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**FOREWORD:** The Rise of Internet Interest Group Politics

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**SUMMARY:**

... Throughout this time, courts, policymakers, and commentators have struggled to decide whether and how the Internet – of which the web is the best-known component – should be governed and regulated. ... A common – and striking – feature of many of these Notes is the extent to which established law and institutions are being called upon to resolve disputes based upon Internet activities. ... Second, the interconnected nature of network computing that is so central to the Internet has led to some remarkable changes in the social environment. ... This year's Notes suggest that policy discussions about the best path for Internet regulation might benefit from an understanding of these developments and the actors and interests shaping them. ... **INTEREST GROUP THEORY AND THE INTERNET** ... Throughout the growth of the Internet's popularity, commentators have debated whether digital technology alters the balance of interests that copyright serves. ... In addition to the traditional copyright players (the content and technology industries), the copyright law and policy field has attracted and inspired a wide range of new players focused on innovation, civil liberties, consumer protection, and artists' rights. ... Lawmakers in most areas of Internet regulation have decided to apply traditional modes of regulation and substantive law – at least for the time being. ...

**TEXT:**

[\*1]

Fourteen years have passed since a forerunner of the World Wide Web's core protocol was first implemented. n1 Throughout this time, courts, policymakers, and commentators have struggled to decide whether and how the Internet – of which the web is the best-known component – should be governed and regulated. The "adolescent" age of the Internet n2 invites one to take a somewhat different tack. The record of Internet regulation is rapidly expanding, and introducing this year's Annual Review of Law & Technology presents an opportunity to discuss how Internet regulation has actually evolved. In particular, the cases that provide the subject matter for many of the Notes in this volume highlight some features of Internet regulation that are mature and others that are still in their infancy.

A common – and striking – feature of many of these Notes is the extent to which established law and institutions are being called upon to resolve disputes based upon Internet activities. That is, there is little evidence of ab initio Internet governance, free from the influences and control [\*2] of traditional governments. n3 The current ascendancy

of traditional law and institutions in regulating Internet-based activities does not imply, however, that the Internet lacks features that deserve special legal and policy consideration, or that traditional doctrines provide the best answers for addressing Internet-based disputes. We do not wish to oversell the importance of the Internet in law and technology; many of the Notes in the 2004 Annual Review discuss important developments in patent, trademark, trade secret, and First Amendment law that are independent of the effects of the Internet. But many of the Notes in the Annual Review tell a story of how the Internet is straining the law and the institutions and agencies that administer it. Moreover, these Notes indicate that the Internet can rapidly change the social and political conditions that underlie the purposes of many laws, as well as the definitions of groups that benefit from them and bear their costs. Recent developments in copyright law provide particularly vivid illustrations of these pressures, though the Notes discussing privacy, antitrust, common law, and constitutional law all highlight the influence of new interests. Other recent developments, from patent law to trademark to telecommunications, although beyond the scope of this Foreword, would likely similarly reveal the participation of new actors and interests. n4 We do not suggest that existing doctrines have become or [\*3] should become inapplicable. Rather, we suggest that approaching technology law developments with an explicit focus on the Internet's ability to create and transform interest groups may help to draw out common features of the response of disparate doctrinal areas to the Internet.

In Part I, we provide a brief overview of the legally salient features of the Internet and the range of scholarly views as to how it should be governed. Part II surveys public choice theory and explains its utility as a descriptive framework for law relating to the Internet. Finally, in Part III, we focus on developments in copyright law as covered in the 2004 Annual Review to reveal rapidly changing interests at work.

## I. BACKGROUND

### A The Technology of the Internet

Although the Internet is still adolescent and capable of further evolution, it is stable enough to support an examination of its most salient features. The Internet itself is as difficult to characterize as the content it contains. In a narrow sense, it is simply a set of tools: the servers and other hardware that compose the physical medium of the World Wide Web, e-mail, and other networked environments. n5 It has aspects of a forum or gathering place, of a market or commercial hub, of a library or archive, and of a well-amplified megaphone. Although its many meanings are sometimes invoked haphazardly, we use the term "Internet" largely as shorthand to describe the world of interconnected digital networks and the cluster of technologies that constitute and regulate it.

[\*4] Of the many Internet-related technological features driving the development of new interests and pressures, and thus affecting legal institutions and the substance of law, a few are particularly salient. First, several features of digital technology are worth noting. The vast memory storage, geometrically increasing processor speed, and compression technologies now available make it possible to harness information in a way that seemed inconceivable even a decade ago. n6 Digital computing also allows flawless, cheap, and instant copying and transmission. n7 Anyone with a laptop computer and a home broadband connection can easily become a large-volume publisher.

Second, the interconnected nature of network computing that is so central to the Internet has led to some remarkable changes in the social environment. In addition to making the distribution of content almost as cheap and instantaneous as copying it, n8 the vast "population" of the Internet, and the remarkable search tools now available, bring together and coalesce its denizens in a way not possible in a physical forum. Moreover, as a communications medium, the Internet becomes more valuable as greater numbers of people connect to it - a self-reinforcing growth pattern, or "network externality." n9 Connections among Internet users have also created value in interoperability, which in turn encourages uniformity in platforms, applications, and protocols. n10

Third, the interactive technologies of the Internet have created a strange paradox; activity on the Internet is simultaneously more anonymous and more monitored than on any other communicative medium. The anonymity of the Internet is part of its popular mythology, and it can allow interaction and communication free of any need to truthfully identify oneself. n11 But in another sense, anonymity is easily shattered by technology - [\*5] the cookies, web bugs, and other technologies that constantly monitor and record individual users' activities n12 - and by firms that hold (and often sell or release) the information necessary to connect a network address to a name. n13

Finally, the Internet's "end-to-end" method of sending content makes the networks themselves agnostic to the content of the "bits" they carry. n14 The wires and hubs of the Internet are just as happy delivering an e-mail from Aunt Bessie as

a crippling computer virus. This feature protects the reliability of Internet transmissions, but makes distinctions based on content difficult to enforce at the transmission level. All of these features have profound implications for the application of traditional legal institutions and substantive law to the Internet.

