IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

FRANK D. SMITH, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No.: 4:02-CV-280
	:	
CORNELL UNIVERSITY;	:	
NATIONAL SCIENCE FOUNDATION;	:	
LOS ALAMOS NATIONAL LABORATORY;	:	
UNIVERSITY OF CALIFORNIA;	:	
UNITED STATES DEPARTMENT OF ENERGY;	:	
	:	
and	:	
	:	
PAUL GINSPARG, Professor of Physics and Computer Science, Cornell University, Individually and in his Official Capacity;	:	
SIMEON WARNER, Research Associate, Computer Science Department, Cornell University, Individually and in his Official Capacity;	:	
SARAH THOMAS, University Librarian, Cornell University, Individually and in her Official Capacity;	:	
and	:	
JEAN POLAND, Associate Librarian, Cornell University,	:	

Individually and in her Official Capacity;

and

RICHARD LUCE, Administrative Director, Los Alamos National Laboratory, Individually;
JOHN C. BROWNE, Director, Los Alamos National Laboratory, Individually;
and
ROBERT L. VAN NESS, University of California Assistant Vice President for Laboratory Administration, Individually;

Defendants.

MEMORANDUM IN SUPPORT OF RESPONSE OF PLAINTIFF FRANK D. SMITH, JR., TO MOTIONS TO DISMISS OF DEFENDANTS CORNELL UNIVERSITY, PAUL GINSPARG, SIMEON WARNER, SARAH THOMAS, AND JEAN POLAND; AND OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF CALIFORNIA D/B/A LOS ALAMOS NATIONAL LABORATORY , RICHARD LUCE, JOHN C. BROWNE, AND ROBERT VAN NESS

Pursuant to Federal Rule of Civil Procedure 12(b)(2) and 2(b)(6) and Local Rule 7.1, Plaintiff Frank D. Smith, Jr., respectfully submits this memorandum of law in support of his reponse opposing the motions to dismiss his claims against Defendants Cornell University ("Cornell"), Paul Ginsparg, Simeon Warner, Sarah Thomas, and Jean Poland (collectively, "Cornell Defendants") and of Defendants The Regents of the University of

"Cornell Defendants") and of Defendants The Regents of the University of California d/b/a Los Alamos National Laboratory ("The Regents"), Richard Luce, John C. Browne and Robert Van Ness (collectively, "the individual UC Defendants"). References to the Affidavit of Plaintiff Frank D. Smith, Jr., in support of this Memorandum (which Affidavit is hereby incorporated herein by reference) are denoted by [S.Aff. ¶1] etc. According to the criteria of Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir.1988), the Court should, for the purposes of considering those Motions to Dismiss, make all reasonable inferences in favor of Plaintiff.

The Motions to Dismiss should be denied.

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arXiv is a public forum

ArXiv[1] is a public forum that was established in 1991 on government facilities at Los Alamos National Laboratory, which was and is operated by The Regents and which was and is funded by a branch of the U.S. government, the Department of Energy ("DOE"), and which at some times was and is funded by another branch of the U.S. government, the National Science Foundation ("NSF"). It is expected that details of the relationships among The Regents and DOE and NSF with respect to arXiv during the period from 1991 to September 2001 will be discovered during the discovery phase of this case. [S.Aff. ¶¶ 6,7]

During the period from 1991 to September 2001, using government facilities and funding, the arXiv public forum grew to achieve its unique position as the dominant electronic archive and distribution server for research papers in physics (as well as some other fields), to the extent that, as Defendant Paul Ginsparg said in 1996: "... These archives .. In some fields of physics ... have already supplanted traditional research journals as conveyers of both topical and archival research information ...".[S.Aff. ¶8]

In September 2001, administration of the arXiv public forum was

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[1] The term "arXiv" is used here instead of "e-print archive" because Cornell uses it in its memorandum in support of its motion to dismiss.

