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The Emerging Law of the Internet

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REMARKS

THE EMERGING LAW OF THE INTERNET

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It's a pleasure and an honor to be with you today. A pleasure because this is my first time on your beautiful campus. An honor because this is a distinguished lecture series, and I was motivated to accept the kind invitation to talk today because it came from my friend Ron Ellington[1] and because my dearly beloved senior coauthor, the late Charles Alan Wright, had delivered this lecture many, many years ago. So, I feel as if there is something genealogical about my being here.

Now, you would think that I would talk to you about Civil Procedure. After all, that is my professional world and it's always been my professional world, and I'm arrogant enough to believe I know something about it. But, after all the years I've spent in Procedure, speaking about it again is frankly uninviting for me and probably would be quite boring for you. So, I thought I would talk to you about something I know nothing about, but strikes me as challenging and basic to your future. It's far more fun, especially since these remarks will be very impressionistic and possibly a bit irreverent.

I'm going to talk to you about the Internet, the Internet as it relates to our profession. You all know what the Internet is. You all are on the Internet at one point or another; many of you, perhaps, for too much of your day; some of you, perhaps, for not enough of your day. This is not intended to be an exercise in prediction;

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* Bruce Bromley Professor of Law, Harvard Law School. This address was given at the University of Georgia School of Law on November 14, 2002 as part of the John A. Sibley Lecture Series. These *Remarks* remain faithful to the unscripted remarks given on the date of the Lecture. Footnote references have been kept to a minimum.

[1] C. Ronald Ellington, A. Gus Cleveland Professor of Legal Ethics and Professionalism and former Dean, University of Georgia School of Law.

Nostradamus I am not. Nor am I going to make forecasts or take bets because Jimmy the Greek I am not. This will be something of a still picture of where I believe we are in thinking in legal terms about the Internet, and, I suppose, I will be proven a liar because I will probably offer a suggestive thought about the future here or there.

The Internet is interesting because it is another example of the law having to deal with a social phenomenon. In this case, it happens to be a technological phenomenon. This is not a new exercise for the Bench and Bar. The law is not a stranger to technology or having to deal with technology. I suppose it started with fire, which is its own form of technology, especially once humans began to harness it. It graduated to the wheel. After the wheel, perhaps the steam engine, the internal combustion engine, the automobile, the airplane, the telephone, radio, television, the fax machine, the computer, and now the Internet. So, we are not a stranger to this phenomenon. It's recurrent. One thing we do know, simply on the basis of experience over time, is that the law tends to be reactive to societal change. It tends to look at a new phenomenon, in this context the new technology and, over time, figure out what to do with it. It generally moves slowly and cautiously—a step at a time.

When railroads came along, everybody applauded. They tied the country together. But they also, because of the technology of its time, caused fires to adjacent land. And that raised these wonderful questions of—How do we maximize the utility of the technology and minimize the deleterious side effects? How do we accommodate the rights of the railroad with those of the farmer? It took close to 100 years to figure that one out—always reactive, always trying to see what the state of the art was at a moment in time, what was technologically feasible, what the risk/benefit analysis was.

So, perhaps we're not so stupid being reactive—watching, waiting, building experience. Indeed, in those instances in which the law has not been reactive but has tried to be ahead of the curve as they say, prematurity has been the result. I spent a great deal of time working in connection with what became the Copyright Act

of 1973/6.[2] We thought we were ever so clever. Unfortunately, because of rapid technological change, the statute was obsolete on the day it was enacted. Then I was appointed to a Presidential Commission to study the computer and copyright, and, once again, we thought we were ever so clever.[3] We had figured out what to do with things like computer programs and data banks and artificial intelligence. And, we put our report into Congress, and Congress duly enacted what we proposed.[4] Then along came the chip, and it made everything we had done obsolete. So, sometimes it's better to be the turtle rather than the hare. We will have to see whether or not our reaction to the Internet misses the mark on one side or the other or whether we hit it on target.

