'friends' of such quality that they'd strip such a line out of one of your emails prior to stitching you up like this?

—dmt¹⁵

But not being privy to your motivations, how are we to know why this was posted on the net? Perhaps it was posted without your permission. Perhaps you wanted it to be there, and "leaked" it. Ok, we know now that you didn't, but don't blame us for that lack of prescience, or for the fact that it made a fascinating read. Personally, I'm not sorry I read your email, but I'm sorry it was posted without your knowledge, and that some people said careless things about you. If you're looking for somewhere to shove the "blame" though, you may want to start closer to home.

—walrus¹⁶

The funny thing is that Garrett didn't really disagree with any of these analyses. She herself gave a quick account of the email's (presumed) spread and gradual transition from public to private and treated this spread as inevitable. She drew a contrast with a longhand letter she wrote after attending the 1979 Carter-Brezhnev talks; casual forwarding would never have landed that letter before the eyes of thousands. But with email, she concluded, things were very different:

This saddens me deeply, and I have learned a sorry lesson. I shall no longer deliver such personal musings to friends and confidantes via the Internet. No one can be trusted in this CLICK-FORWARD electronic world.

And that's a fairly stunning result, isn't it? People, serious and thoughtful people, will *stop using email* for certain matters if this is what happens when they use it. What is more, this sort of letter—a fact-filled but informal update on interesting international issues as seen from the inside—is a paradigmatic example of *what email is supposed to be for*. And, after all, that instantaneous CLICK-FORWARD loop is one of the great *virtues* of email and digital text. When Laurie Garrett's experience with "this CLICK-FORWARD electronic world" leads her to threaten to chuck it all out the window and go back to longhand, it's hard not to feel that something has been lost.

INFORMATION WANTS TO BE FREE?

It's easy to recognize a classically techno-libertarian viewpoint in some of the responses above. On this view:

- It is impossible to stop the spread of information that has hit the Net.
- Further, information that people consider interesting *will* spread rapidly.
- This spread is a good thing.

It can be hard to argue with these premises. Indeed, the rapid distribution of Garrett's original letter seems like a perfect example of techno-libertarianism working perfectly. A writer with good inside access dashes off an essay, which spreads rapidly and comes to the attention of thoughtful readers who carry on an interesting discussion about the economic issues that the essay raises. It's easy to feel perfectly comfortable siding with the MeFi-ites against Garrett's slurs to their community. She may be upset at their flippant tone, but there's serious and constructive dialogue taking place in that thread. This is what democracy looks like, as they say at protests.

That said, it's also easy to sympathize with Garrett's sense of dislocation and betrayal in seeing her "personal" thoughts spread across the Web. Many MeFi-ites did express their concern for her sake. walrus said it best: "Personally, I'm not sorry I read your email, but I'm sorry it was posted without your knowledge, and that some people said careless things about you."¹⁷ That's about as close as you can get to a pure statement of the paradox: An essay that brought pleasure and enlightenment to

many has become—precisely because it was of interest to so many—such an albatross for its author that she regrets having written it.

Which is why walrus's next statement—If you're looking for somewhere to shove the "blame" though, you may want to start closer to home."—is so disturbing.¹⁸ Since wide distribution is so inevitable in the techno-libertarian scheme of things, authors who don't *want* wide distribution have only themselves to blame. Once they released that first digital copy, the next step was foreordained. Every email comes with an implicit "Bcc:everyone" header set; every Webpage is immortal. It's easy to find stories of people whose ribald emails got away from them, whose "secret" blogs were discovered by their co-workers.¹⁹ It's all their fault, in this brave new CLICK-FORWARD electronic world. If you're going to write something, anything at all, you'd better be prepared to share.

I suppose it's logically possible to think that a world in which that iron maxim held true would be a good one. You would have to do what David Brin does in *The Transparent Society* and take it several giant steps further. Given the complete dissolution of the category of the "private," you'd say, we must adjust our expectations so as not to place such high value on privacy. As long as *everyone's* emails to their friends are similarly discoverable, there will be no informational inequality and no injustice. But when it comes to our fondness for speaking only into our beloved's ears, we will need to learn to let go of such sentimentality and accept that MetaFilter is listening in. Much that is now said in private will become public; the rest will never be said at all.

In theory, one could go there. But Laurie Garrett doesn't want to live in that world, and it seems unlikely that most of the MeFi-ites quoted above would like to live there either. But if we want to avoid it, we must either find a mechanism to prevent the free flow of information or find a reason to believe that not all information will naturally flow of its own accord.