transferred from The Regents to Cornell, but arXiv continues to receive funding from NSF and The Regents and DOE continue to be involved with arXiv because Los Alamos National Laboratory continues to be intimately connected with arXiv as its primary back-up site. Further, Cornell has connections with the State of New York. [S.Aff. ¶¶7,9]

The fact that arXiv has used, and still uses, government property, whether for its home web site or for its primary back-up, is an important point with respect to the character of arXiv as a public forum, under the opinion of Justice Thomas, joined by the Chief Justice and Justice Scalia, concurring in part and dissenting in part, in the case of Denver Area Educational Telecommunications Consortium, Inc., et al. v. Federal Communications Commission et al., 518 U.S. 727 (1996), in which Justice Thomas said:

> "... government may designate public property for use by the public as a place for expressive activity and that, so designated, that property becomes a public forum. ... Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum. See, e. g., Hague v. CIO, 307 U.S. 496, 515 (1939) (streets and parks); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)

(sidewalks adjoining public school); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (theater under long-term lease to city); Carey v. Brown, 447 U.S. 455, 460 -462 (1980) (sidewalks in front of private residence); Widmar v. Vincent, 454 U.S. 263, 267 - 268 (1981) (university facilities that had been opened for student activities). ... Properly construed, our cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated. ...".

Through its NSF funding and use of Los Alamos National Laboratory as primary back-up, the U.S. government clearly "holds a significant property interest consistent with the communicative purpose of the forum to be designated.".

arXiv declared a policy of open authorship

arXiv has declared a policy of open authorship in connection with the Open Archives initiative by stating on the arXiv web site "... Description of submission policy ... Open but with some moderation of appropriateness to archives and subject classes. Restrictions on size and format; submissions required to be complete. ...".[S.Aff. ¶10]

If Cornell is unable or unwilling to administer arXiv as a public

forum in a proper manner, then, since The Regents d/b/a Los Alamos National Laboratory have about 10 years experience in administering arXiv as a public forum and still have primary back-up facilities, it is reasonable to propose that in that case The Regents should resume their administration of arXiv as a public forum. Therefore, the characterization by The Regents and the Individual UC Defendants, in their Argument and Citations of Authority in Support of their Motion to Dismiss, of such relief sought by Plaintiff as “outrageous” is quite inaccurate.

arXiv blacklisted Plaintiff

Cornell Defendants state in their Memorandum of Law in Support of their Motion to Dismiss: “...The arXiv database administrators decided not to post plaintiff’s paper ...”[p. 7]. That statement is incomplete, in that it fails to state the reason why the arXiv database administrators made that decision, which was made in August 2002 and continues to the present.

In fact, the arXiv database administrators stated by e-mail that the reason for that decision was that Plaintiff was in "... a large pool here - typically flagged by reader complaints - encouraged to find alternate outlets. ...", thus placing Plaintiff on a blacklist.[S.Aff. ¶¶11-24]]

Further, when Plaintiff sent an e-mail message to arXiv asking who complained about him, what was the substance of any complaint, and for an opportunity to respond to the substance of any complaint, arXiv failed to

even show Plaintiff the courtesy of a reply. [S.Aff. ¶¶25-26]

blacklisting violated free speech and due process

Blacklisting Plaintiff by the public forum arXiv violated Plaintiff's right of free speech under Amendment I of the U. S. Constitution, and, to the extent that Cornell is sufficiently connected with the State of New York, Plaintiff's right to free speech under the New York State Constitution Article I, §8.

Failing to give Plaintiff a reasonable way to contest his blacklisting violated Plaintiff's right to due process under Amendment V of the U. S. Constitution (applicable due to U. S. government involvement in arXiv through NSF and DOE) and Plaintiff's right to due process under Amendment XIV of the U. S. Constitution and related law (applicable due to State involvement in arXiv through the connections of Cornell with the State of New York and through the connections of The Regents with the State of California) and, to the extent that Cornell is sufficiently connected with the State of New York, Plaintiff's right to equal protection under the New York State Constitution Article I, §11.

It is expected that details of the relevant relationships among NSF, DOE, The Regents, the State of California, Cornell, and the State of New York will be discovered during the discovery phase of this case.