#### B. The Spectrum of Scholarly Perspectives on Internet Governance

Early in the Internet's history, legal scholars began to take notice of these technological features. Theories concerning how to address the legal implications of the Internet varied widely, but it is helpful for our purposes to note two polar perspectives. One response has been "cyberlibertarianism." n15 Cyberlibertarianism's proponents described the Internet as a separate "place," and argued that the Internet should be left entirely to self-regulation. n16 The other end of the spectrum might fairly be called the "clear rules" view. n17 Its adherents claim that the Internet presents few, if [\*6] any, new legal questions, and could be handled within existing institutions and viewpoints. It is best, they argued, to apply existing legal rules to the Internet, because creating Internet-specific doctrines was unlikely to succeed and, according to one of these commentators, "may cause harm." n18

Both groups of theorists have strong normative views about how the Internet should be regulated, and are part of a continuing debate. We do not attempt to settle that debate here, but simply note that a significant amount of regulation is occurring through the adaptation of pre-Internet laws and institutions to the Internet. n19 Nevertheless, the development of Internet regulation appears far from its end. This year's Notes suggest that policy discussions about the best path for Internet regulation might benefit from an understanding of these developments and the actors and interests shaping them. We suggest below that public choice theory provides a useful framework for this description.

### II. INTEREST GROUP THEORY AND THE INTERNET

All agree that the Internet facilitates the work of groups that provide information on specific topic. n20 This availability of information, combined with Internet users' ability to "perfectly filter" disagreeable information and viewpoints, has led some to worry that the Internet will lead to "polarization, cascades of false information, and a concomitant rise in extremism." n21 Thus, the suggestion is that the Internet will cause fractures in public discourse about matters of political concern. n22 We advance an orthogonal argument: that the Internet is both creating and facilitating interest [\*7] groups that are pursuing their interests in traditional regulatory forums. To understand why it is significant to find the Internet acting in this way, a better understanding of the operation of interest groups is helpful.

Some of this understanding is provided by public choice theory. This theory has been described as "the application of the economist's methods to the political scientist's subject." n23 That is, public choice theory examines government by working from the fundamental postulate the individuals rationally seek to advance their own self-interests. n24 The "interest group branch" of public choice theory uses this axiom of self-interest to explain and predict the behavior of political actors. n25 An interest group is "a number of individuals with a common interest," n26 and interest group theory seeks to explain why groups form around some interests but not others and to account for the variation in the size of interest groups. n27 We focus primarily on the descriptive part of this theory - identifying political actors and describing how they act under the constraints of institutional rules. n28 Of particular concern to interest group theory is the problem of identifying a group whose individuals share a common interest in obtaining some collective good, such as legislation or favorable legal precedent. n29

[\*8] This descriptive framework has generated a wide variety of normative applications, which range from a fully economic theory of legislation, n30 to theories of statutory interpretation, n31 to a rejection of public choice theory on the grounds that it cloaks descriptive inaccuracy in scientific certainty. n32 We view public choice theory as a "piece of the elephant," n33 insufficient standing alone but a useful part of a bigger picture. n34 We do not attempt to present the whole picture here. Instead, we use some of the cases discussed in the Annual Review to draw attention to how the rapidly changing composition of interest groups is a central difficulty in applying several areas of substantive law to Internet-related cases. n35 Thus, this [\*9] Foreword provides an opportunity to relate these new actors to the laws that regulate them, or to the institutions that administer those laws. Finally, while we accept that many institutions and legal doctrines have been applied to Internet-related actions, we do not believe that a final equilibrium has been reached. Instead, in this Foreword, we hope to demonstrate, most specifically through the lens of copyright law, that this would be a bold prediction, one that we do not make ourselves. n36

[\*10]

### III. THE EMERGENCE OF INTEREST GROUPS IN INTERNET REGULATION

Recent discussions of the Internet and copyright have focused largely on the unauthorized copying and distribution of creative works over the Internet, and the entertainment industries' attempts to curb this infringement. But the entertainment industries, as well as other groups traditionally interested in copyright – broadcasters, cable television providers, and consumer electronics manufacturers, for example – are increasingly interacting with new groups whose interests in copyright and whose abilities to organize are tied to the Internet. Throughout the growth of the Internet's popularity, commentators have debated whether digital technology alters the balance of interests that copyright serves. n37 One of us recently described in detail the emerging economic and social forces reshaping the copyright domain. n38 In addition to the traditional copyright players (the content and technology industries), the copyright law and policy field has attracted and inspired a wide range of new players focused on innovation, civil liberties, consumer protection, and artists' rights. The past year has furnished cases that illustrate not only that the Internet has changed the distribution of costs and benefits of copyright rules to formerly diffuse interest groups, but also that those interests groups are willing to invest in changing the law.

#### A. Eldred v. Ashcroft and the Copyright Term Extension Act

The most obvious example of the Internet spurring the involvement of new groups and new interests in traditional areas of law arose from the Congress's recent tinkering with the duration of copyrights. In 1998, Congress passed the Copyright Term Extension Act ("CTEA"), which extended [\*11] by twenty years U.S. copyright protection for creative works. n39 Term extension is nothing new – it has occurred eleven times in the last forty years n40 – but this recent law, a result of heavy lobbying by major copyright owners, n41 happened to coincide with the rise of the Internet.