Before going further I must make a disclaimer. Please do not think that I'm a technologist, because I am not. I started college studying to be a metallurgical engineer. It lasted eight days—in one early morning Algebra class, I fell asleep, I fell out of my chair, got up, walked out, and changed my major. To this day, I cannot spell metallurgy. But I do have an instinct that I am not far from the mark by believing that the Internet and the allied technology that makes up the Internet is potentially the most powerful medium of communication the world has ever known, and it is only likely to increase in stature. Indeed, the United States Supreme Court, which generally is not technologically advanced, has already remarked that the Internet is a wholly new medium of worldwide human communication[5]—and that's what it is. It's a worldwide medium of human communication. Think about this simple fact. We can move any piece of information, with picture or without, anywhere on the planet in under two seconds—any amount of information with or without pictures anywhere on the planet in under two seconds. That's astounding. Yet today we take it for granted.

Another thing. Digital communication is infinitely replicable. You can make as many copies of anything on the Internet as you

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[2] 17 U.S.C. §§ 100 et seq. (2004).

[3] National Commission on New Technological Uses of Copyrighted Works, Final Report on New Technological Uses of Copyrighted Works (1979).

[4] 17 U.S.C. §§ 106, 403 (2004).

[5] *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 850 (1997).

want. In doing so, you do not have to worry about degradability. The 452,000th copy, qualitatively, is just as good as the first. No other communications medium can make any of those statements. We even have given the world of the Internet a name. We call it cyberspace—and what is cyberspace?

I can't see it. I can't feel it. All I know is that I'm in it, and we're all in it. It surrounds each and every one of us. And when you think about cyberspace, you can think of it as an alternative universe. It's like something out of "Star Trek." We're going through some sort of a warp, maybe not a time warp, but we're going to an alternative universe that has a virtual reality, to use the cliché. And, most strikingly of all, it is basically a legally free-fire zone.

No formal law controls cyberspace. At the moment, there is a degree of self-regulation, but total reliance on that can't last over time. The number of chips on the table, the social implications, the economic stakes, the political implications of cyberspace are too stunning to leave to private regulation over time. And that's where we come in, because in one way or another, particularly you folks—most of whom look younger than I—will be the regulators of cyberspace. You will have to figure it out. And, I submit to you that just as cyberspace is an alternative universe, over time it will reflect the entire universe of the law. Virtually anything you can think about in terms of law will in some way or another emerge and pose a problem in cyberspace. These problems will challenge the transaction lawyers, the litigators, the Bench, and the scholars.

The mega-question I suppose is—Will there be a law of cyberspace; will it be something brand new? Will your Professor Dick Wellman[6] (who was my colleague at the University of Michigan Law School four decades ago) spend the remaining years of his marvelous career as a law teacher and a commissioner on uniform state law developing a uniform law of cyberspace? I hope so. He has more talent to do something like that than anyone I know. Or, will this be, as so much of the law is—again as the cliché goes—new

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[6] Richard V. Wellman, Robert Cotten Alston Chair in Corporate Law Emeritus, University of Georgia School of Law.

wine in old bottles? Will we take existing doctrines and simply recast them or moderate or modulate them and say, "This cyberspace stuff . . . there's nothing new here, nothing new at all. We just have to tweak the tried and true." Well, I'd like you to consider three examples of law in cyberspace and think about them in terms of "where do we go from here." Think about them in terms of what I just said is the mega-question—new or old?[7]

Now at the risk of being stoned to death for my first example, because I said I was not going to talk about Procedure. I would like to take a subject that my good friend Ron is a master at—jurisdiction over the person. He tells me that he taught that subject this fall to his class, so I assume that those of you who are first year students are extremely well-versed in jurisdiction over the person. What principles apply to the Internet? Think about Web sites. Each and every one of us can sit down and access any Web site around the world. Does that mean that the operator of that Web site is subject to personal jurisdiction everywhere? That might suggest that Ron needs to be put out to pasture because there is nothing left to teach in civil procedure. We'll have universal jurisdiction—that will make everything very simple.

Well, it can't be that simple. No matter what the power of cyberspace might be, it has to deal with certain doctrines like state sovereignty, national sovereignty, various aspects of due process, such as fairness, notice, and opportunity to be heard. So, what are we going to do to figure out how or when you get or don't get jurisdiction based on the accessibility—here in Athens, Georgia, or up in Cambridge, Massachusetts—of a Web site? Indeed, where is that Web site? Where is it?—Where the person who designed it is? Where the software is? Where the server is? Where the communications link you fortuitously tap into when you access the Web site is? Where is it? Let's put that question to one side. That is very hard to figure out.