SOCIAL NORMS

Not every email you send your lover will wind up on MetaFilter; disgruntled (ex-)lovers have been going public with "personal" correspondence for centuries. Email and the Internet are neither necessary nor sufficient for the sort of expectations meltdown involved in the Laurie Garrett incident. Your lover doesn't forward your email, well, out of love, and even afterwards, there's still a taboo on violating the confidences of that relationship. The strongest pressure on Garrett's friends not to forward that email was social. She trusted them with a private email; someone among them violated that trust. *There's* your

problem, says dmt. Either you didn't warn your friends about your expectations or you have an untrustworthy fink for a friend.

There's something to this idea. We don't ask our friends to submit P3P policies to us before we send them email.²⁰ No, instead we wrap everything we say or write in an implicit privacy policy, one grounded in the social norms of our friendship and our society's notions of friendship. These privacy policies can be remarkably intricate. For example, teenage girls tell each other secrets that are anything but. Similarly, when was the last time you appended "please don't forward to my boss" to an email to your drinking buddies? Social norms aren't going to go away anytime soon; we can count on them to take care of a lot of the subtle negotiations surrounding the exchange of "private" information.

But social norms have never solved all our problems—think of the jilted lover choosing whether to burn the love letters or publish them—and, more importantly, the Internet does change things. Garrett's example of the letter that she handwrote from the Vienna Summit is telling:

Now, imagine my recipient found the letter amusing or insightful and photocopied my handwritten note, posting it to ten friends. And so on. Snail mail hell? Doubtful. In those seemingly ancient days we all respected privacy, and the time and money required to photocopy and post missives prompted all of us to pause and question whether we had a right to forward a personal letter without the authors permission.²¹

Her analysis of the reasons for that hesitation is wide of the mark, but her conclusion is so obviously right we often overlook it. Email and snail mail obey fundamentally different laws of propagation. Email can spread like wildfire, but unless you get a copy of your snail-mail letter into a major newspaper or can afford a massive direct-mail spam, it stops with your friends.

In crudely mechanistic terms, going from paper to bits lowers the cost of copying and forwarding. It takes a pretty important letter to be worth the bother of Xeroxing, stamping, and mailing, but even an infinitesimally small benefit is worth the minimal cost of clicking on the forward button and typing in a few addresses. People who wouldn't have forwarded a letter will forward an email, and they'll forward it to more people. More people, each of whom is more likely to forward the message, means a greater likelihood that any given email will escape from captivity. Or, put another way, email has a much lower critical mass of interest than pen-and-paper mail has.

Garrett attributes email's wider circulation to the passing of "those seemingly ancient days we all respected privacy," that is, to the collapse of a social norm. Technological determinists would emphasize instead a mechanical cost-benefit tradeoff in which social norms enter only as an afterthought. Both views are wrong because the social norms that have grown up around email are norms that usually make sense in the context of rapid and easily replicable textual communication. On the one hand, we don't put quite as much of ourselves into any given email as we would put into a letter; on the other, we expect a certain degree of wider redistribution. The median email is less private and more public in its content than the median letter, not because our words care whether they travel by ink or by bits, but because we have evolved a set of expectations about email that are less private and more public than our expectations about traditional letters.

Even the most useful understandings break down now and again, and Garrett got caught by just such a breakdown. Her letter, although to her a "personal" note, is fairly evidently the product of a journalist. Thus, when the issue *du jour* was whether the letter was a hoax, many commentators started from the assumption that it was a relatively informal dispatch, rather than a relatively formal letter. It's certainly not a bad assumption—lots of interesting modern journalism is highly informal²²—and yet in this case it turned out to be completely wrong.

What happened was that as the letter got forwarded further and further from Garrett's keyboard, the necessary cues that would have indicated a disapproval of forwarding were stripped away. By the time it hit the Psychohistory mailing list, remember, the original header information, along with her last name, had gone missing. Under those circumstances, who among us would *not* forward an interesting essay? (Purported attributions aren't always reliable, either; just think of the "Kurt Vonnegut" commencement speech.²³) More importantly, when the email reached people who didn't know Laurie Garrett personally, it reached people who didn't know her expectations about forwarding email. When it comes to the norms of forwarding, these implicit headers are just as important as the official ones.

How did the letter wind up in its denuded state? Once again, one hardly needs to posit active malice. One of Garrett's friends forwards it to his wife; the wife sends it to her two sisters, one of whom sends it to a co-worker who strips the headers and sends it to three or four friends . . . and bingo. We've reached escape velocity. The funny thing is that even a Laurie Garrett might well have added any given link to that chain. Given the close relationships

involved, none of these individual decisions to forward feels like a significant betrayal of trust.