A justification for the CTEA – that allowing copyrights on commercially valuable works to expire would remove most incentives to keep these works available – is weakened when one considers that the Internet allows existing works to be published with little very little investment. That is, the Internet has lowered the costs of publishing public domain works to such a degree that people have become willing to offer them for free. n42 Representatives of this group were largely absent from discussions of the CTEA, n43 but in the year following the CTEA's enactment, a group with an interest in publishing public-domain creative works challenged the law. Led by Eric Eldred, a computer administrator who publishes public domain works online, a group of plaintiffs that included commercial [\*12] presses and nonprofit performers and archivists n44 filed a lawsuit to challenge the constitutionality of the CTEA. n45

The controversy around the Eldred v. Ashcroft case grew proportionally with the Internet and its constituencies. As the Note on Eldred discusses, by the time the Court heard arguments in October 2002, a public domain interest group had formed. Though Eldred and his supporters – archivists, librarians, computer scientists, and Internet enthusiasts everywhere – lost the Court, n46 they may have won the public. Based on the rising popularity of causes such as Eldred's, n47 and interest in Congress to sharpen the blunt instrument of blanket retroactive and prospective copyright term extensions, n48 it seems unlikely that a future Congress contemplating another copyright term extension will be able to ignore that interest groups have formed around the cause of exploiting works that have fallen out of copyright protection. Nevertheless, as Notes in the Annual Review discuss, other avenues for protecting uncopyrightable information may be open. One way is through the use of trademark law, though the Supreme Court in *Dastar* held that the doctrine of reverse passing off does not prohibit a party from distributing works whose copyrights have expired. n49 A second and potentially more expansive way of protecting information that a party finds valuable is through the use of contracts. As a Note on *Ticketmaster v. Tickets.com* discusses, the rules for enforcing contracts that restrict gathering and reusing information offered on the Internet remain in flux.

#### B. Anti-Circumvention and the Digital Millennium Copyright Act

In response to the spectre of digital copying and distribution, many copyright owners have resorted to technological protection mechanisms to prevent copying. Because many of these mechanisms – such as encryption [\*13] and watermarking n50 – may be defeated by enterprising hackers, the content industries sought laws prohibiting the "circumvention" of digital rights management ("DRM") technologies. n51 This pressure resulted in the Digital Millennium Copyright Act of 1998 (DMCA), n52 which accommodated the competing interests of the content industries and a few other well-organized groups, such as the information technology and consumer electronics industries. n53 The DMCA, among many other changes to copyright and commercial law, created civil and criminal penalties for circumventing DRM technologies. n54

As with the CTEA and the Eldred case, the now-evident interest of groups in the Internet-regulation aspects of the DMCA had not fully formed in 1998. That has changed. Recent litigation over and regulation of the DMCA has involved actors who represent groups with a new interest in copyright law. The Note on *Lexmark International, Inc. v. Static Control Components, Inc.* n55 and *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, n56 discusses the battle over the permissibility of reverse-engineering under the DMCA. n57 Thus, business groups whose members depend upon creating products – such as printer cartridges and garage door openers – that interoperate with those of their competitors are interested in establishing limits to the scope of the anti-circumvention provisions. Computer enthusiasts and innovators and free software developers share with these business groups an interest in the outcomes of these and other cases. Moreover, they are participating with the more traditional [\*14] copyright interest groups in shaping regulations to create exemptions to the DMCA's anti-circumvention provisions. n58

The dynamic here is somewhat the opposite of the CTEA, which neglected the nascent interests of Internet publishers in making public domain works freely available online. The DMCA, by contrast, was heavily motivated by the desire to develop Internet commerce and to provide copyright owners with new rights to address copying over the Internet. n59 But one of its early effects has been to subject businesses that sell physical goods to unexpected liability for circumvention. If Congress revisits the DMCA, it will certainly face pressure from these mobilized groups to address these concerns.

### C. Peer-to-Peer File Sharing

The issue of online file sharing provides a similarly dramatic instance of how Internet-based activities strain the equilibrium achieved by copyright interest groups. As the Note on *In re Aimster* n60 and *MGM v. Grokster* n61 discusses in detail, these lawsuits were brought by members of the recording and film industries against information technology firms that produce peer-to-peer network software. The copyright doctrine at issue here has mediated much of their interaction between these industry groups for twenty years: n62 the "substantial noninfringing use" defense to secondary [\*15] copyright infringement liability. n63 This doctrine, which was first announced in *Sony Corp. v. Universal City Studios, Inc.* n64 and which relieved Sony of contributory infringement liability for manufacturing video cassette recorders (VCRs), n65 was framed against an interest group picture that resembles that of peer-to-peer file trading. Members of the film industry (and, in *Grokster* and *Aimster*, members of the recording industry) sued the manufacturers of products that consumers used to make unauthorized copies of copyrighted works.

The Internet, however, has changed the attributes of some of these groups' interests in the litigation. Technology companies might be said to have a sharpened interest in innovation – that is, an interest in advancing the state of the art in devices in applications, regardless of whether they bring some negative consequences with the positive. Most importantly, the millions of users of peer-to-peer networks obviously place value on their ability to access content that they might otherwise have purchased or accessed through some authorized delivery mechanism. n66 This distributive ability did not exist (at least at this scale) with analog technologies like the VCR. The groups whose interests the Sony Court reconciled – copyright owners' interest in compensation for the use of their works, n67 equipment manufacturers' interest in technological innovation, n68 and the public interest in the results of both n69 – changed as a result of the large-scale, loosely coordinated action possible on the Internet. n70

[\*16] Whether these groups will accept courts' present interpretations of the Sony doctrine is unclear. As the Note discussing these cases explains, the *Grokster* and *Aimster* courts reached different judgments of the software manufacturers' liability, and the Supreme Court has stayed out of the fray. n71 To some, at least, the actions of peer-to-peer users do not advance a legitimate political interest, but rather consist of participation in "arguably the largest international networks of illegality in human history." n72

For the most part, Congress has sought to maintain the existing proprietary structure of copyright law. Two bills in the current Congress, which propose additional criminal sanctions for peer-to-peer activities, reflect a commitment to strongly enforcing copyright holders' exclusive rights. n73 Some have argued, however, that Congress should consider a more fundamental change in its course, in light of a public accustomed to file sharing n74 and the potential benefits of peer-to-peer networks in distributing information. For example, one commentator has proposed that proprietary copyright on the Internet should be replaced with a levy on peer-to-peer enhanced goods and services in order to finance a "fair return" to creators. n75 As the conflict between the *Grokster* and *Aimster* courts shows, the rules provided by the pre-Internet copyright regime might not provide a technologically flexible standard for secondary infringement liability. Moreover, technologists' interests in designing their products around legal rules in order to exploit Internet copying and distribution, n76 combined with an uncertain understanding among the public as to whether file sharing is [\*17] illegal,

n77 present a picture of groups whose interests may be difficult to reconcile with those of copyright holders.