The Regents and the Individual UC Defendants, in their Argument

and Citations of Authority in Support of their Motion to Dismiss, say that "The Claims Against The Regents Are Barred by the Eleventh Amendment"[p. 4]. However, under the doctrine of Ex parte Young, 209 U. S. 123, which was reaffirmed in Verizon Maryland Inc. v. Public Service Commission of Maryland et al., 122 S. Ct. 1753 (May 20, 2002), Amendment XI is subordinate to Amendment XIV and related law, so that Amendment XI is not a bar to Plaintiff's non-monetary-damage relief in this case.

Georgia long-arm jurisdiction

Two points on which Plaintiff agrees with the Memorandum of Law in Support of their Motion to Dismiss of Cornell Defendants are their statements: "... In order for Georgia to have personal jurisdiction over Cornell University and the individually-named Cornell employees, plaintiff must satisfy Georgia's long-arm statute. ..."[p. 5] and "... The Georgia long-arm statute allows the courts to exercise jurisdiction over non-residents ... O.C.G.A. §9-10-91 ... if the non-resident "[t]ransacts any business within the state" ..."[p. 6].

the business of arXiv

The business of arXiv is:

1. receiving papers submitted by third party authors located anywhere in the world (including Georgia U.S.A.) over the internet using such data transfer methods as e-mail, web browser, ftp, etc.. Statistics on this activity, called submission rate statistics, have been maintained by arXiv.

2. permanently posting and indexing such papers and their abstracts on the arXiv web site, the Los Alamos National Laboratory primary back-up site, as well as on other sites acting as mirror sites.

3. allowing viewing and downloading of such papers and their abstracts by anyone anywhere in the world (including Georgia, U.S.) with an internet connection using such data transfer methods, usually by web browser. Statistics on the web browser component of this activity, called HTTP server usage statistics, have been maintained by arXiv in terms of both number of connections and number of hosts connecting.

4. being paid for 1., 2., and 3.,

> in lieu of direct payments by third parties who submit papers and/or view and/or download papers and/or abstracts,

by, in substantial part, the National Science Foundation using funds from U.S.A. taxpayers (including U.S.A. taxpayers who are citizens of and reside in Georgia, U.S.A). [S.Aff. ¶27]

As arXiv has stated on its web site: "..... $$This archive is based

upon activities supported by the U.S. National Science Foundation under Agreement No. 0132355 (7/01-6/04) with Cornell University.$$ ...".

Discovery of all the terms and conditions of the Agreement between Cornell and NSF should provide more detailed relevant facts. For example, discovery will be necessary to determine the extent to which NSF funding depends on the levels of arXiv activities including, but not limited to, those described above as 1., 2., and 3. [S.Aff. ¶28]

In the course of its web site business, arXiv solicits business (as described above) from anyone viewing its web site from anywhere in the world (including Georgia, U.S.A.) by such means as, for example, stating on its web site general information help page http://arXiv.org/help/general

"... General Information About the Archives

> "Started in Aug 1991, arXiv.org (formerly xxx.lanl.gov) is a fully automated electronic archive and distribution server for research papers. Covered areas include physics and related disciplines, mathematics, nonlinear sciences, computational linguistics, and neuroscience.
>
> "Users can retrieve papers from the archive either through an on-line world wide web interface, or by sending commands to the system via e-mail. Similarly, authors can submit their papers to the archive either using the on-line world wide web interface,

using ftp, or using e-mail. Authors can update their submissions if they choose, though previous versions remain available.

"Users can also register to automatically receive a listing of newly submitted papers in areas of interest to them, when papers are received in those areas. These listings are sent by e-mail.