Such are the social norms of email. Against these norms, the idea that Garrett could or should have reined in her friends starts to look more than a little cockeyed. dmt wrote, “The mail we discussed didn’t have ‘please don’t forward on’ written on it anywhere as far as I can see,” but what would *you* do if Garrett’s email, disclaimer attached, landed in your inbox? The social norms of email look upon such disclaimers with thinly veiled contempt. People who send email from disclaimer-laden corporate accounts are roundly mocked; unless the email is obviously and by its very nature not meant for certain eyes (an invitation to a surprise party would be one example), disclaimers are next to useless. This one forward is fine, goes the thinking, and it is, but one plus one plus one equals many, in the exponential logic of digital communications media.

Even when social norms are mostly effective, it doesn’t take much to go critical. As long as the average number of forwards per recipient is greater than one—no matter by how little—the laws of probability tell us to expect nice happy exponential curves zipping up towards infinity. The Internet treats indifference as damage and routes around it. After all, if the Internet is all about empowerment, then we want the few who care about an issue to be active in getting the good word out. If you believe in affinity groups and virtual social networks and the creation of new communities online, then it’s a good thing that the complaisant many can be outvoted by the interested few. Otherwise, every last one of us would be watching “American Idol,” instead of just a sixth of us.

Social norms won’t magically save us. At the most, they tell us that Laurie Garrett misread the applicable social norms of email, as they applied to her friends, to her friends’ friends, to their friends, and so on. But that leaves us back where we were at the end of the last section: She won’t make *that* mistake again, which means that she’s never writing one of these dispatches and committing it to email again, which means no interesting discussion topic for MetaFilter.

Perhaps one day we might bring her out of this self-imposed shell. Perhaps our understanding of email will change. Perhaps we’ll have headers that “suggest” limited distribution. X-Do-Not-Forward-Unless-You-Know-The-Author, X-Do-Not-Remove-Authors-Name, and X-Do-Not-Forward-This-Means-You-Yes-You come to mind. Or perhaps we’ll have a mind-your-own-business norm and will delete anything not personally written expressly for us. These prospects are unlikely, at best. Some of them require us to turn our backs on the nature of email, to forgo the very possibilities it opens up. Others feel like

crude attempts to turn legal or technical rules into standards of conduct. None of them seem workable, especially since these norms will require near-universal adherence if privacy is the name of the game.

To repeat, there is something here. Well-understood norms do—and will—prevent many privacy accidents. But they have never been a complete solution, and the advent of the Internet has rendered them strikingly less effective. More people, more anonymity, fewer non-verbal cues, greater individual autonomy, and the list goes on and on. Today, more so than at any time in history, we can interact with people whose values are not our own, and we can do so under highly fluid and ambiguous conditions. Quasi-private emails leak out *all the time* now, not because we want what is private to become public, but because it has become so hard to tell private from public in the context of email. Social norms will not rebottle this genie.

TECHNICAL RESPONSES

This leaves us with one remaining response: that perhaps the Laurie Garretts of the world could *prevent* their private emails from becoming public. Technological self-help is an appealing idea; it seems to square with our ideas about autonomy and the decentralized nature of the Internet. As dmt asked, “Using encryption are we Ms Garrett?”²⁴

Well, no. She wasn’t. No one uses encryption, not least because encryption wouldn’t have solved the problem (as dmt went on to admit). True, it would have stopped eavesdropping third parties from reading Garrett’s email, but the point of good message encryption isn’t just that unintended recipients can’t read your messages, but also that intended recipients can. The recipients would have had to have access to the text of her email, or there’d be no point in sending it at all. But as soon as they had access to the text of her email, the jig was up for technical self-help.

It’s technically impossible to give someone a piece of information without also empowering them to redistribute that information. If you could, it wouldn’t be information. Encryption is fine for the digital connection, but the digital connection was already the secure part of the link. Garrett’s expectations of privacy were compromised between the seat and the keyboard; the same place every other foolproof scheme fails.

P3P—the much-hyped but little-used standard for Web sites and browsers to negotiate over privacy policies—has been an abject flop for the same reasons. Technology will encrypt your credit card number and send your passport data only to sites that promise full privacy, but technology will never be able to stop the unscrupulous

merchant at the other end of the wire from doing whatever he wants. The only technologically meaningful bright line is the one between the author and the entire rest of the world; the first disclosure contains the prospect of all the others. No privacy policy in this or any other world is or can be self-enforcing.