#### D. Beyond Copyright

Many other Notes in the Annual Review demonstrate how the Internet strains traditional areas of law. And while we cannot examine in depth all of these, it is worth mentioning them to better appreciate the scale of the involvement of new interests. Another aspect of the peer-to-peer controversy provides an example. As one Note reports, the Recording Industry Association of America ("RIAA") brought lawsuits against hundreds of individuals whom it accused of uploading files to peer-to-peer networks. n78 In order to obtain uploaders' names, the RIAA served ISPs with subpoenas issued by a federal court under a provision of the DMCA. n79 Faced with statutory and constitutional challenges to applications of this provision, the D.C. Circuit in *RIAA v. Verizon* n80 held that the subpoena provision is inapplicable to peer-to-peer users. n81 Still, Verizon produced a result that surprised the well-organized groups whose compromise n82 was enacted into law just five years earlier. It also drew attention to the fragility of anonymity on the Internet, where third parties control a great deal of personally identifying information. However, another Note reviews two cases that indicate that pre-Internet privacy conceptions might not provide a viable framework privacy protection. These cases, *Theofel v. Farey-Jones* n83 and *In re Pharmatrak*, n84 involve attempts to use the Electronic Communications Privacy Act ("ECPA") n85 to sanction private parties' unauthorized disclosure of information. The ECPA, enacted at a time when electronic [\*18] communications were far less common than today, n86 provided little relief for the plaintiffs in either case. Although some administrative agencies, such as the Federal Trade Commission (FTC), and some non-profit groups have become active in seeking greater protection for privacy in online activities, n87 the distributed benefits (to the public) and concentrated costs (which fall primarily on law enforcement agencies) of the ECPA cast doubt on whether Congress will update this statute. n88

Developments in antitrust law also reveal that the Internet is producing conflicts between venerable, public-regarding statutes and Internet connectivity. As we noted above, the Internet provides a driving force for standardized products. This standardization, however, can offend the Sherman Act when one producer controls a standard, or competitors agree to produce interoperable products. n89 Some of this conflict is evident in the differing approaches taken by government regulators and private parties in the ongoing antitrust litigation against Microsoft. As the U.S. Department of Justice continues to enforce the consent decree n90 it entered into with Microsoft after the company was found to have violated section 2 of the Sherman Act, n91 both competitors n92 and groups of purchasers n93 are leveraging the facts and law from the earlier case to seek more expansive remedies. These and other developments are surveyed in the Annual Review.

Finally, the past year's developments show that courts remain divided about how to translate fundamental concepts of common law and constitutional [\*19] law to the Internet. Perhaps the clearest example of this phenomenon is in the California Supreme Court's decision in *Intel Corp. v. Hamidi*. n94 In *Hamidi*, the court rejected Intel's claim, based upon the tort of trespass to chattels, that a former employee's mass e-mail to current Intel employees harmed Intel's servers. n95 In so deciding, the court departed from the holdings of other courts that have faced similar facts. n96 More broadly, the *Hamidi* decision indicates that courts are continuing to struggle with the decision of where private property interests on the Internet end and the right of speakers to access e-mail addresses begins. n97 The court, however, did not decide where this boundary lies. Other decisions reported in the Annual Review also show that federal Internet regulations do not present a coherent picture of the Internet as a communications medium. In *United States v. American Library Ass'n*, for example, the Court upheld a facial constitutional challenge to a statute that requires public libraries to install anti-obscenity filters in order to qualify for federal Internet access subsidies. n98 But in *Batzel v. Smith*, the Ninth Circuit decided that a defamation liability immunity provision of the Communications Decency Act n99 - which the court noted was more protective of speech than the First Amendment requires - applied to a class of content provider that was not explicitly named in the applicable statute. n100 In all of these cases, older legal principles, applied to the Internet, do not seem perfectly to capture the interests of the new actors involved.

#### IV. CONCLUSION

This brief discussion of the new interest groups created by and participating in Internet regulation only skims the surface of a complex and varied new frontier. Lawmakers in most areas of Internet regulation have decided to apply traditional modes of regulation and substantive law - at least for the time being. The particular interests and actors vary considerably from area to area, and each deserves special attention in order to understand [\*20] and predict the possible future compromises and equilibria that will emerge. We see quite clearly, however, that the Internet has generally motivated new actors to agitate for legal change and has given old actors new interests for which to push. For instance, Internet

service providers may be similar in nature to telecommunications companies, yet have sharply different interests due to their deeper connection to the information they store and provide to their customers. Traditional industries like the makers of after-market parts for consumer products suddenly have an interest in the copyright laws. Regulation of the Internet may be possible through our familiar administrative mechanisms, but it will require re-drawing of many of the old compromises to account for the new interests spurred by Internet technology.

The final question, then, is in what direction will these new interests push the law? What substantive changes can we expect as the Internet moves from adolescence to maturity? Obviously, the substantive legal outcomes will vary from subject area to subject area, but we can discern one positive trend: The Internet has motivated many to push forcefully for the "public interest" in related areas of law. In copyright, Eric Eldred and his supporters gave voice to the "public domain" in a way not seen before. New grass-roots and lobbying organizations advocate for consumer and Internet user rights with respect to privacy, intellectual property, and free speech. While actors have organized in the past to address the public's interest in law, the Internet has coalesced and motivated individuals around these nebulous and distributed costs and benefits. As public choice theory suggests, these organized actors will likely push the equilibria of the substantive laws closer to outcomes that benefit Internet users, which – due to the rapid diffusion of the Internet – increasingly encompasses the public in general.

