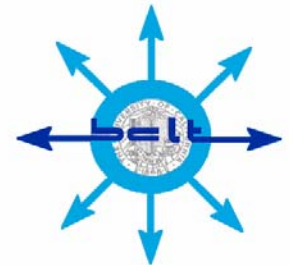


April 1, 2005

Regulating Spyware: The Limitations of State “Laboratories” and the Case for Federal Preemption



Professor Peter S. Menell
Berkeley Center for Law & Technology
University of California at Berkeley School of Law





The Latest Cyber-Regulatory Challenge

Substantive Issues

- Privacy
- Intellectual Property
- Contracting

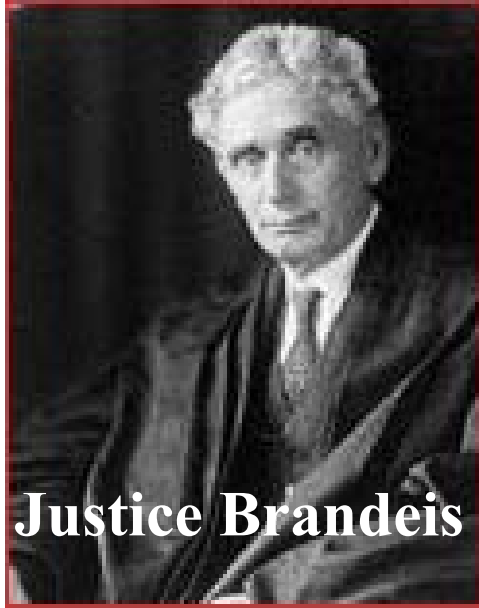
Governance Issues

- Who?
 - Federalism
- How?
 - Regulatory Design

Spyware: Federalism Issues

- **Theory**
- **Unfair Competition Law**

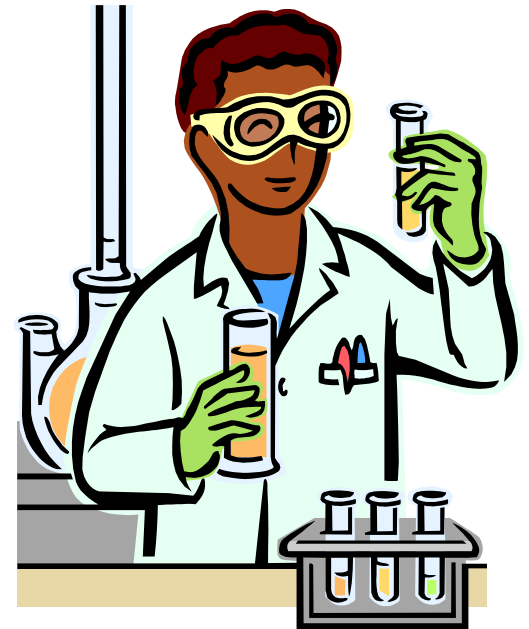
Federalism

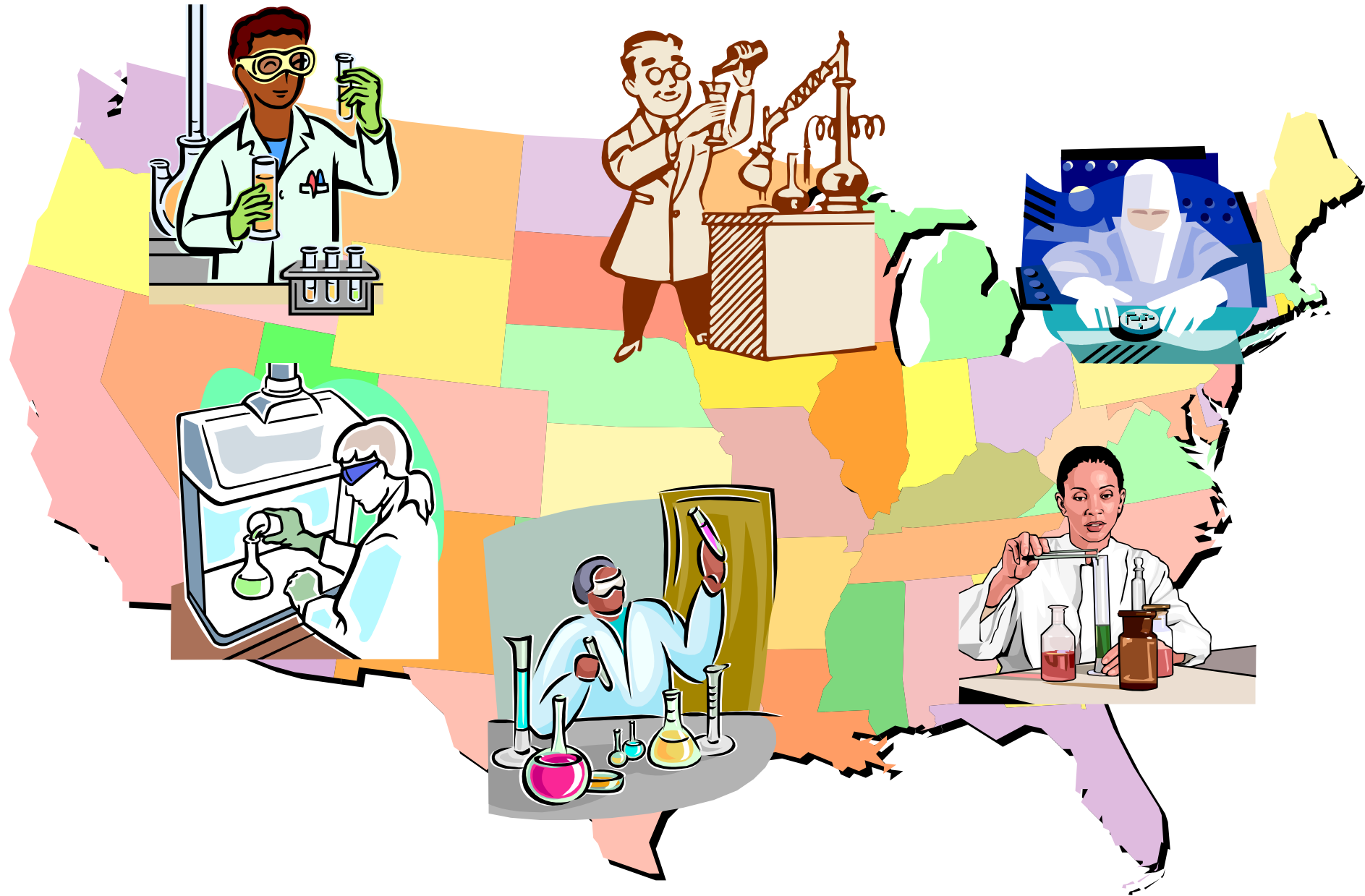


Justice Brandeis

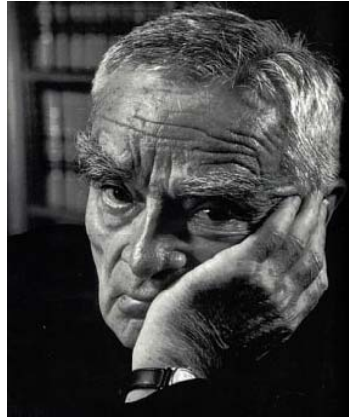
“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

**New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)
(Brandeis, J., dissenting)**





Unfair Competition Law



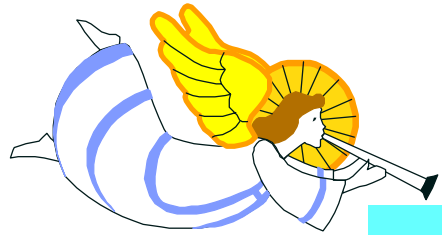
There is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.”

Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927)

Unfair competition law is an area “where angels fear to tread” due to the lack of harmonization among states.

“Since most cases involve interstate transactions, perhaps some day the much needed federal statute or uniform laws on unfair competition will be passed.”

American Safety Table Co. v. Schreiber, 269 F.2d 255, 271 (2d Cir. 1959) (Medina, J.)



Unfair Competition Law

Why do angels fear to tread?