True, strong privacy-protection technology might make it annoying or difficult to CLICK-FORWARD that email. It might require a more conscious effort to violate the author's expectations of non-disclosure. This would be a case in which the privacy technology was useful for its effect on social norms; I think this is the idea that Garrett had in mind when she talked about the loss of "respect" for privacy that she sees as part and parcel of the exchange of email. As with disclaimers, it's not unreasonable to think that a more nuanced set of default forward permissions—your choice of no forwards, one forward, forwards by author's automated approval, or unlimited forwards, say—might take care of many of these accidental privacy leaks.

That said, any such scheme will face severe limits. No set of rules or permissions will ever be sufficiently granular to handle the infinite variety of human social relations. After all, didn't Garrett want her email to go only to "people who will say nice things about it and/or quote it in a positive context?"²⁵ Go ahead, *you* try expressing "positive context" in a way enforceable by a computer.

Moreover, however effective such technical restrictions are at honoring the author's wishes, they will be exactly that effective in overriding the wishes of her correspondents and would-be forwarders. Technical schemes make this conflict explicit: "I want to forward this email but I can't because the author says I can't! Where's my autonomy in this, eh? What about *my* free speech rights?" These conflicts are insoluble; reifying the rules in technology makes them explicit; and where will explicit adversarial relationships be most destructive? In contexts characterized by informal interactions based on personal trust, of course. Keeping private emails private is just about the least likely place for a technical solution to work.

Even more damningly, a fundamental precondition of technological solutions is the ability to force the other guy or gal to play by your technological rules. Setting the do-not-forward bit on your email is useless unless email clients respect that bit. Therefore: Palladium.²⁶ Therefore: the broadcast flag.²⁷ Therefore: certificate authorities.²⁸ Therefore: the DVD Content Control Association.²⁹ All of these institutions are or were devoted to the widespread enforcement of compliance. They encourage (or sometimes coerce) the adoption of their preferred technologies in many different ways, but the underlying idea is always the same: create a forum within which certain rules of behavior are enforced at the architectural level.

Enforcing Laurie Garrett's wishes about the distribution of her thoughts on Davos, then, would have required the deployment of some serious technical infrastructure. The kicker is that this technical infrastructure needs to be backed up by an equally serious institutional infrastructure. The broadcast flag won't just find its way into HDTV sets; someone powerful needs to put it there, possibly under threat of legal compulsion.³⁰ There aren't so many open mail relays any more because the people who run them get blackballed by the spam-hating vigilantes of the Net. Cracking open your TiVo will void your warranty. Trusted systems are trusted for the same reason that money is trusted: because of the strength of the institutions behind them.

If there is one thing that these huge and powerful institutions are supremely ill-adapted to do, it would have to be preserving the ambiguous privacy of quasi-personal emails. Privacy itself is an institutional non-starter. TRUSTe has suffered from massive enforcement problems; P3P doesn't even have an enforcement policy. It's hard to define offenses against information privacy, harder to detect them, and harder still to translate issues of "privacy" into universally applicable standards. Indeed, the very act of formulating a privacy policy at the technical level has the unfortunate side effect of standardizing a data format for the information supposedly to be kept private, making it that much easier to merge and mine personal information from multiple sources.

And that's not the half of it. However hard technical protections on personal information may be, it's at least possible to formulate the question in a meaningful way. Medical records, for example, are fairly well-defined things, with a reasonably clear trust model: Medical professionals involved in the treatment of a patient have access. But email? Email is squishy and contextual. The "personal" part of a 2,000-word email may consist of two sentences. Two emails may be completely innocent taken individually but damning if they meet. The set of "approved" readers may be hideously ill-defined; when we fire off an email, most of us never give any thought to deciding whether we'd be upset if Conan O'Brien read it. It's okay to forward this message, but not if it makes its way back to Jim or Flora before next Thursday, unless they already know.

The list goes on and on. Institutions may be able to step in and sort through the smoking wreckage after an email privacy disaster, but they will never be able to promulgate a comprehensive set of policies in advance of such disasters. Such a set of policies is precisely what would be required for a technical solution to the CLICK-FORWARD problem of private emails turning public. Otherwise, we'll be left with the situation that we face

here: a great many almost-entirely innocent people glad that they forwarded a letter and one almost-entirely innocent person very upset that her letter was so widely forwarded.

Faced with this choice, it's not hard to see which way people will jump. I doubt that even Laurie Garrett would give up her ability to forward at will in exchange for a complex and confusing anti-forwarding email client that will *perhaps* keep her musings on Davos from becoming public.