"In addition, the archive provides for distribution list maintenance and archiving of TeX macro packages and related tools. Mechanisms for searching through the collection of papers are also provided. ...". [S.Aff. ¶29]

A few examples of papers submitted from Georgia, U.S.A., and posted by arXiv on its web site during the year 2002 are:

http://arXiv.org/abs/hep-th/0206036 from gatech.edu

http://arXiv.org/abs/cond-mat/0204530 from gatech.edu

http://arXiv.org/abs/cond-mat/0204327 from gatech.edu

http://arXiv.org/abs/cond-mat/0204213 from gatech.edu

http://arXiv.org/abs/cond-mat/0203571 from gatech.edu

http://arXiv.org/abs/math-ph/0208021 from cau.edu

http://arXiv.org/abs/math.AG/0207287 from gatech.edu

http://arXiv.org/abs/math.AG/0203260 from gatech.edu

http://arXiv.org/abs/math.AG/0203241 from gatech.edu

http://arXiv.org/abs/physics/0207095 from Plaintiff Smith's

computer in Cartersville, Bartow County, Georgia, using his princeton.edu address (which is the last paper that Plaintiff Smith has been permitted to put on the Cornell archives)

http://arXiv.org/abs/hep-ph/0201039 from berry.edu

http://arXiv.org/abs/astro-ph/0004252 from berry.edu [S.Aff. ¶30]

arXiv and the Zippo criteria

The leading case about long-arm jurisdiction of internet web sites is Zippo Mfr. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), which case said: "... The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials [FN5] reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles.

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with

residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996).

At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.g. Bensusan Restaurant Corp., v. King, 937 F.Supp. 295 (S.D.N.Y.1996).

The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo.1996). ...".

In their Memorandum of Law in Support of their Motion to Dismiss, Cornell Defendants only quote from Zippo the language "A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction" [p. 10], despite the obvious fact that arXiv is not merely a passive Web site, but does in fact engage in transactions that "involve the knowing and repeated

transmission of computer files over the internet" and is clearly an "interactive Web [site] where a user can exchange information with the host computer.". Therefore, Plaintiff's contention that the Zippo criteria hold arXiv subject to Georgia jurisdiction should not be dismissed pursuant to either of the two pending Motions to Dismiss.

some Cornell Memorandum misstatements:

LeBron v. National R.R. Passenger Corp. and **McHale v. Cornell University and the NCAA** etc.

The Cornell Memorandum [pp. 16-18] relies on cases such as

LeBron v.National R.R. Passenger Corp., 513 U.S. 374, 400 (1995) and McHale v. Cornell University and the Nat'l Collegiate Athletic Association, 620 F. Supp. 67, 70 (N.D.N.Y. 1985) to support their contention that Cornell is not a state actor under the facts of this case.

The evidence, including discovery, will show that under their facts such cases as LeBron (Amtrak as "part of the government") and McHale (NCAA) do not hold against Plaintiff's position in this case (open access public forum).

Mayacamas Corp. v. Gulfstream Aerospace Corp.

The Cornell Memorandum [p. 6-7] states: "... the courts of Georgia have held that the formation of a contract with an out-of state party alone is insufficient to establish the minimum contacts necessary to grant personal jurisdiction on a non-resident. ... Mayacamas Corp. v. Gulfstream Aerospace Corp., 190 Ga. App. 893, 893 (1989) ..."

In fact, Judge Benham's opinion in Mayacamas Corp. v. Gulfstream Aerospace Corp. said, at page 893:

> "... The United States Supreme Court has held that an individual's contract with an out-of-state party *alone* cannot automatically establish sufficient minimum contacts in the other party's home

> forum, and that the contract is "'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction' [Cit.] It is these factors - prior negotiations and contemplated future consequences , along with the terms of the contract and the parties' actual course of dealing - that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." Burger King Corp. v. Rudzewicz, 471 U. S. 462, 469 (105 SC 2174, 85 LE2d 528) (1985). ...".

In the instant case, the process of an author reading the information on the arXiv web site, then deciding to submit a paper to arXiv, then actually submitting the paper to arXiv, then having arXiv post the paper on its website, and then having anyone with web access that is sufficiently interested in the paper to view and download it, has characteristics of "prior negotiation and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing - that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.". Therefore, Plaintiff's contention that arXiv should be subject to Georgia jurisdiction should not be dismissed pursuant to either of the two pending Motions to Dismiss.