#### FOOTNOTES:

n1. World Wide Web Consortium, A Little History of the World Wide Web, at <http://www.w3.org/History.html> (last visited Mar. 12, 2004) [hereinafter Web History] (reviewing events leading to the writing of a "global hypertext protocol" and a "line mode browser"); see also T. Berners-Lee et al., Hypertext Transfer Protocol – HTTP/1.0 1.1 (May 1996), at <http://www.ietf.org/rfc/rfc1945.txt> ("HTTP has been in use by the World-Wide Web global information initiative since 1990."). For a brief but general overview of the Internet's history, see generally Barry M. Leiner et al., A Brief History of the Internet, Part I (May/June 1997), at <http://www.isoc.org/oti/articles/0597/leiner.html>.

n2. See Web History, *supra* note 1 (noting that, in January 1994, several companies devised the "'Internet in a box' product to bring the Web into homes"). Note that, while the web is helped to popularized the Internet, the web is, technically speaking, a component of the Internet. Throughout this Foreword, we refer to the Internet in the broad sense that is described *infra*.

n3. One commentator has argued that this situation represents an inversion of some predictions (see *infra* notes 15–16 and accompanying text) of the path that law on the Internet would take. See generally Michael Geist, Cyberlaw 2.0, B.C. L. Rev. 323 (2003). Geist associates three principles with "Cyberlaw 1.0": (1) that a "borderless" Internet would pose "virtually insurmountable" hurdles to enforcing local laws on the Internet, *id.* at 325–27; (2) that the primary regulator of the Internet would be computer hardware and software ("code"), *id.* at 327–28; and (3) that governments would leave policy decisions about the Internet to the private sector, *id.* at 328–32.

Geist argues that each of these principles is being inverted to form "Cyberlaw 2.0," in which "the borderless Internet becomes bordered, bordered laws become borderless, the regulation of code becomes regulated code, and self-regulation becomes industry consultation, as government shifts toward a more traditional regulatory approach." *Id.* at 332.

n4. The Federal Trade Commission has recently proposed wide-ranging reforms of the patent system that may reveal such pressures. FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>. The World Wide Web Consortium (W3C), an international organization of industry, academe, users' organizations, and public policy experts responsible for setting the core technical standards for the web, recently requested reexamination of a patent which covers basic Internet functionality. Press Release, W3C, World Wide Web Consortium Presents U.S. Patent

Office with Evidence Invalidating Eolas Patent (Oct. 29, 2003), at <http://www.w3.org/2003/10/28-906-briefing>.

In the trademark area, the Internet Advertising Bureau ("IAB"), an organization supporting the development of advertising models on the Internet, as well as several search engines and new companies delivering pop-up advertisements, have become engaged in litigation over trademark issues. See Bob Tedeschi, *Legal Battles Pit Online Advertising Companies That Create Pop-up Ads Against the Owners of Web Sites*, N.Y. Times, July 7, 2003, at C6; Leslie Walker, *Publishers Sue Gator Over Web Ad Tactics*, Wash. Post, June 27, 2002, at E06.

The ability to carry voice over the Internet Protocol (VoIP) has attracted the interest of the telecommunications field and will undoubtedly reshape the telephony industry. See *Voice-Over-Internet Protocol*, Consumer & Governmental Affairs Bureau, Federal Communications Commission, at <http://www.fcc.gov/voip/> (last updated Mar. 12, 2004) (discussing this technology and providing links to proposed rules and statements of the Commissioners).

n5. See A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 *J.L. & Com.* 395, 398 n.1 (1996).

n6. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 *N.Y.L. Sch. L. Rev.* 63, 110-11 (2003).

n7. See *id.* at 114.

n8. See *id.* at 116.

n9. See Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 *Conn. L. Rev.* 1041, 1045-47 (stating that "the Internet is a rare example of the 'strong' form of network externality"); see also Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 *Calif. L. Rev.* 479, 483 ("[A] network effect exists where purchasers find a good more valuable as additional purchasers buy the same good."); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 *Am. Econ. Rev.* 424, 424 (1985) (defining various kinds of network externalities).

n10. See Lemley, *supra* note 9, at 1047-50 (discussing network externalities in computer operating systems, programming languages, and web browsers).

n11. See Froomkin, *supra* note 5, at 414.

n12. See Will Thomas DeVries, Note, *Protecting Privacy in the Digital Age*, 18 *Berkeley Tech. L.J.* 283, 291-92 (2003).

n13. See *In re DoubleClick, Inc. Privacy Litig.*, 154 *F. Supp. 2d* 497 (S.D.N.Y. 2001) (dismissing privacy claims against Internet advertising company that released the personal information of web surfers).

n14. Mark A. Lemley & Lawrence Lessig, The End of End-to-End, *48 U.C.L.A. L. Rev.* 925, 930-31 (2001).

n15. See, e.g., David R. Johnson & David Post, Law and Borders - The Rise of Law on the Internet, *48 Stan. L. Rev.* 1367 (1996). The earliest use of the term "cyberlibertarian" that we have been able to find occurred in 1997. See Margaret Chon, Introduction to Symposium on Internet Law, *20 Seattle Univ. L. Rev.* 613, 614 (1997).

n16. See Johnson & Post, *supra* note 15.

n17. See, e.g., Frank H. Easterbrook, Cyberspace and the Law of the Horse, *1996 U. Chi. Legal F.* 207 (1996) [hereinafter Easterbrook, Law of the Horse]; Jack L. Goldsmith, Against Cyberanarchy, *65 U. Chi. L. Rev.* 1199, 1201 (1998) (arguing that regulation of cyberspace is feasible and legitimate from the perspective of jurisdiction and choice of law"); Joseph H. Sommer, Against Cyberlaw, *15 Berkeley Tech. L.J.* 1145 (2000) (arguing generally: "Let us forget about the 'law of the Internet,' or 'cyberlaw.' They cannot be useful and may cause harm."). Judge Easterbrook argued, however, that some existing doctrines, such as fair use, should be expressed in clearer rules, irrespective of their application to Internet activities. See Easterbrook, Law of the Horse, *supra*, at 208.