You know, in spite of the fact that there are many predecessors of the Internet in terms of communications technology, just think

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[7] Different views on this subject can be found in Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE (1999); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL. F. 207.

about them—the postal system, wire and then wireless telegraphy, the airwaves, telephone, and fax—in just a few years, there are more cases that have been decided about Internet jurisdiction than have been decided regarding all of those technologies put together, even though some of them have been around for more than 100 years. Now, what do the Internet authorities say? It's not definitively clear yet. No case has reached the Supreme Court, but there are footprints in the sand. A very, very forward thinking federal District Judge in Pennsylvania five years ago, in *Zippo Manufacturing Company v. Zippo.com, Inc.*,[8] came up with the notion that you could array Web sites on a spectrum and think about jurisdiction based on a particular Web site by looking at its position on the spectrum. He says at one end of the spectrum are what are called passive Web sites; they speak to you. You can reach into the Web site, and it will give you information—it's just passive, and therefore there is no jurisdiction. The Web site didn't come to you. You came to the Web site. Sitting in Athens, you reached to Palo Alto. And, you know there is a rough analogy—the great case of *Worldwide Volkswagen Corporation v. Woodson*.[9] Do you remember, the Robinsons bought the car in Northern New York and were driving it to Arizona when an accident caused it to burn up in Oklahoma. Volkswagen didn't put the car in Oklahoma. So, the *Zippo* Judge concluded, "Look, passive Web sites can't provide a jurisdictional base. If you took jurisdiction based on the passive Web site, there would be universal jurisdiction." And, I'd say that idea is established.[10]

At the other end of the Web site spectrum is the active Web site . . . the active Web site. What's an active Web site? The one on which you can literally not only exchange conversation with the Web site, but you can transact business through the Web site. I happen to love fountain pens. Having nothing to do on Sunday and, since I lead an exceedingly boring life, I went on the computer. I discovered that in Melbourne, Australia, there was a pen I was

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[8] 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997) (McLaughlin, J.).

[9] 444 U.S. 286 (1980).

[10] *See generally* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1073 (3d ed. 2002) [hereinafter WRIGHT & MILLER].

looking for. And, with the "backing" and "forthing" between the seller and myself and the appropriate bargaining that befits my ethnicity, I bought the pen. Now, I think there's jurisdiction there under fairly traditional principles. I think this poor seller in Melbourne is subject to jurisdiction in Cambridge, Massachusetts, if the pen doesn't work. More difficult is the question whether I am subject to jurisdiction in Melbourne if I don't pay for it. We will just have to wait and see. That's an active, transactional Web site.

In the middle, said this prescient Judge, you have interactive Web sites. You can communicate back and forth, but you really can't consummate transactions. You can't engage in business. And he thought that, in the immortal two words of the law that really sums up your three years at this law school and probably the next sixty years thereafter in the profession because it's all you have to know about the law: "it depends." With regard to the interactive Web site, it depends. It depends on a variety of factors, commonsensical factors—the frequency and intensity of the interaction, the proximity to actually engaging in a transaction or some formal business, and how profitable or how much of an assist toward profitability the Web site is. Thus, the District Court established this sliding-scale framework and numerous cases have embraced it.

Now, how do you fit that framework into what you've studied in the Procedure course? Well, you know that the Supreme Court of the United States has announced that we have general jurisdiction and specific jurisdiction.[11] General jurisdiction is a form of continuous and systematic contact between the defendant and the forum. It's unlikely that a Web site in and of itself would give rise to general jurisdiction, although eBay might be an example of a Web site that is continuously and systematically in every state of the Union—and beyond. But certainly, a Web site-plus—a Web site plus other activities by the defendant in the forum—might give you general jurisdiction.

There really aren't very many general jurisdiction Web site cases yet, so we look to specific jurisdiction. That generally requires us to look at long-arm jurisdiction. If you've studied the Georgia Long-

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[11] Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).

Arm Statute,[12] it is very much out of central casting. It is very much like any other explicit long-arm statute. It deals with transacting business, torts in the state, torts out of the state having an impact in the state, and all the rest. And then, it seems to me, it becomes a more or less straight application of traditional principles of long-arm jurisdiction. This statutory analysis is backed up by that massive jurisprudence that consumes so much of a first-year Procedure course under the Due Process Clause, starting with *International Shoe Corp. v. State of Washington*[13]—minimum contacts equaling fair play and substantial justice. Does the Web site have minimum contacts with the forum so that it's fair play and substantial justice to reach out and touch it and grab it and subject it to local jurisdiction? Again, that is a question of whether the defendant's contact with the forum are a little bit more, or a little bit less than the Constitution demands.