We're back at one of the great truisms of computer security: People make secure systems insecure. Not out of malice, or even out of laziness. People make secure systems insecure because insecure systems do what people want and secure systems don't. In this case, an insecure email system that does what "people" want does something Garrett doesn't want.

DEMOCRATIC VALUES

There's something more at stake here than just email forwards and hurt feelings. Laurie Garrett didn't just write some random email about her cats and her day at work. She wrote a long and reasonably detailed inside account of one of the most Zeitgeisty events on the planet. You may or may not think that the World Economic Forum invitees are quite as important as they think they are, but they're hardly insignificant players on the world stage. You may or may not think that Garrett's account was useful and thoughtful, but you have to admit that it's sparked some decent discussion. To quote jessamyn again:

To be honest, I would worry about a democracy that did not encourage the dissemination of information using the Internet as a medium.

Now this is a real problem. Laurie Garrett's composing a 2,000-word email to her friends is the sort of thing democracies like to encourage. It represents journalism, analysis, deliberative discourse, and the like. MetaFilter's discussion, as fueled by the Internet distribution of her writing, is also the sort of thing democracies like to encourage. It embodies citizen involvement, intermediate institutions, deliberative discourse, and the like. But her democracy and their democracy seem to have some trouble playing nicely with each other.

It's possible to read this whole brouhaha as a culture clash. On the one hand, you have Laurie Garrett and her circle of close friends, who apparently exchange long and factual letters by email and discuss the prevailing mood among world leaders. On the other hand, you have MetaFilter, in which bloggers and netizens from around

the world offer rapid-fire commentary and snide remarks in response to a steady procession of links. Both seem an awful lot like communities involved in worthwhile civic engagement. But when you look at how they address each other, it's obvious that neither regards the other as a serious participant in the democratic exercise.

Thus, Garrett writes:

Do you imagine for a moment that the participants in the WEF—whether they be the CEOs of Amoco or an IBM or the leaders of Amnesty International and OXFAM—waste their time with Internet chat rooms and discussions such as this? Do you actually believe, as you type your random thoughts in such Internet settings, that you are participating in Civilization? In Democracy? In changing your world?

Whereas rcade replies:

The world doesn't need to wait around for professional journalists to carefully predigest the news for us any more. We're capable of collecting and analyzing information from a thousand different sources and directions, even an injudicious e-mail by a chatty Pulitzer Prize winner to at least one loose-lipped friend.³¹

The naturally sensible, empathetic reply to these feuding flammers and their dueling versions of democratic discussion is, "Do we have to choose?" Unfortunately, this a question whose answer increasingly may be "yes." What happened here was that Garrett's group, with its version of discourse and its rules about forwarding, ran up against the MetaFilter gang, with its own very different notions of discourse and very different ethic of forwarding. Who brought them together? The Internet, better known as the very same communications tool both of them were using to engage in their local forms of democratic activity.

Remember how everyone keeps saying that distance is irrelevant on the Internet? This is what happens when distance disappears. You wind up right next to the damndest people. You can hear your noisy neighbors; they can't help but overhear you. These communities are having some serious boundary issues. When you speak in one, it's no longer so clear which community you're addressing. Theorists of democracy are all over the map on the nature of interest groups and whether intra-group conversations are good or bad. But Laurie Garrett's experience is especially striking, because it suggests *both* that the Internet encourages the formation of virtual communities with divergent norms and interests *and* that it brings these groups into contact—and conflict.

Remember how everyone keeps saying that the Internet blurs the line between private and public? Well, here you go. Case study. A letter meant to be “private” is interpreted as “public”; it then becomes public because people think of it as such. When the author complains, her status as a journalist becomes a reason for claiming that she should expect her “personal” writings to be held to the same standards as her “public” ones (quote from dmt):

Your humiliation is right and deserved. Stand by what you’ve written or don’t write it—as writer you should know better than to commit falsehoods (i.e. factual inaccuracies) to paper, regardless of their recipient.³²

At the same time, note that Garrett’s original email was a “private” letter about the World Economic Forum, a “private” organization of “public” figures. Her attendance was part of the WEF’s carefully calculated media strategy. Her email spread so widely, in part, because it reflected information that the WEF was willing, presumably eager, to have distributed. Her email was able to cross into the Web bloodstream precisely because it was never wholly “private” or “public” to begin with. Put another way, social norms fell down on the job here because it was highly ambiguous which set of norms ought to govern.

It’s a commonplace belief that the Internet gives every author an unlimited audience. Perhaps not every author wants an unlimited audience. There are some things that Laurie Garrett would rather not write than let the Internet read. Actually, that’s not strictly true. Laurie Garrett may still write letters of this sort, but she won’t commit them to email. As we’ve already noted, when Garrett refuses to use email for a letter perfectly suited to email, something has been lost.