Vermeulen v. Renault U.S.A., Inc.

The Cornell Memorandum [pp. 12-13] states:

"... The Eleventh Circuit has developed a three-pronged test to determine whether personal jurisdiction is properly exercised where continuous and systematic contact between the defendant and the forum state does not exist.

Vermeulen v. Renault U.S.A., Inc., 985 F.2d 1534, 1546 (11th Cir. 1993). The elements that must be met under the "minimum contacts" test are as follows: first, the contacts must be related to the plaintiff's cause of action or have given rise to it. ...; second, "the contacts must involve 'some acts by which the defendant purposefully avails itself of the privilege of conducting business within the forum ..., thus invoking the benefits and protections of its laws,'" ...; and third, "the defendant's contacts with the forum must be 'such that [the defendant] should reasonable anticipate being haled into court there.'" ...

"... The first requirement cannot be satisfied. ... The decisions that give rise to the cause of action cannot be construed in any way as arising in the State of Georgia. The second requirement ... the

> operation of a website can constitute purposeful availment if the "website is interactive to a degree that reveals specifically intended interaction with residents of the state," ... the third requirement cannot be met. ... being subjected to civil proceedings under the jurisdiction of Georgia could not have been reasonable anticipated. ...".

Plaintiff contends that Cornell's interpretation is flawed as follows:
as to the first requirement, the contacts that gave rise to the cause of action include the submission of the paper in question from plaintiff's computer in Georgia to arXiv's website in New York, and arXiv's sending of messages of rejection from arXiv in New York to plaintiff's computer in Georgia, so that the internet electronic contact between Georgia and New York was clearly " related to plaintiff's cause of action or have given rise to it";
as to the second requirement, the arXiv website pages are made available on the web to anyone reading them anywhere in the world, including the State of Georgia, and those pages did not indicate any policy of arXiv to exclude interaction with the State of Georgia, so that the arXiv website is in fact "interactive to a degree that reveals specifically intended interaction with residents of the state" of Georgia; and
as to the third requirement, clearly it is reasonable for arXiv to have realized that making its website available to anyone reading them anywhere

in the world, including the State of Georgia, without indicating any policy of arXiv to exclude interaction with the State of Georgia, would make arXiv subject to civil proceedings in the State of Georgia if arXiv acted, as it did, to impair the free speech and due process rights of citizens of the State of Georgia.

Clearly, the Motions to Dismiss cannot be sustained with respect to the Vermeulen requirements.

American Network, Inc. v. Access America

The Cornell Memorandum [p. 11] states: "..... Plaintiff cites in his complaint American Network, Inc. v. Access America, 975 F. Supp. 494 (S.D.N.Y. 1997) for the proposition that an interactive website with six subscribers can fulfill the Fourteenth Amendment due process requirements. ... However, plaintiff fails to mention that the defendant in that case mailed a software package and written copy of the subscription agreement to subscribing customers in the forum state. In addition, the company also received $150 per month from the subscribers ... "... If [Access] sought to avoid subjecting itself to suit in New York, it could have chosen not to send those materials there." ...".

In fact, the reason that plaintiff failed to describe the details of the six

transactions in that case is that the business model of that case (direct payment for software and its use) is different from the arXiv business model, described on pages 9-13 of this Memorandum, in which funds are received from NSF to pay for the process described on page 10 hereof involving submission, posting, indexing, viewing, and downloanding of papers. The point of plaintiff is that, whichever business model is used, six transactions are sufficient to maintain long-arm jurisdiction, and arXiv has engaged in many more than six transactions in Georgia during the year 2002 alone. (See this Memorandum, pp. 12-13)

However, part of the Cornell Memorandum could be paraphrased to be applicable to this case, as follows: "... If arXiv sought to avoid subjecting itself to suit in Georgia, it could have chosen not to accept submissions from there."