What I have just described is very reminiscent of *Calder v. Jones*. Indeed, the Fourth Circuit in a case decided months ago[14] said: "You know, this is like *Calder v. Jones*."[15] In *Calder v. Jones*, what did you have? You had this miserable gossip newspaper magazine down in Florida writing nasty, but fun stuff about celebrities. The object of the particular story happened to be in California but the defendant had directed the publication into California. And the Court said, "Look, look, you purposefully availed yourself of California, you directed yourself at California, and you caused impact in California. Constitutionally, that's enough." And it seems to me, many, many Web sites, particularly transactional Web sites, Web sites that are directed at a particular subpopulation that can be identified or geographically located, would qualify in constitutional terms, so that if the particular events and litigation fit the words of the long-arm statute and fit the Supreme Court tests from *Shoe* to *Calder*, there should be jurisdiction.

The great mystery is whether the principles we have been discussing qualify under the "stream of commerce" doctrine, which

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[12] O.C.G.A. §§ 9-10-90 to 9-10-94 (1981 & Supp. 2003).

[13] 326 U.S. 310, 316 (1945). *See generally* 4A WRIGHT & MILLER, *supra* note 10, §§ 1067-1609.8.

[14] ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002).

[15] 465 U.S. 783 (1984).

extends jurisdiction over anyone who puts a product (and presumably a service) into the "stream of commerce" anywhere the product (or service) is sent and allegedly causes injury. Of course, the Supreme Court left us dangling in *Asahi Metal Industry Co. v. Superior Court*[16] as to whether entry into the "stream of commerce" in and of itself was constitutionally sufficient to establish personal jurisdiction. Four Justices said yes; four Justices said you needed more; and one Justice thought it unnecessary to decide the issue. We have been waiting for more than fifteen years for further enlightenment on the subject.

Can you think of anything that fits the concept of "stream of commerce" more clearly than a Web site? A Web site puts that information, that data, that business information into the stream of commerce, and the ultimate question (not decided by the Supreme Court) is does that create what might approximate universal jurisdiction? To wax poetic: "I shot my electronic signals into the air, they fell to earth, I know not where. But there is jurisdiction." At least four justices in *Asahi* said that's the way it should be. But none of those justices are still on the Court.

Okay, that's illustration number one of our exploration of the brave new world of Internet law. Let me give you another one that's a personal favorite of mine. In introducing me, Ron mentioned that I have a secondary interest in copyright. It's actually my primary interest, although the bulk of my professional activities are devoted to Procedure. I love copyright. I love copyright. I originally decided to teach it because I loved books and movies, and art and plays. Until recently it was a boutique law school subject. Fifty, sixty students saying let's take that weird old Miller for a course. But it's no longer only about books and movies, and art and plays. It's increasingly about technology. Indeed, for most law students it's largely about technology. And, I can't beat them away with a stick. Copyright and Intellectual Property are "in" courses.

There are certain things we know. We know that computer programs are copyrightable as "literary works."[17] They are works of

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[16] 480 U.S. 102 (1987). *See generally* 4A WRIGHT & MILLER, *supra* note 10, § 1067.4.

[17] *See generally* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 983-84 (1993).

expression, human expression. We know that databases are copyrightable, although the Supreme Court has ratcheted back on what the copyrightable element of a database is.[18] It's not facts, and it's not completeness. It's selection. It's arrangement. In other words, there's a copyright in a database, whether it is Dow Jones, a Mobil Travel Guide, or Westlaw or Lexis, but it is a rather thin copyright. So we know those things. We know that copyright will probably extend to computer-produced art and music. What my friends at MIT are struggling with is the copyright status of works generated by artificial intelligence. But, thank goodness those great scientists are only at the flatworm stage, so we've got a way to go before we really have to worry about that subject.