n18. Sommer, *supra* note 17, at 1227. A third group of Internet theorists combines elements of cyberliberarianism and the "clear rules" school. On the one hand, they recognize that the Internet will need more than self-regulation. On the other hand, they warn that mechanical application of existing law through existing legal institutions would preclude the development of a regulatory regime that protects the openness and neutrality of the Internet's technological structure. See Dan Hunter, Cyberspace as Place and the Tragedy of the Digital Anticommons, *91 Calif. L. Rev.* 439, 507-14 (2003); Lemley & Lessig, *supra* note 14.

n19. See Geist, *supra* note 3.

n20. See *Reno v. ACLU*, *521 U.S.* 844, 851 (1997) ("There are thousands of such newsgroups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.").

n21. See Dan Hunter, *Philippic.com*, *90 Calif. L. Rev.* 611, 611 (2002) (book review) (arguing that claims of perfect filtering and its potential consequences are overblown).

n22. See *id.*

n23. Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 1 (1991).

n24. Robert D. Tollison, Public Choice and Legislation, *74 Va. L. Rev.* 339, 339 (1988) (asserting that public choice can be used to emphasize "testable propositions at the expense of normative evaluations of democratic decisionmaking processes" and to separate the question of "whether a law is 'good' or 'bad'" from "such questions

as why the law was passed, how the law was passed, or why it has not been repealed"); see also Farber & Frickey, *supra* note 23, at 44 ("In public choice, government is merely a mechanism for combining private preferences into a social decision.").

n25. See Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 *Chi.-Kent L. Rev.* 123, 128 (1989) [hereinafter Mashaw, *Economics of Politics*] (distinguishing "interest group theory" from voting theory, which "is primarily concerned with the structure of voting rules and with the effect of voting structures on the outcomes of collective decisionmaking").

n26. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 8 (1965).

n27. *Id.* at 1-2.

n28. See *id.* at 126.

n29. Olson uses the terms "collective good" and "public good" interchangeably. See *id.* at 14 (noting that "the common or collective benefits provided by governments are usually called 'public goods' by economists"). In brief, the theory predicts that "the larger the group, the farther it will fall short of providing an optimal amount of a collective good." *Id.* at 35.

Olson cites labor unions as one example of a "large" group that relies upon coercion to finance its lobbying activities. See *id.* at 135-37 (explaining that "it was only the labor unions started to deal with the employers, who alone had the power to force the workers to join the union, that they began to prosper"). "Business lobbies," by contrast, are organized by the "series of (generally oligopolistic) 'industries,' each of which contains only a fairly small number of firms." *Id.* at 143. Therefore, according to Olson, "these industries will normally be small enough to organize voluntarily to provide themselves with an active lobby." *Id.*

n30. See, e.g., Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 *Harv. L. Rev.* 4, (1984).

n31. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. Pa. L. Rev.* 1479, 1482-98 (1987) (proposing an "evolutive perspective" on statutory interpretation that would allow judges to consider whether "societal conditions [have] changed in ways not anticipated by Congress and, especially, when the legal and constitutional context of the statute [has] decisively shifted" when interpreting a statute). Eskridge proposes three general justifications for this model: (1) Some scholarship suggests that the Madisonian view of the Constitution is not one that requires "rigid separation of powers or pure majoritarianism"; (2) "Judicial lawmaking from statutes has a constructive role to play" in the Constitution's system of "deliberative," public-regarding government; (3) A wide range of scholarly disciplines denies the possibility of static interpretation - that is, the "objective and mechanical process of discovering 'historical' meaning." *Id.* at 1498.

n32. See, e.g., Abner Mikva, *Foreword to Symposium on the Theory of Public Choice*, 74 *Va. L. Rev.* 167, 169-70 (1988).

n33. See *id.*

n34. The list of caveats might include the concession that economic self-interest is not the only kind of self-interest that one must consider. See Jerry L. Mashaw, *Greed, Chaos, and Governance* 45 (1997).

n35. See Mashaw, *Economics of Politics*, *supra* note 25, at 123. ("Economics provides substantive criteria for the application of law, describes its underlying rationale or defines parameters for the evaluation of the law's success or failure.").

Several studies reveal interest groups at work in several areas of technology-related law. See, e.g., Jessica Litman, *Copyright Legislation and Technological Change*, 68 *Or. L. Rev.* 275 (1989) (providing a detailed history of the role of interest groups in shaping the Copyright Acts of 1909 and 1976); Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900–2000*, 88 *Calif. L. Rev.* 2187, 2234–40 & nn.217–34 (2000) (discussing the Copyright Term Extension Act of 1998 as a "classic instance of almost pure rent-seeking legislation," and relating this law to the activities of lobbying groups affiliated with the entertainment industries); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 *Cardozo L. Rev.* 909, 916–18 (2002) (describing the anti-circumvention provisions and the Internet service provider (ISP) immunity provisions of the DMCA as a balance between the "divergent interests" of copyright holders and ISPs, which would present a "deep pocket" for copyright infringement claims).

In addition, some commentators have used theories of political and social conditions to suggest doctrinal reform. See, e.g., Joseph P. Liu, *Copyright and Time: A Proposal*, 101 *Mich. L. Rev.* 409–10 (2002) ("Courts should adjust the scope of copyright protection to account for the passage of time by expressly considering time as a factor in fair use analysis. More specifically, ... the older a copyrighted work is, the greater the scope of fair use should be ... .") (citation omitted). One theoretical justification given for this proposal is that "consumers do not band together in sufficient numbers to oppose efforts by the copyright industries to expand protection." *Id.* at 448; see also Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283, 286–87 (1996) (arguing that copyright law requires a balance between "neoclassicist" expansion and "minimalism" in order to preserve copyright's purpose of facilitating the dissemination of ideas in a democratic society); Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 *Harv. J.L. Tech.* 389, 427–30 (2002) (explaining that a Rawlsian theory of "public reason" suggests that patent holders should be required to justify to society their basis for suppressing patented information).

n36. Cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 80 *N.Y.U. L. Rev.* (forthcoming 2004), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=470842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=470842). Professor Balkin notes that:

If we assume that a technological development is important to law only if it creates something utterly new, and we can find analogues in the past – as we always can – we are likely to conclude that because the development is not new, it changes nothing important. That is the wrong way to think about technological change and public policy, and in particular, it is the wrong way to think about the Internet and digital technologies.