A CLICK-FORWARD WORLD

But that’s not strictly true, either. The situation is even worse than Garrett realizes, or will be soon. She would like to go back to 1979 longhand, but she can’t. She can only go back to 2003 longhand, which is a very different animal. Anyone with enough time could transcribe her letter and fire off hundreds of copies by email. Or they could just shove it in a fax machine. Or they could scan it and post the images on the Web. Or they could wait a few years and run some impending generation of OCR software on the letter. Same result.

As these digitizations become easier, the same CLICK-FORWARD social regime that governs email will make ever-greater inroads into the paper world. How long until

we see a tablet PC with a built-in full-page scanner? Five years? Less? Who then will object to scanning a letter? SCAN-FORWARD is coming; when it arrives, where then will the Laurie Garretts of the world turn? The problem isn’t just that the Internet is leaky; the Internet makes everything leaky.

In the face of this prediction, Garrett’s choice becomes much starker. She can write for the world or not at all. There is no middle ground. Perhaps she will write for the world—spell-check every how-are-you and organize her holiday greetings as inverted pyramids. Perhaps she’ll write as she’s always written, knowing full well that the world will make fun of her grammar. Or perhaps she’ll decide that the game isn’t worth the candle and keep her thoughts to herself. I can see her, or people in her shoes, trying all of these options. Any which way, someone loses.

When Laurie Garrett modifies her style to be MetaFilter-friendly, her intended readers lose, because these unwanted interlopers have come between her and the words that she would have chosen for her true audience. When she shrugs and lets her personal thoughts leak to the world, she loses because the connection and trust involved in private communications have been burnt away. In both of these cases, the sphere of the “private” has suffered from its Internet-induced collision with the “public.”

But when Laurie Garrett stops writing entirely, we all lose, because it is the “public” realm that has suffered from the collision. Something interesting and useful has gone unsaid. Not something useful to us individually. Something useful to us as a society, grist for the democratic mill. In jessamyn’s words:

Maintaining a free society requires an informed populace.³³

It’s easy to claim that the “problem” is an author who doesn’t believe in democracy or a community that doesn’t value privacy. But neither of these claims is quite the case here. There’s something deeper and more troubling at work. The populace, by the very act of informing itself, has cut off a source of its information.

I don’t know about you, but I’m worried.

POSTSCRIPT: ELEPHANTS AND LIONS

It’s time to come clean. There’s an elephant in this room. I’ve been avoiding mentioning it because once you point out the elephant in the corner, nobody can talk about anything else. I want this discussion to *end* with the

elephant, not begin with it. But since we're coming to the end, the time has come to deal with the elephant that is copyright.

Laurie Garrett, after all, has a copyright in her written works. One can argue about the terms on which she licensed her email—she did, after all, send it, without disclaimer, to an undisclosed list of friends—but the baseline assumption would still be that she retains copyright to her words. Every subsequent forward was a *prima facie* infringement on her copyright. And by the familiar copyright legal logic of the last few years, she should—in theory—be able to cease-and-desist her way into having that letter redacted from every Web site, deleted from every errant inbox.

To state this possibility is to refute it. From Garrett's perspective, the damage is already done. None of the unkind comments will be retracted, no one who has read the letter will unread it. Cease-and-desist letters are a great way to lose old friends and make new enemies. An email is so small, so easy to encode and disguise, so close to a pure meme, that she doesn't stand a chance even of identifying all the copies out there, let alone of enjoining them out of existence. Copyright law is not about to solve Laurie Garrett's problems. It's just the wrong tool for the job.

But that's not to say that copyright isn't relevant. This whole microdrama has played itself out in the elephant's shadow. Laurie Garrett wants to restrict distribution of her words to certain people—close friends—and what's so wrong with that? But you might equally well say that novelists want to restrict distribution of their words to certain people—paying customers—and what's so wrong with that? Any solution you cook up to help Garrett out of her jam is going to help some other people out of a jam, too. The Recording Industry Association of America, for instance. Garrett is in the position of the music labels; the Psychohistory discussion list was her Napster.

Many MeFites were aware of this similarity. The hostility some expressed towards Garrett resembles nothing quite so much as anti-RIAA rants. Even those who were more personally sympathetic towards her share in the ideological commitment to free distribution of information. Hard cases make bad law, goes the saying; one author's hardship, says MetaFilter, is no reason to abandon a principled stance. Information wants to be free, will be free, and this is good.