All right, so what's the Internet issue? The issue is the obvious question that everybody in this room has read about. Can I go to the Internet and just copy? Can I just copy anything on the Internet? Now you know one version of that question as the so-called Napster problem—the music problem.[19] That is just one manifestation of it. You go to the Internet, and you start reaching into various sources of information pockets, and the question is—can you take something from that information pocket, or will somebody slap your wrist and say, "You're an infringer"? Now if you talk to lots of folks in the "biz," in the Internet "biz," you discover it's populated, rampantly so, by folks like those who believe in free software. They think the Internet is a free zone, a public commons. They believe that anything on the Internet is free and can be downloaded, reproduced, and retransmitted. They think that you can copy it, you can replicate it, and you can distribute it. If I know anything about copyright, I have to say that can't be true. It just can't be true—at least not in those extreme terms. If I write a book, and then put it on television or the motion pictures or radio or video, each and every one of those transformations is a copyrightable

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[18] *See* Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340 (1991) (holding only original selection and arrangement of database are protectable).

[19] A&M Records, Inc. v. Napster, Inc., Nos. C9905183MHP, C000074MHP, 2000 WL 1170106 (N.D. Cal. Aug. 10, 2000), *affirmed in part, reversed in part on other grounds* 239 F.3d 1004 (7th Cir. 2001). Variations on the Napster model also have ended up in litigation. *See generally In re* Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

derivative work of my copyrighted book, and he or she who takes it is a copyright infringer! Pure and simple, that merely reflects good old American property values. I cannot conceive of the answer being any different just because somebody reaches into the Internet rather than the public library to copy my work. If it's copyrighted, it's copyrighted, although courts seem to be increasingly sensitive to a variety of competing policies many of which are embedded in the Fair Use doctrine.[20]

And that, of course, is exactly what happened in the Napster case, and I cannot see any result other than that. Now, Napster may be more or less a thing of the past, although there is a thing called—I can't even pronounce it—KaZaa . . . Accent on the wrong syllable, right? Kazaa. What is Kazaa? Kazaa is the offspring of Napster. You can go to Kazaa and you can get music. It's already got millions of subscribers. It's already been sued. And already guess what you could get on Kazaa as of a couple of days ago? The Harry Potter movie. You can get Harry Potter on Kazaa—in some places before it reaches the movie houses. Understandably, Warner Brothers was extremely upset. As well it should be. Also understandably there are those that say, let's go get and stamp out Kazaa, just the way we terminated Napster in its original iteration; let's do it, as they say in the movies, with extreme prejudice.

Here's the problem. Kazaa is a product of an enterprise called Sharman Networks. Catch this. I love it. This is right out of a first year law school examination question. The distributor of the program is incorporated in the South Pacific island nation of Vanuatu. Now we've all visited there, haven't we?! We speak of nothing else but Vanuatu, right?! The service is managed from Australia. Its computer servers are in Denmark. And the source code for its software was last seen in Estonia. The original developers appear to be living in the Netherlands. But no one appears to be very sure. Now, where do we sue, as the law school exam would ask? Whose law applies? And since there are practicing lawyers in the room, the ultimate question is—how do

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[20] Fair Use has been codified in 17 U.S.C. § 107 (2004). *See, e.g.*, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002).

you enforce the judgment in Vanuatu? I don't think our Constitution's Full Faith and Credit Clause applies there.

So there are enormous difficulties in enforcing copyrights, even if we all agree that the copyrightable status does not change simply because a work of expression is on the Internet. There are enormous problems of identification and enforcement. These are not insurmountable problems. I remind everyone, being an old fogey, that the world of music used to be sheet music. The copyright proprietor, Stephen Foster, for example, made his money by selling copies of sheet music and perhaps by performing his songs. Well, the whole world's lost its music literacy. Nobody buys and reads sheet music anymore. They simply play the music on some type of electronic device.

And, in the 1910s and 20s, how did music copyright proprietors enforce their copyrights? Because people were performing, without licenses or permission, which is an illicit act—just as copying is an illicit act—they formed ASCAP (American Society of Composers, Authors and Publishers) and then BMI (Broadcast Music Industries). They hired an army of private detectives who fanned out into the nightclubs and the hotels and the dining establishments of America. They would sit there and as soon as they heard copyrighted music, they would pull a summons out of their pocket and say, "Which would you prefer, a license or this?" Eventually, they got the entire performing industry—including establishments that played live, recorded, or broadcasted music—to honor the copyrights.[21]

I think we will see consortia of other groups of copyright proprietors develop to deal with the Internet. We will see technological enforcement in the sense that the same technology that can carry information can also monitor how it is used and bill for it. That's a matter of time. And indeed, to offer a prediction (I'm violating my own rule), it seems to me, that the concept of copyright infringement—which historically, meant copy an entire work, although we don't do that much anymore; we extract, we sample, we seek answers, we perform—will probably transmute itself into a basic notion of use, and it will be use that will be the compensable

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[21] *See generally* Buck v. Jewel LaSalle Realty Co., 283 U.S. 191 (1931).

act. The Internet community and the relevant industries over time are going to figure out how. It's just a question of debits and credits for copyright proprietors and users.