*Id.* (man. at 1–2). *Contra* Easterbrook, *Law of the Horse*, *supra* note 17; Sommer, *supra* note 17.

n37. See, e.g., Netanel, *supra* note 35, at 286–87, 308–11, 336–39 (summarizing tension between the "neoclassicist" view that "far from simply inducing the creation and dissemination of new expression, copyright

serves as a vehicle for directing investment in existing works," and the "minimalist" view that digital technology so dramatically changes the balance of social costs and benefits of copyright that it should be confined to the duration and scope required to induce creation of specific categories of works). For historical perspective, see Jane C. Ginsburg, Copyright and Control over New Technologies of Dissemination, *101 Colum. L. Rev. 1613, 1618 (2001)* (arguing that the DMCA's anti-circumvention provisions "implements lessons drawn from prior resolutions of tensions between copyright and new technologies, and is consistent with the earlier pattern" of allowing copyright holders to control technologies that would otherwise deprive them of access to new markets).

n38. See Menell, *supra* note 6, at 162-90.

n39. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2829 (codified at *17 U.S.C. 108, 203, 301-304*).

n40. *Brief for the Respondent at 9, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1836720.*

n41. See William M. Landes & Richard A. Posner, Indefinitely Renewable Copyright, *70 U. Chi. L. Rev. 471, 483* (noting "Disney's successful efforts to lobby for the Sonny Bono Act"); see also Christina N. Gifford, The Sonny Bono Copyright Term Extension Act, *30 U. Mem. L. Rev. 363, 385-86 (2000)*.

n42. "The public domain" is an expansive concept that includes facts and ideas as well as works whose copyright has expired. For a "mapping" of the public domain, see Pamela Samuelson, Mapping the Public Domain: Threats and Opportunities, *66 Law & Contemp. Probs. 147, 148*. ("The public domain has been, for the most part, an uncharted terrain. Sometimes it seems an undifferentiated blob of unnamed size and dimensions."). In *Graham v. John Deere Co.*, the Supreme Court included in the public domain notions of patentability. See *383 U.S. 1, 5 (1967)* ("Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available."). For a discussion of the public domain in relation to excludability under copyright, trademark, and contract law, see Samuelson, *supra*, at 148-69.

We restrict ourselves to a discussion of the entry of copyrighted works into the public domain.

n43. See Edward C. Walterscheid, Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause, *7 Intell. Prop. L. 315, 387-88 (2000)* ("The industries controlling [highly valuable] copyrights will continue to obtain major royalties for the use of the works covered by them for twenty years longer than they had any reasonable basis to expect, other than their lobbying skills.").

n44. See *Brief for Petitioners at 3-7, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041928.*

n45. *Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999)* (alleging that the CTEA exceeded Congress's authority under the Copyright Clause, U.S. Const. art. I, 8, cl. 8).

n46. *Eldred v. Ashcroft, 537 U.S. 186 (2003)* (upholding the CTEA).

n47. See Supporters, The Eric Eldred Act, at [http://eldred.cc/ea\\_supporters.html](http://eldred.cc/ea_supporters.html) (last visited Mar. 10, 2004).

n48. See, e.g., The Public Domain Enhancement Act, H.R. 2601, 108th Cong. (2003) (requiring that copyright holders renew registrations for their works after 50 years in order to maintain copyright protection). Cf. Landes & Posner, *supra* note 41, at 473–75 (arguing that requiring copyright owners to renew their copyrights, but allowing them to do so indefinitely, "need not starve the public domain").

n49. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003).

n50. See Megan E. Gray & Will Thomas DeVries, The Legal Fallout from Digital Rights Management Technology, 20 No. 4 Computer & Internet Law. 20, 22 (2003).

n51. See Pamela Samuelson, The Copyright Grab, *Wired*, Jan. 1996, [http://www.wired.com/wired/archive/4.01/white.paper\\_p](http://www.wired.com/wired/archive/4.01/white.paper_p)

n52. Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified in scattered sections of 5, 17, 28, and 35 U.S.C.).

n53. See Jessica Litman, Digital Copyright 125–26 (2001).

n54. 17 U.S.C. 1201(a)–(b) (2000). For an in–depth analysis of the anti–circumvention provisions, see 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* 12A.03 (2003).

n55. 253 F. Supp. 2d 943 (E.D. Ky. 2003). The case was subsequently argued before the Court of Appeals for the Sixth Circuit. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, No. 03–5400 (6th Cir. argued Jan. 30, 2004).

n56. 292 F. Supp. 2d 1040 (N.D. Ill. 2003), appeal docketed, No. 04–1118 (Fed. Cir. Dec. 15, 2003); 292 F. Supp. 2d 1023 (N.D. Ill. 2003).

n57. See generally Pamela Samuelson & Suzanne Scotchmer, The Law and Economics of Reverse Engineering, 111 *Yale L.J.* 1575, 1634 (2002).

n58. 17 U.S.C. 1201(a)(1)(C)–(E) (2004); see U.S. Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, at <http://www.copyright.gov/1201> (last visited Mar. 12, 2004).

n59. See, e.g., H.R. Rep. No. 105-551, pt. 1, at 17-20 (1998) (explaining the anti-circumvention provisions codified at 17 U.S.C. 1201, and noting that "The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book").

n60. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

n61. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), appeal pending, No. 03-55901 (9th Cir. argued Feb. 3, 2004).