CLARIASM

 **WhenU**
Just-In-Time Marketing

GoogleTM

Unfair Competition Law: Evolution

S
T
A
T
E

F
E
D
E
R
A
L

TM
Act ®

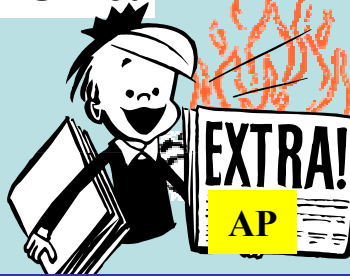
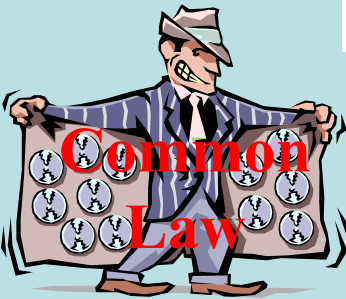
Mini FTC Acts
FTC Act

• Unfairness
• Deception

Lanham Act

§43(a) unfair
competition

• Unfairness
• Deception



Early
1800s

1914

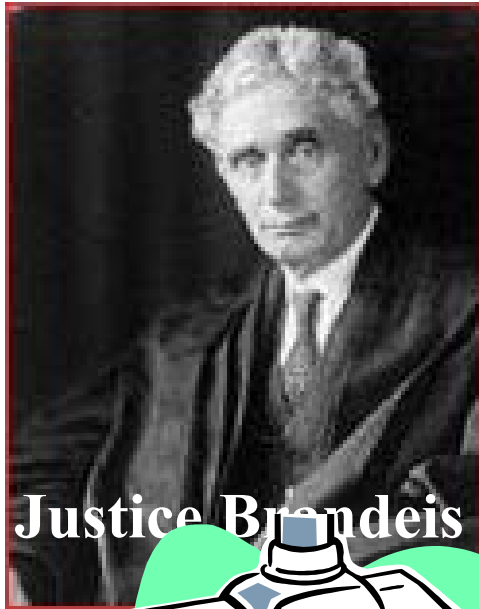
1938

1946

1960s

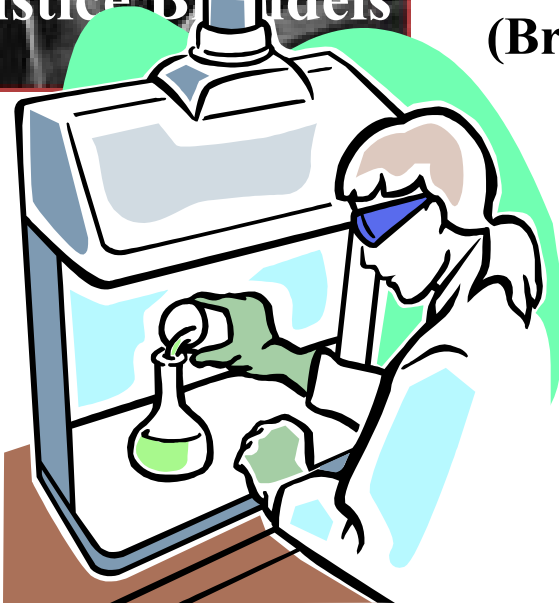
1980

Unfair Competition Law: Federalism Issues



“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

**New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)
(Brandeis, J., dissenting)**



- controlled

- isolated

- identical starting conditions





Are the Laboratories Controlled and Isolated?

or do they contaminate other laboratories?



A cartoon character wearing a green hat and a grey jacket is reading a newspaper. The character's face is partially obscured by the newspaper, with only one eye visible. The newspaper has some text and a small illustration on it.

Spyware/Unfair Competition Law

Are the Laboratories Controlled and Isolated?

or do they contaminate other laboratories?