I'm not so sure. For all her lack of tact, Laurie Garrett is a much more sympathetic poster child than the Universal Music Group. She's in the self-censorship game to preserve her sense of privacy, not for the money. If we say "no" to her, we're saying "no" to the lovers and the dreamers.

On a technical level, privacy and copyright are isomorphic problems. Information is to be shared with certain people and not with others. From this observation have come some interesting ideas. (For example, Jonathan Zittrain suggests using digital rights management to keep electronic medical records private.³⁴) But this overlap has unfortunate consequences, as well, because many people's ethical intuitions cut very differently across these two problems. A technically consistent pair of responses to them may feel wildly inconsistent as a matter of right and wrong. If credit-card databases were trivially available on major BitTorrent trackers, how many people who now believe in file-sharing would demand a complete ban on BitTorrent?

The conventional distinction between privacy and copyright is that the information is used in different ways. Copyright violations tend to involve many individuals violating the rights of a few large entities; privacy violations often reverse this picture. This asymmetry makes it possible to enforce privacy protections. You could stop the NSA in its tracks by prohibiting them from maintaining the wrong sort of database. You could go out, find major commercial violators, and slap them with big fines. The traditional privacy violator invades privacy wholesale; "copyright infringement" today often connotes something much more individualistic.

Internet-enabled, peer-to-peer privacy violators break down this convenient distinction. There is only one Laurie Garrett, but a great many people have seen a letter she never meant them to see. There was no central chokepoint, no privacy-intrusion clearinghouse. Our legal system can handle (or could, if it tried harder) the big boys who want to be big brothers, too; it's not so well equipped to stop people from hitting the "forward" button. Indeed, for all the reasons above, privacy spills like Garrett's are much harder to conceptualize, contain, and prevent than copyright leaks. Ten years down the road, we could have a system in which music traders go to jail but personal emails are never safe from public eyes.

But enough with the doom and gloom. For now, at least, most private emails stay private; most expectations are honored. Laurie Garrett's plight is striking because it is not yet the norm. We trust email, not because it promises us anything in trade for our trust, but because it hasn't burned us. Too badly. Yet. As long as the spills and leaks are rare, we are likely to cross our fingers and hope for the best.

Stupid? Perhaps not. Think of form contracts: the interminable pages of small print you pretend to read, the shrinkwrap software licenses you click through without hesitation, the bank documents you sign in the belief that the dreaded soul-forfeiture clause will never be turned against *you*. As Karl Llewellyn wrote:

[T]he form-agreements tend either at once or over the years, and often by whole lines of trade, into a massive and terrifying jug-handled character; the one party lays his head into the mouth of a lion—either, and mostly, without reading the fine print, or occasionally in hope and expectation (not infrequently solid) that it will be a sweet and gentle lion.³⁵

The privacy lion is drawing blood.