n62. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (extending the Sony doctrine to the "space-shifting" of music files from purchased digital recording media to MP3 players); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 266-67 (5th Cir. 1988) (applying the Sony doctrine and holding, in a case involving a computer program that defeated software copy protection, that "the Copyright Act does not expressly render anyone liable for the infringement committed by another") (internal quotation and citation omitted).

n63. We use the broad term "secondary liability," rather than the more specific "contributory" or "vicarious" liability, because the applicability of the Sony defense to vicarious liability was disputed but not resolved in the peer-to-peer cases.

n64. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

n65. *Id.* at 456.

n66. By contrast, the allegedly infringing conduct at issue in Sony was the home taping of television broadcasts. The Court noted that "[in] the context of public broadcasting, ... the user of the copyrighted work is not required to pay a fee for access to the underlying work." *Id.* at 447 n.28.

n67. See *id.* at 447 (discussing importance of the right to authorize certain uses of copyrighted works as a means of exploiting works economically).

n68. See *id.* at 441 n.21 (noting that the "logical implication" of the studios' claim was that "the Copyright Act confers upon all copyright owners collectively ... the exclusive right to distribute [VCRs] simply because they may be used to infringe copyrights").

n69. See *id.* at 440 ("When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated.").

n70. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 648-49 (7th Cir. 2003) (comparing principal uses of VCRs with the use of peer-to-peer software to trade files).

n71. See *Deep v. Recording Indus. Ass'n of Am., Inc.*, 124 S. Ct. 1069 (2004) (denying Aimster's petition for writ of certiorari).

n72. Lior J. Strahilevitz, Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks, 89 *Va. L. Rev.* 505, 507 (2003). Strahilevitz argues that the amount of time a lawsuit takes, combined with the establishment of pro-file-sharing norms in the "loose-knit environment" of peer-to-peer networks, render civil legal enforcement practically ineffective. See generally *id.* He suggests that weakening the norms that support file uploading will be more effective in the long run. *Id.* at 595.

n73. See Protecting Children from Peer-to-Peer Pornography Act of 2003, H.R. 2885 (108th Cong., July 24, 2003); Piracy Deterrence and Education Act of 2003, H.R. 2517 (108th Cong., June 19, 2003).

n74. See Strahilevitz, *supra* note 72, at 507 (reporting an estimate that "as many as 40 million Americans use a peer-to-peer network to obtain copyrighted content every week").

n75. Neil W. Netanel, Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing, 17 *Harv. J.L. & Tech.* 1, 3-6 (2003).

n76. See Strahilevitz, *supra* note 72, at 576 (noting that *A&M Records. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), "established clear rules and largely resolved the dispute among the parties" but "failed to rally the public around the cause of combating copyright infringement on the Internet").

n77. See Piracy Deterrence and Education Act of 2003 2(2) ("Many computer users either do not know that copyright laws apply to Internet activity or simply believe that they will not be caught or prosecuted for their conduct.")

n78. Amy Harmon, The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing, *N.Y. Times*, Sept. 9, 2003, at A1.

n79. See 17 *U.S.C.* 512(h)(1) (2000).

n80. *Recording Indus. Ass'n. of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

n81. *Id. at 1236.*

n82. See H.R. Rep. No. 105-551, pt. 1, at 11 (1998) (stating that the title of the DMCA codified at *17 U.S.C. 512* "addresses concerns raised by a number of on-line service and Internet access providers regarding their potential liability when infringing material is transmitted on-line through their services").

n83. *341 F.3d 978 (9th Cir. 2003).*

n84. *329 F.3d 9 (1st Cir. 2003).*

n85. Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

n86. See H.R. Rep. No. 106-932, at 9 (2000) (noting that "in 1986 when the Electronic Communications Privacy Act became law there were about 50,000" computers connected to the Internet).

n87. For an overview of the FTC's activities in this area, see FTC, Privacy Initiatives, at <http://www.ftc.gov/privacy/index.html> (last visited Mar. 16, 2004). For an example of one non-profit group's work to create more stringent privacy protection, see generally the website of the Electronic Privacy Information Center, at <http://www.epic.org> (last visited Mar. 16, 2004).

n88. See Eskridge, *supra* note 31, at 1518-20 (arguing that interest groups rarely form to promote diffuse benefit laws, but interest groups easily form to block legislation that imposes concentrated costs).

n89. See *15 U.S.C. 1* and the sections that follow.

n90. See *New York v. Microsoft*, *224 F. Supp. 2d at 76*; *New York v. Microsoft Corp.*, No. 98-1233 (CKK), 2002 WL 31961461, 2002-2 Trade Cas. (CCH) P 73, 854 (D.D.C. Nov. 1, 2002) (order adopting consent decree entered into by the Department of Justice and Microsoft).

n91. *15 U.S.C. 2* (2000); see *United States v. Microsoft Corp.*, *87 F. Supp. 2d 30 (D.D.C. 2000)*, *aff'd in part, rev'd in part, and remanded*, *253 F.3d 34 (D.C. Cir. 2001)*.

n92. See *In re Microsoft Corp. Antitrust Litig.*, *237 F. Supp. 2d 639 (D. Md. 2002)*, *aff'd*, *333 F.3d 517, 534 (4th Cir. 2003)*.

n93. *In re Microsoft Corp. Antitrust Litig.*, No. MDL 1332, 2003 WL 21766566 (D. Md. 2003)

n94. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003).

n95. *Id.* at 1347.

n96. See, e.g., *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1063, 1069-73 (N.D. Cal. 2000) (granting preliminary injunction restraining defendant from using an automated price-gathering "robot" to collect auction bids from plaintiff's site).

n97. See *Hamidi*, 30 Cal. 4th at 1360-64 (declining to extend California's common law tort of trespass to chattels to include "an otherwise harmless electronic communication whose contents are objectionable").

n98. 123 S. Ct. 2297 (2003).

n99. 47 U.S.C. 230(c) (2000).

n100. See *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003).