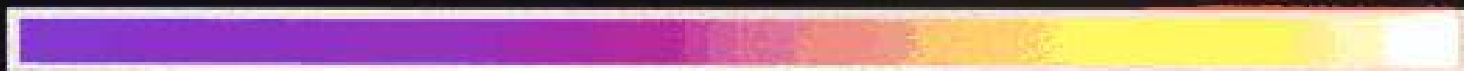
Case Study

CLARIASM

■ A Leader In Online Behavioral Marketing

WhenU.com

The Leader in Contextual Marketing



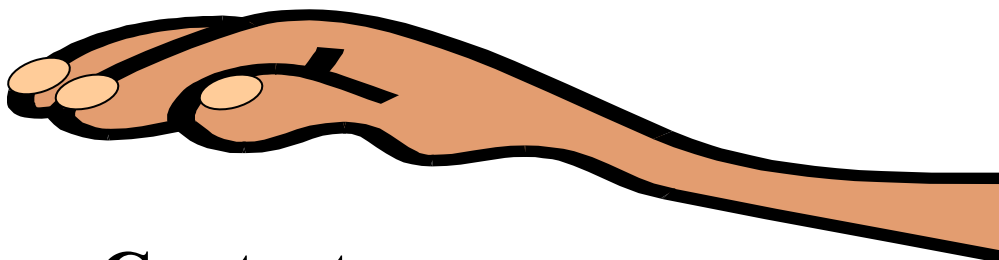


Spyware/Unfair Competition Law

Are the Laboratories Controlled and Isolated?

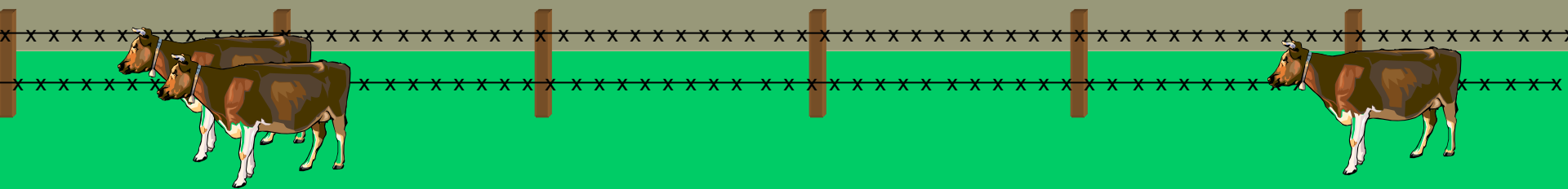
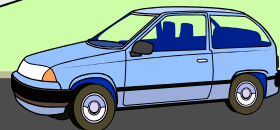
or do they contaminate other laboratories?

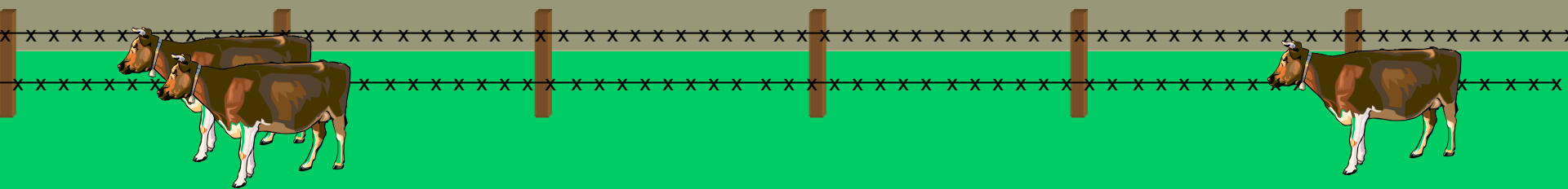
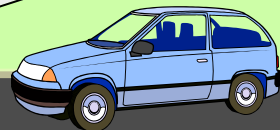
Internet-Related Activities: Personal Jurisdiction

- Long Arm Statute
 - Due Process/Minimum Contacts
- 

Least Common Denominator Implication

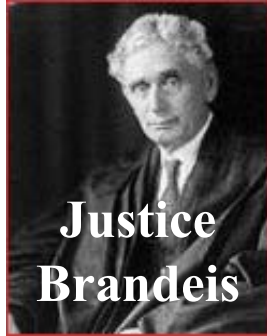
National Law = Law of Most Restrictive State