NOTES

1. See generally <http://www.lauriegarrett.com>.
2. Laurie Garrett, "Gates Grant Tackles Disease: \$200M To Go for Research," *Newsday*, Jan. 27, 2003, at A11; Anne Q. Hoy & Laurie Garrett, "Powell Iraq Threat Is 'Greatest Danger,'" *Newsday*, Jan. 27, 2003, at A5.
3. Lloyd deMause, *Swiss View (Davos)*, to Psychohistory List, available at <http://lists.topica.com/lists/psychohistory/read/message.html?mid=1711891071> (Feb. 06, 2003 15:55 PM), quoting email from Laurie Garrett.
4. MetaFilter, <http://www.metafilter.com>.
5. sparky, to See Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true> (Feb. 11, 2003 7:42 PM).
6. See damn yankee, to Could This Be True?, MetaFilter, <http://www.MetaFilter.com/23493/Could-this-be-true#434195> (Feb. 11, 2003 8:06 PM).
7. blissbat, to Could This Be True?, MetaFilter, to <http://www.metafilter.com/23493/could-this-be-true#434246> (Feb. 11, 2003, 10:34 PM).
8. See Katie Hafner, "A Beautiful Life, an Early Death, a Fraud Exposed," *N.Y. Times*, May 31, 2001, at G1. MetaFilter threads on the hoax include *Is it possible that Kaycee did not exist?*, MetaFilter, <http://www.metafilter.com/comments.mefi/7819> (May 19-May 21, 2001); *And so it ends*, MetaFilter, <http://www.metafilter.com/7841/> (May 20-Aug. 30, 2001); *The Plot Sickens*, MetaFilter, <http://www.metafilter.com/comments.mefi/7856> (May 21-May 25, 2001), and *The Kaycee Nicole (Swensen) Faq*, MetaFilter, <http://www.metafilter.com/comments.mefi/7878> (May 22-May 22, 2001).
9. See Givewell, MetaFilter Wiki, <http://mssv.net/wiki/index.php/Givewell>; Stephanie Strom, "Founder of a Nonprofit Is Punished by Its Board for Engaging in an Internet Ruse," *N.Y. Times*, Jan. 8, 2008, at A21. MetaFilter threads on the matter include *Givewell or Give 'em Hell?*, MetaFilter, <http://metatalk.metafilter.com/15547/givewell-or-give-em-hell> (Dec. 31, 2007-Jan. 6, 2008) and *Fallout from the Givewell affair*, MetaFilter, <http://metatalk.metafilter.com/15575/fallout-from-the-givewell-affair> (Jan. 6-Feb. 1, 2008).
10. beagle, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#434681> (Feb. 12, 2003, 1:47 PM).
11. beagle, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#435946> (Feb. 14, 2003, 7:13 AM).
12. beagle, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#437751> (Feb. 17, 2003, 9:57 AM).
13. crasspastor, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#438265> (Feb. 17, 2003, 8:33 PM).
14. jessamyn, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#438664> (Feb. 18, 2003, 12:54 PM).
15. dmt, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#438442> (Feb. 18, 2003, 7:27 AM).
16. walrus, to Could This Be True?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#438384> (Feb. 18, 2003, 4:08 AM).
17. *Id.*
18. *Id.*
19. See, e.g., "Email Scandals Archive," Above The Law, http://www.abovethelaw.com/email_scandals/.
20. See generally "Platform for Privacy Preferences (P3P) Project," World Wide Web Consortium, <http://www.w3.org/p3p/>.
21. beagle, *supra* note 12.
22. See, e.g., Bruce Sterling, "Information Wants to Be Worthless," *Austin Chronicle*, Mar. 1, 2002, available at <http://www.austinchronicle.com/gyrobase/issue/story?oid=oid%3a84834>.
23. Mary Schmich published a column in the *Chicago Tribune* with the text of a graduation speech she would give if she were ever asked to give one. Within months, the column had been widely forwarded online, where it had picked up an attribution mistakenly claiming that it was a real commencement speech delivered by Kurt Vonnegut at MIT. See Ian Fisher, "What Vonnegut Never Said; It's All the Talk of the Internet's Gossip Underground," *N.Y. Times*, Aug. 6, 1997, at B1. In a further irony, the speech was then set to music by multimedia impresario Baz Luhrmann, became a hit single (reportedly played at some graduations, see "Wear Sunscreen," Wikipedia, http://en.wikipedia.org/wiki/wear_sunscreen (Apr. 9, 2008 13:19)), and the basis for a book by Schmich, Mary Schmich, *Wear Sunscreen: A Primer for Real Life* (Andrews McMeel Publishing 1998), which is promoted by its publisher as, yes, a graduation gift. *Wear Sunscreen*, Andrews McMeel Publishing, <http://www.andreusmcmeel.com/products/?isbn=0836255283>.
24. dmt, *supra* note 15.
25. davidfg, to Could this be true?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#438683> (Feb. 18, 2003, 1:06 PM).
26. See generally "Next-Generation Secure Computing Base," Wikipedia, http://en.wikipedia.org/wiki/next-generation_secure_computing_base (Feb. 10, 2008 11:26).
27. See generally "Broadcast Flag," Wikipedia, http://en.wikipedia.org/wiki/broadcast_flag (Apr. 8, 2008 15:44).
28. See generally "Certificate Authority," Wikipedia, http://en.wikipedia.org/wiki/certificate_authority (Mar. 23, 2008, 00:58).
29. See generally "DVD Copy Control Association," Wikipedia, http://en.wikipedia.org/wiki/dvd_copy_control_association (Dec. 23, 2007 06:03).
30. See *Am. Library Ass'n v. FCC*, 406 F.3d 689 (2005) (striking down rule that all HDTV sets contain hardware to detect and respect a flag specifying that particular content is not to be copied, as being beyond the FCC's delegated rulemaking authority).
31. rcade, to Could this be true?, MetaFilter, <http://www.metafilter.com/23493/could-this-be-true#439061> (Feb. 18, 2003, 9:18 PM).
32. dmt, *supra* note 5.
33. jessamyn, *supra* note 14.
34. Jonathan Zittrain, "What the Publisher Can teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication," 52 *Stan. L. Rev.* 1201 (2000).
35. Karl Llewellyn, *The Common-Law Tradition: Deciding Appeals* 362 (1960).