Let me make a few comments about a third and final subject. Again, it's one near and dear to my heart—it's privacy. Issues of privacy and technology have also been kicking around for a long time. It goes back to wiretapping in the criminal law field. In the 1960s, that concern about privacy developed into the Big Brother imagery of Orwell's *1984* that surrounded the government's proposal to create a computer based National Data Center—that's when I got involved in it both as an author and as an activist.[22] It was then that people began to realize that our privacy was being invaded, not by spike microphones driven into walls and parabolic microphones aimed at people, but simply by data collection, or data extraction and data dissemination. Indeed, those of you who can remember the Vietnam conflict (a supposed non-war) may recall that a military operation called CONUS (Continental United States) Intelligence developed a database of dossiers on all people protesting the Vietnam War. I remember when I was at the University of Michigan teaching on the law faculty. The university behaved rather stupidly by complying with a House Un-American Activities Committee subpoena for information on a number of university students without telling the university students and complying two weeks in advance. I mean, academics often lack common sense, but that's off the charts. They did it, so predictably the students seized the Administration building. A couple of my colleagues, Sam Estep and Layman Allen and I, went out to this massive sit-in, just to explain to the kids—I shouldn't say that because I was a kid then—what all this was about. And the next thing I know, there is a file on me in Congress. I'm exercising First Amendment rights and educational freedoms, and the government has created a dossier on me. [As these remarks are being prepared for publication, we learn that a dossier was also created on John Kerry, now Senator from Massachusetts and the presumptive Democratic nominee for President, because of his activities against the War in Vietnam.] In

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[22] *See, e.g.*, ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971).

any event, it was not a happy chapter in our Nation's life. And many people and Congress started to think about technology and privacy.

Well, let's fast-forward and look at the Internet. Consider how much of your life is captured in a data bank and available on the Internet. We are in an era of healthcare accountability, a keystone of which is the conversion of all medical data into electronic form and the ability to transmit it back and forth to medical providers, insurers, bean counters, and who knows who else. So, our entire health profile ends up on the Internet. On the bright side, of course, it should make for more economical and efficient delivery of health services. Virtually everything we do is recorded. Whether you fly on an airplane, use a credit card, check into a hotel, you're at least generating an electronic file, and all of that, over time, goes into the Net. My friends from Atlanta put me into the Ritz Carlton yesterday before we all came to Athens this morning. First thing said by the clerk was, "Welcome back, Mr. Miller." I'd been there six years ago, but the hotel's computer said I was a repeat customer. Now, if that got me an extra chocolate or a free beverage, perhaps I would be willing to trade my privacy. But, what the anecdote illustrates is the increasing commercial utilization of personal information; it's just a piece of imagery of what is happening in our world of sophisticated direct marketing. What do we do about protecting individual privacy? In an environment in which, as I said near the beginning of these remarks, any piece of information about any one of us can move globally in two seconds, what do we do about the international implications of vast data-banking and information transfer? What do we do about the transnational character of information systems and the ability to put personal information on the Net and move without our knowing it or having any ability to control it?

Now, against that reality, let's look at the Patriot Act of 2001.[23] This is a statute that I defy anyone in this room to read from beginning to end and stay awake. It is a stunning statute. It

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[23] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Public Law No. 107-56, 115 Stat. 272 [hereinafter Patriot Act].

provides for what are called "sneak and peak" searches and seizures, not based on probable cause but based on a lower standard of reason to believe.[24] "Sneak and peak" searches and seizures. It provides for data intelligence in terms of international terrorists and spying, which can be done in conjunction with criminal investigations so you don't know which is the tail and which is the dog.[25] But most germanely for purposes of this afternoon's talk, it literally provides, based on FBI declaration, the right to data mine . . . to access, study, and make decisions regarding any data on any part of your life that is in electronic form—and since that process can follow you through your daily activities it means the government can data mine anyone you are in communication with on a global basis.[26] I say that because another provision in the Patriot Act of 2001 provides for data exchange between the United States and friendly governments,[27] which I suppose means everyone other than Iraq, Iran, Syria, and maybe North Korea these days. The legislation is really quite stunning. And it makes me think that today, in the year 2002, understanding the horror of 9/11 and the need for the war against terrorism, that here in 2002, under the Patriot Act of 2001, we are right back where we were during the Vietnam War.[28] Of course, the civil liberties community is up in arms so there will be constitutional challenges, and those will be enjoyable to watch and even more enjoyable to participate in if the opportunity arises.