Spyware: Federalism Issues

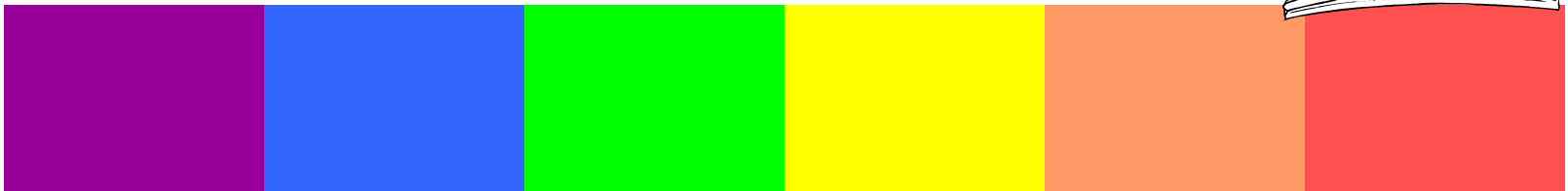
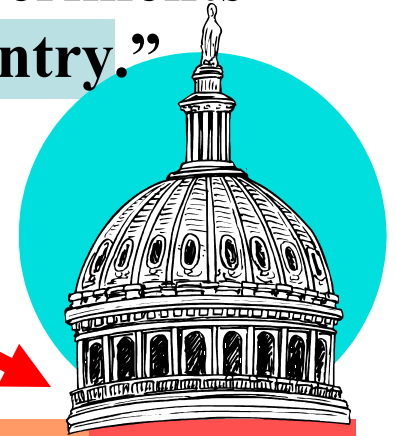
Theory



“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

- public choice/capture

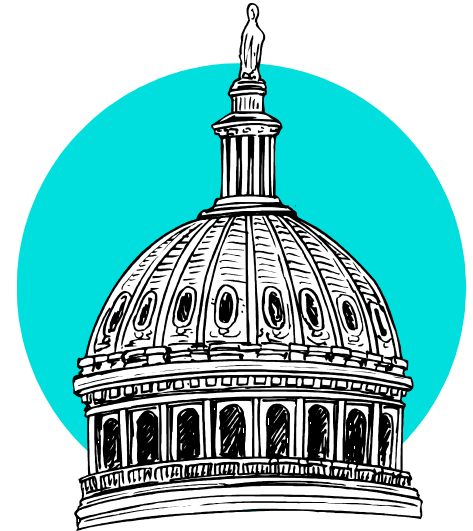
States as Laboratories
of Experimentation



