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What the Fourth Amendment Can Teach the First

"Cloud computing" has drawn a great deal of attention lately from businesses and individual users who like its just-in-time outsourcing of ever more complex computing needs. At the same time, privacy advocates have complained that without Fourth Amendment protection, the cloud is too easily accessible to warrantless government searches (as well as to an even larger amount of private data-mining). In earlier work, I have pointed out the greater vulnerability of hosted material to copyright complaints, while many in the Free Software movement criticize "network services" for giving up the hard-won freedoms of Free and open source software on the desktop.

Both of these debates highlight, in different ways, the importance of localized end-user control. As arguments about the special nature of the "home" have had longer to germinate in Fourth Amendment jurisprudence, this article will draw upon those theories to examine more recent incursions of copyright through secondary liability, anticircumvention, and click-wrap hooks. Finally, I ask whether physical centralization in the cloud is displacing intellectual property control of distributed product, and compare the two in impacts on end-user autonomy and innovation.

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