So, there you have just a trilogy of illustrative aspects of cyberspace and the law. It will fill your professional lives with wondrous issues, whether you are a transactional lawyer and are called upon to anticipate many of the implications of cyberspace to protect your client, or whether you're a litigator, and that means whether you are a plaintiff's litigator or a defendant's litigator. All you have to do is look at a couple of recent cases that are not far from sounding like a law school exam. DoubleClick, the people who

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[24] Patriot Act § 213.
[25] *Id.* § 215.
[26] *Id.* § 218.
[27] *Id.* § 215.
[28] For a contrary view of the privacy implications of the Patriot Act, see Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607 (2003).

put up the advertising flags that miraculously—and without invitation—appear when you go into a Web site. They've been sued several times because they put those flags up pursuant to a contractual arrangement either with a Web site or with an ISP.

Now, this is not fictional. Suppose you are looking for a book for Christmas, so you go to Amazon.com. Amazon.com will at the first sign of your appearance slip you a "cookie." That "cookie" has been placed in your machine because Amazon wants to do what the Ritz Carlton did to me last night. They want a kinder, friendlier relationship with you. That's marketing, that's modern direct marketing. Okay, remember this is a hypothetical but apparently this is what is happening. They didn't get my consent to do it. Although many organizations now have a privacy statement if you can find it on their Web site and if you can understand the language that says, "[by] coming on the Web sites, you consent to their 'cookie-ing' you" like, "You come here, you give up your privacy."

It's like those shrink-wrap licenses around software or "Click Here" or "I Accept" boxes you see on many Web sites. In any event, they put their "cookie" in, and then up comes the advertising flag, courtesy of DoubleClick, who also puts a "cookie" into your machine, because now they want to track you to see what other sites—they're not only interested in Amazon.com—they want to know where you go around the Net, what you're reading and what you're thinking about buying, so they will have a better target for selecting which of their flags should be put on your screen. They can now customize their flags to meet your habits. That's actually in litigation.[29] Indeed, in the spirit of full disclosure, I served as counsel in one such case.

Another case in which I personally participated at the class action certification stage, involved CVS, the premier pharmacy chain in the Commonwealth of Massachusetts. A number of drug manufacturers had convinced CVS to turn over pharmacy information to them so that the drug manufacturers could

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[29] *See, e.g.*, *In re* DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 500 (S.D.N.Y. 2001) (challenging—unsuccessfully—DoubleClick's practices of gathering information about Internet users who view DoublicClick products or services and placing "cookies" on Internet users' computers).

communicate with the drug purchasers about alternative therapies.[30] Think about that. There are First Amendment values that are in play, medical information that the recipient might want to know—but at the same time it involves a privacy invasion. There's no consent, and there's a breach of a privilege that exists in Massachusetts between pharmacy and patient. So, the litigation about privacy and the Internet has already started. Those of you who are students better hurry up and graduate because who knows, these interesting cases may all be gone by the time you leave this marvelous institution and enter the profession.

But I jest. In truth, I suspect the legal implications of the Internet—and I've only touched the tip of the iceberg—will outlast all of us in this room. It may prove to be the most important twenty-first century technological phenomenon. Given the Internet's global character, many of these issues can only be dealt with on an international basis, and who knows how we will ever achieve that. On the other hand, if we were able to get a 15-0 vote in the Security Council on the first Gulf War, miracles do happen. Going even further, perhaps one day Internet problems having transnational characteristics will wend their way to an international tribunal. So, let me close by wishing you great good fortune in your careers. And, I hope you do encounter some of these problems, because they are intellectually wondrous and should make you feel professionally alive and challenge you to use all of your skills. Thank you.

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[30] *See* Weld v. Glaxo Wellcome, Inc., 746 N.E.2d 522 (Mass. 2001).