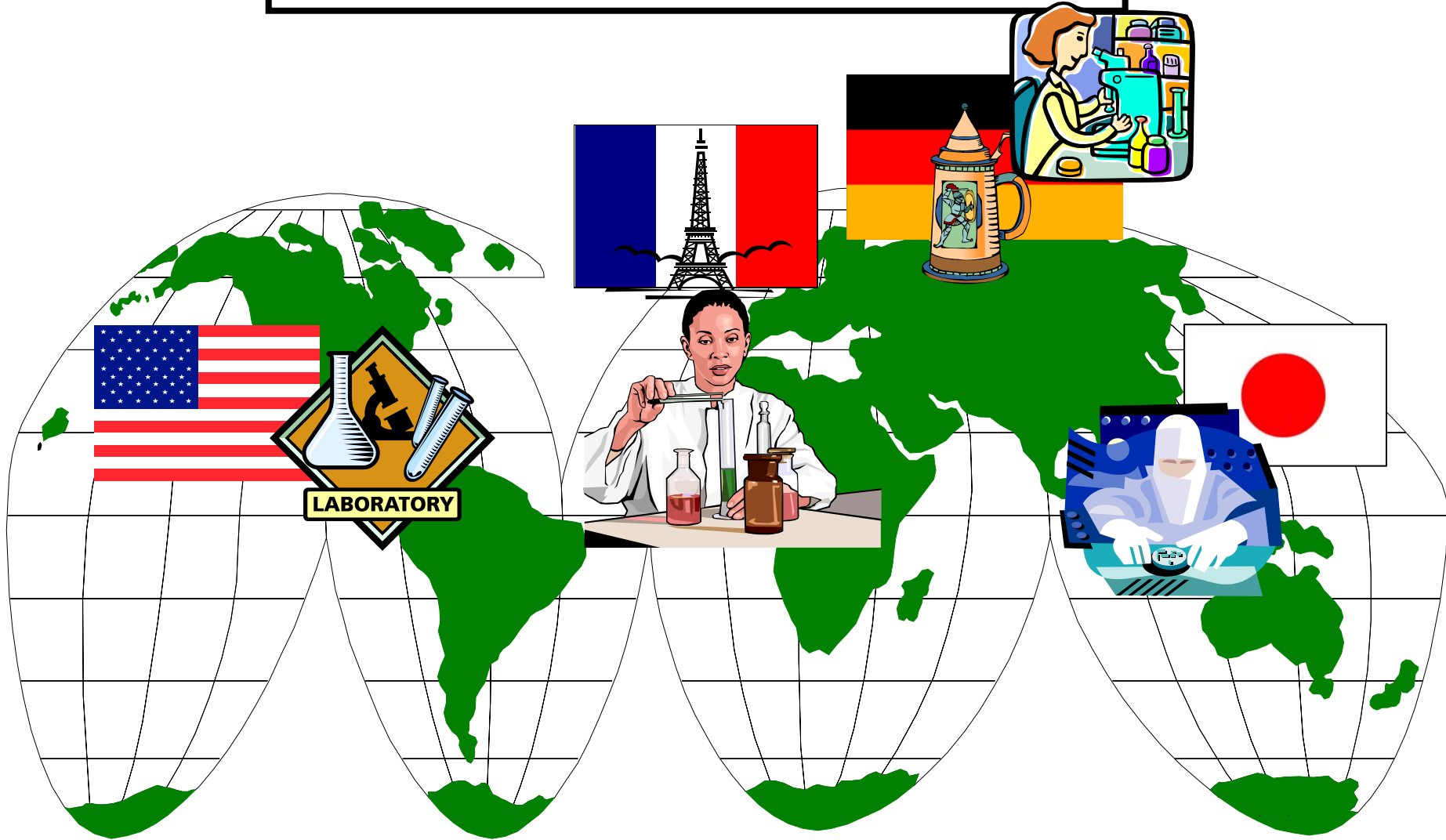
Federal Regulation



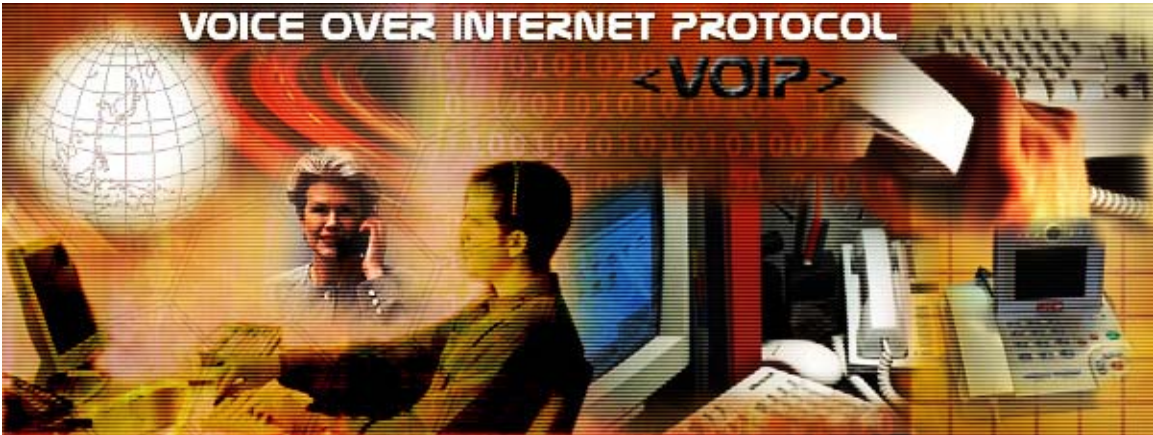
FEDERAL TRADE COMMISSION
FOR THE CONSUMER



International Laboratories of Experimentation and Innovation



Federal Preemption: Internet-Related Activities



Unfair Competition Law and Internet-Related Activities

American
Blind and Wallpaper Factory
decorationtoday.com

Google™

State Law Claims

GEICO®