Ways in which arXiv could have implemented such a decision include (but are not necessarily limited to): by posting a policy statement on the arXiv web site declaring that submissions from Georgia are not acceptable, and then removing any post if and when it appears that it was made from Georgia; by refusing to accept e-mail or connections from addresses of anyone known to be from Georgia; or by refusing to accept e-mail or connections from internet addresses of Georgia institutions.

some false analogies

1. The Cornell Memorandum [p. 7] states: "... Internet communications and the transfer of data files are nothing more than the Twenty-First Century equivalent of telephone and mail communications. ...".

In fact, as Paul Ginsparg stated in a 1996 article, arXiv "... systems are entirely automated (including submission process and indexing of titles/authors/abstracts), and allow access via e-mail, anonymous ftp, and the WorldWideWeb. ... researchers who might not ordinarily communicate with one another can quickly set up a virtual meeting ground, and ultimately disband if things do not pan out, all with infinitely greater ease and flexibility than is provided by current publication media. ... each entry is archived and indexed for retrieval at arbitrarily later times ... ... For some fields of physics, the on-line electronic archives immediately became the primary means of communicating ongoing research information, with conventional journals entirely supplanted in this role. ...". There is no way that such convenient submission, indexing, and access could be done by telephone or mail. Further, maintaining all arXiv files is done forever (or at least until "arbitrarily later times"), which would be very difficult to do by telephone or mail.

2. The Cornell Memorandum [p. 21] states: "... plaintiff agues that he has a First Amendment right to compel a particular library to acquire and

"shelve" his papers and to compel a particular publisher to publish his papers ... libraries are, and must be selective, regarding the materials that they acquire ...".

In fact, arXiv itself, by declaring an open access policy as a public forum (See this Memorandum, pp. 4-6), has distinguished itself from a conventional library with limited acquisition funds and shelf space.

One of the interesting distinctions between an archive of papers on web site computers and an archive of books in a building is that computer memory is so readily available that the equivalent of shelf space is effectively unlimited for an archive on web site computers, particularly if reasonable computer file size limits are imposed, something that arXiv has done in a reasonable manner.

3. The Cornell Memorandum [p. 22] states: "... academic freedom has included not merely liberty from restraints ... but also the idea that universities and schools should have the freedom to made [sic] decisions about how and what to teach ..."; and [p. 23] states "... there is strong caselaw support for government funding of particular viewpoint, which do not require inclusion of competing viewpoints ...".

In fact, arXiv was a public forum with an open access policy at the time that its administration was transferred to Cornell, and, even under Cornell administration, arXiv continued to declare its open access policy

and to use government funding and facilities (such as the Los Alamos National Laboratory primary back-up site).

If Cornell wants to use its academic freedom to change arXiv from an open access public forum to a private forum with a blacklist of individuals and restriction of material to that having its own particular viewpoint, then Cornell and The Regents d/b/a Los Alamos National Laboratory should recognize that Cornell is not just assuming administration of the arXiv public forum with open access, but is in fact killing the open access public forum.

In that event, The Regents d/b/a Los Alamos National Laboratory should use their facilities, now used as primary back-up, to reinstate arXiv as an open access public forum administered at Los Alamos National Laboratory;

let Cornell do whatever it wants to do with its private facilities and private funding; and

let the other mirror sites throughout the world each decide whether to act as mirror for Cornell's private thing or for arXiv as an open access public forum administered at Los Alamos National Laboratory.

conclusion

Plaintiff, upon reaching the 25-page limit of Local Rule LR 7.1 D, respectfully submits that this Memorandum shows that the facts and issues

of fact in this case are such that both Motions to Dismiss should be denied.

Plaintiff finds it ironic that Cornell's claims that

"... Cornell's decisions regarding the arXiv database are entirely private. ..." [Cornell Memorandum, p. 19] and

".. The arXiv ... operation is guided by and consistent with Cornell academic principles. ..." [Affidavit of Paul Ginsparg, ¶7]

are being used to justify a policy of blacklisting individuals.

Respectfully submitted this ___ day of _____, 2003.

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